Calendar No. 848

88TH CONGRESS
2d Session

SENATE

REPORT
No. 872

1580

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

REPORT

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

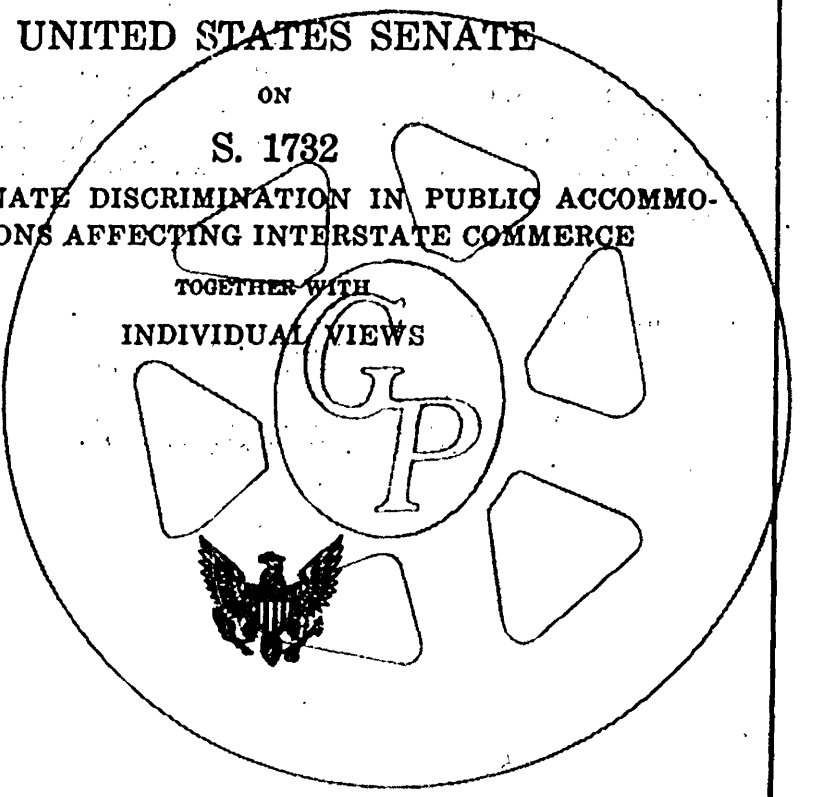
ON

S. 1732

TO ELIMINATE DISCRIMINATION IN PUBLIC ACCOMMODATIONS AFFECTING INTERSTATE COMMERCE

TOGETHER WITH

INDIVIDUAL VIEWS



FEBRUARY 10, 1964.—Ordered to be printed.

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1964

23-062

COMMITTEE ON COMMERCE

WARREN G. MAGNUSON, Washington, *Chairman*

JOHN O. PASTORE, Rhode Island
A. S. MIKE MONRONEY, Oklahoma
STROM THURMOND, South Carolina
FRANK J. LAUSCHE, Ohio
RALPH YARBOROUGH, Texas
CLAIR ENGLE, California
E. L. BARTLETT, Alaska
VANCE HARTKE, Indiana
GALE W. McGEE, Wyoming
PHILIP A. HART, Michigan
HOWARD W. CANNON, Nevada

NORRIS COTTON, New Hampshire
THRUSTON B. MORTON, Kentucky
HUGH SCOTT, Pennsylvania
WINSTON L. PROUTY, Vermont
J. GLENN BEALL, Maryland

EDWARD JARRETT, *Chief Clerk*
RALPH W. HORTON, *Assistant Chief Clerk*
GERALD B. GRINSTEIN, *Chief Counsel*
JEREMIAH J. KENNEY, Jr., *Assistant Chief Counsel*
STANLEY H. BABER, *Staff Counsel*

CONTENTS

Calendar No. 848

88TH CONGRESS, 2d Session | SENATE | REPORT No. 872

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

FEBRUARY 10, 1964.—Ordered to be printed

Mr. MAGNUSON, from the Committee on Commerce, submitted the following

REPORT

together with

INDIVIDUAL VIEWS

[To accompany S. 1732]

The Committee on Commerce, to whom was referred the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

BRIEF SUMMARY

The purpose of S. 1732 is to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations.

Motels, hotels, restaurants, places of amusement, and retail and service establishments substantially affecting interstate commerce individually or cumulatively would be covered by the bill, as would labor unions or business associations affecting interstate commerce.

The bill would guarantee all persons freedom from a refusal by an included establishment or organization to deal with them on account of race, color, religion, or national origin. Any person refused service by a public establishment on the above-mentioned grounds would have the right to seek a court order against the offending establishment or individual after 30 days' written notice to a State agency or instrumentality authorized to deal with such disputes. In the absence of such a body, 30 days' notice prior to suit would have to be given the Attorney General. This condition precedent of 30 days' notice before instituting suit does not apply to a person aggrieved by a refusal of

membership in a labor union, or professional, business, or trade association because of his race, color, religion, or national origin.

As an alternative to private suit, a complaint may be filed with the Attorney General. Upon receiving a complaint in a case sufficiently important to warrant his conclusion that a suit would materially further the purposes of the act, the Attorney General would have to first refer the case for voluntary settlement to an appropriate agency or permit State and local laws to be utilized, unless he should find that the aggrieved party is unable to undertake or maintain suit on his own for financial reasons or because of fear of economic or other injury. If referral to an appropriate agency or application of State law would be unsuccessful, the Attorney General may initiate suit for compliance.

In brief, the measure speaks on the problem solving level with primary reliance placed on voluntary and local solutions. Only when these efforts break down would the residual right of enforcement come into play. In addition, the sanctions provided in the bill are limited to injunctive relief so that there would be a judicial interpretation and warning of coverage before any penalties attached for violation of a court order.

SECTION-BY-SECTION ANALYSIS OF S. 1732

Section 2

The bill as introduced contained specific findings in section 2. The bill as reported deletes these findings and substitutes a declaration of policy explaining the goals of Congress and the purposes of this bill. The declaration of policy does not limit in any way the constitutional bases upon which this bill may be sustained in a court of law.

Section 3

Subsection 3(a).—This section would grant to all persons a right to be free from discrimination or segregation on account of race, color, religion, or national origin in the enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the public establishments described in paragraphs 1, 2, and 3 of subsection 3(a). These three paragraphs detail three mutually exclusive groups of public establishments.

"Person," as that term is used in subsection 3(a) and other sections of the bill, may include other than natural persons, as in the case where a business entity is refused the right to purchase, use, rent, or hire goods, services, or facilities on account of the race, color, religion, or national origin of its owner or operator.

Subsection 3(a) (1).—There is a change from the bill as introduced. That bill applied the provisions of section 3(a) to all public places engaged in furnishing lodging to transient guests, including guests from other States or traveling in interstate commerce. The reported bill would exclude from coverage "* * * an establishment which (A) is located within the building which the proprietor actually occupies as a home and (B) contains not more than five rooms for rent"; but includes all other places furnishing lodging to transient guests, including guests from other States or traveling in interstate commerce. It is not necessary that most of the transient guests, or any of them, be from other States or traveling in interstate commerce. So long as the establishment furnishes lodging to transient guests, it would be subject to the terms of this act unless satisfying the terms of the exception set out above.

Only public establishments furnishing lodging to transients would be within this subsection. Establishments furnishing lodging to guests of a permanent duration, or to guests of an indefinite duration having no fixed intent to leave, as in the case of a boardinghouse, would not be included. But, an apartment house or boardinghouse that in fact held rooms out for transients would be covered by subsection 3(a)(1). This would be so even if not all the rooms of the establishment were for the use of transients.

The exception contained in the bill would apply only when the "proprietor" actually occupies the building in which the establishment is located as a home. A person may have only one "home" as that term is used here. If a person has more than one place of residence or abode, his home would be that place which he uses as his principal residence.

Subsection 3(a)(2).—There is no change from the bill as introduced. This is the second of three mutually exclusive groups of public establishments that are covered by the bill. This subsection would include all public places of amusement or entertainment which customarily present motion pictures, performing groups, athletic teams, exhibitions, or other sources of entertainment which move in interstate commerce. These public establishments would be within the provisions of the bill even though at any particular time the source of entertainment being provided had not moved in interstate commerce. It is sufficient if the establishment "customarily" presents entertainment that has moved in interstate commerce. If this test is met then the establishment would be subject to the bill at all times, even if current entertainment had not moved in interstate commerce.

Subsection 3(a)(3).—This is the third of three mutually exclusive groups of public establishments that are subject to the provisions of this bill. There is no change from the introduced bill in the terms of subsection 3(a)(3), except for a change in the test stated in subsection 3(a)(3)(ii).

Subsection 3(a)(3) deals with retail establishments or any other public place that keeps goods for sale to the public, including a public place engaged in selling food for consumption on the premises, and any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire, if any one of the four tests set out in subsections 3(a)(3)(i) through 3(a)(3)(iv) are satisfied. As establishments within subsection 3(a)(3) are mutually exclusive from those in subsections 3(a)(1) and 3(a)(2), an apartment house not renting to transients (and thus not within subsection 3(a)(1)) would not be within the scope of this subsection even though it offers facilities or accommodations to the public for use, rent, or hire. Only subsection 3(a)(1) would apply to establishments furnishing lodging. Also, any public establishment offering entertainment or amusements, but not subject to the provisions of the bill under subsection 3(a)(2), would not be subject to the bill by reason of subsection 3(a)(3).

In order for any establishment to be subject to the terms of the bill by reason of subsection 3(a)(3), one of the following four tests must be met:

Subsection 3(a)(3)(i).—Under this subsection, an establishment would be within the terms of subsection 3(a)(3) if the goods, services, facilities, priviliges, advantages, or accommodations are pro

vided to a substantial degree to interstate travelers. A substantial degree is something more than a minimal amount, but would not require a majority of the customers of the establishment to be interstate travelers.

Subsection 3(a)(3)(ii).—The test set forth in this subsection has been considerably changed from that in the bill as introduced. The latter provided that if a substantial portion of any goods held for sale, use, rent, or hire had moved in interstate commerce, then the establishment would be within subsection 3(a)(3). The test as now set forth requires that a substantial portion of the goods held out to the public by an establishment engaged primarily in the sale, rent, or hire of goods have moved in interstate commerce. Thus, a substantial portion of the total goods of the establishment must have so moved, rather than a substantial portion of any one kind of goods, and the establishment must be engaged primarily in the sale, rent, or hire of these goods to the public. This test would not include a place engaged primarily in offering goods for use by the public. Also, requiring that the establishment be engaged primarily in the sale, and so forth, of these goods, the test would not cover businesses that deal primarily in services, although as an incident to that service goods are held out for sale. Thus, this test would not include a barbershop or beauty parlor. Such an establishment may, though, be within the tests set out in subsection 3(a)(3)(i) and 3(a)(3)(iv).

Subsection 3(a)(3)(iii).—The third test for determining whether an establishment is within the general terms of subsection 3(a)(3) is whether the activities or operations of the establishment substantially affect interstate travel or the interstate movement of goods in commerce. There is no change from the test set forth in this subsection in the bill as introduced.

Subsection 3(a)(3)(iv).—The final test for determining whether an establishment is within subsection 3(a)(3) is unchanged from the introduced bill. This test is met if the establishment is an integral part of an establishment included in subsection 3(a). The term "integral part" is defined following the statement of this test as meaning physically located on the premises of an establishment subject to subsection 3(a), or located contiguous to such premises and owned, operated, or controlled, directly or indirectly, by or for the benefit of, or leased from the persons or business entities which own, operate, or control an establishment subject to subsection 3(a). Thus, in all instances, to be an integral part, the establishment would have to be physically located on the premises of an included establishment or located contiguous to such an establishment. A hotel barbershop or beauty parlor would be an integral part of the hotel, even though operated by some independent person or entity.

Subsection 3(b).—This subsection would exclude from the coverage of the act a bona fide private club or other establishment not open to the public, except to the extent that the facilities of such club or establishment are made available to the customers or patrons of an establishment within the scope of subsection 3(a). There is no substantive change from the bill as introduced.

Section 4

Subsection 4(a).—Section 4 of the bill is entirely new. It would confer a right to be free from discrimination with respect to member-

ship in labor unions and professional, business, or trade associations. Section 4(a) states that no person shall be denied membership in a labor organization, or denied benefits of membership therein, on account of race, color, religion, or national origin.

Subsection 4(b).—Subsection 4(b) states that no person shall be denied membership in a professional, business, or trade association or organization on account of race, color, religion, or national origin where membership would affect the ability of such person to engage in activities affecting interstate commerce.

Subsection 4(c).—This subsection defines "labor organization" for purposes of subsection 4(a). Any organization in which employees participate and which exists for the purpose of dealing with employers in an industry affecting commerce, concerning grievances, labor disputes, wages, rates of pay, hours, or conditions of work would be within the definition. The employers with whom the organization deals need not be engaged in interstate commerce. It is sufficient that the industry in which the employer is engaged affects interstate commerce.

Section 5

Section 5 would prohibit the withholding, denying, interfering, or depriving of rights and privileges granted by sections 3 and 4, or attempts to do so, or the intimidating, threatening, or coercing of any person with a purpose of interfering with those rights or privileges, or the punishing or attempts to punish any person for exercising or attempting to exercise those rights or privileges, or the inciting or aiding or abetting of any person to do any of the foregoing.

Section 5 is the same as section 4 in the introduced bill, except that it would extend its prohibition to the denial or interference with the right to nondiscrimination conferred by the new secton 4, as well as to denials or interferences with rights conferred by section 3. Section 5 applies its prohibition to all persons, whether acting under color of law or otherwise. Thus, any person or entity, even though not the owner, operator, or employee of a public establishment within the terms of section 3(a) would be prohibited from interfering with rights or privileges therein conferred. Any person, although lacking affiliation or association with a labor organization, or with a professional, business, or trade association would be prohibited from interfering with rights and privileges secured by section 4 of the amended bill.

Section 6

Subsection 6(a).—This subsection is the same as subsection 5(a) in the bill as introduced. It would confer a civil action for preventive relief whenever any person has engaged, or there are reasonable grounds to believe that any person is about to engage, in any act or practice prohibited by section 5 of the reported bill. An action for a permanent or temporary injunction, restraining order, or other order, could be instituted by either the person aggrieved, or by the Attorney General. The latter may institute an action in the name of the United States if he certifies that he has received a written complaint from the person aggrieved, and that in his judgment the person aggrieved is unable to initiate and maintain appropriate legal proceedings and such action will materially further the purposes of this act. The bringing of an action by the Attorney General under this subsection would be discretionary.

Subsection 5(b) of the introduced bill providing attorney fees for the person aggrieved, if he prevails, is omitted from this bill. Nor could attorney fees be awarded as costs, for attorney fees are not costs as that term is used in rule 54(d) of the Federal Rules of Civil Procedure. Thus, no attorney fees could be allowed either party under this bill as part of the costs.

Subsection 6(b).—This subsection is identical to subsection 5(c) in the bill as introduced. This subsection states when a person would be deemed unable to initiate and maintain appropriate legal proceedings within the meaning of subsection 6(a). If the aggrieved person is unable, either directly or through other interested persons or organizations, to bear the expense of the litigation, or to obtain effective legal representation; or when there is reason to believe that the institution of such litigation by him would jeopardize the employment or economic standing of, or might result in injury or economic damage to, such person, his family, or his property, then he would be deemed unable to institute and maintain appropriate legal proceedings.

Subsection 6(c).—The provisions of this subsection were not contained in the bill as introduced. This subsection would create a condition precedent to the institution of an action by the aggrieved person under 6(a) involving rights or privileges secured by section 3. Actions involving rights or privileges secured by section 4 (dealing with membership in labor organizations, or professional, business, or trade associations) would not be affected by this subsection.

As a condition precedent to the aggrieved person instituting an action involving section 3 rights or privileges, a written notice of the alleged violation would need to be given at least 30 days prior to the date of instituting suit to any State or local agency, located in the State or locality where the alleged violation occurred, and authorized by State or local law or ordinance to provide assistance in resolving disputes relating to denial of section 3 rights or privileges. If no such State or local agency exists within the State or locality wherein the alleged violation occurred, then written notice would have to be given the Attorney General at least 30 days prior to instituting the action.

Subsection 6(d).—This subsection is the same as subsection 5(d) in the bill as introduced, except that it would include complaints involving violations of section 4 rights and privileges as well as section 3 rights and privileges. Also, the word "ineffective" replaces the word "fruitless" in the last sentence of the subsection.

This subsection would provide that in the case of any complaint received by the Attorney General alleging a violation of section 5 in any jurisdiction where State or local laws or ordinances appear to the Attorney General to forbid the act or practice involved, he shall notify the appropriate State and local officials. If said officials request a reasonable time to act under such State or local laws before the Attorney General institutes suit, then he shall afford them a reasonable time. If, though, the Attorney General files with the court a certificate stating that the delay would adversely affect the interests of the United States, or that action by the State or local officials would be ineffective, then he would not have to comply with this subsection, even though there did appear to be a violation of State or local law.

Subsection 6(e).—This subsection would authorize the Attorney General, before instituting an action, to utilize the services of any

Federal, State, or local agency or instrumentality, or of any private organization which may be available, to secure compliance with section 5 by voluntary procedures if, in his judgment, such procedures are likely to be effective in the circumstances.

The introduced bill provided for utilization of the services of only Federal agencies or instrumentalities.

Subsection 6(f).—This new subsection would provide that the United States be liable for costs the same as a private person in any action instituted under subsection 6(a). This addition was necessary to make the United States liable for costs, for rule 54(d) of the Federal Rules of Civil Procedure provides that—

> * * * costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law.

Rule 54(d) also provides that costs shall be awarded the prevailing party unless the court otherwise directs. Thus, costs in actions instituted under this act could be awarded to either party in the discretion of the court.

Section 7

Subsection 7(a).—This subsection is identical to subsection 6(a) in the bill as introduced. It would grant to the district courts of the United States jurisdiction of proceedings instituted pursuant to this act, and would provide further that such jurisdiction be exercised whether or not the aggrieved party had exhausted any administrative or other remedies provided by law. Therefore, in those States having public accommodation laws, the aggrieved party would not have to pursue remedies thereby granted, but could seek his remedy initially and/or solely under this act.

Subsection 7(b).—This subsection is identical to subsection 6(b) in the bill as introduced. It would provide that this act not preclude any individual or State or local agency from pursuing any remedy available under any other Federal or State law requiring nondiscrimination in public establishments. This is an expression of intent to not occupy the field of public accommodation legislation in such a manner as to preempt State or local laws or regulations in this area. The intent expressed is to preserve the right of the States, and political subdivisions thereof, to enact and enforce legislation of this type.

Section 8

Subsection 8(a).—Section 8 of the bill is entirely new. Subsection 8(a) would provide that in all cases of criminal contempt arising under any order of any court issued pursuant to the provisions of this act, the accused, upon conviction, be fined or imprisoned, or both. For criminal contempt the fine could not exceed $1,000 and the imprisonment could not exceed the term of 60 days.

Subsection 8(b).—This subsection would provide that in all cases of criminal contempt arising under any court order issued pursuant to this act, the accused, on demand, be entitled to a trial by jury. This would be subject to the exclusion in subsection 8(c).

Subsection 8(c).—This subsection would exclude from jury trial contempts committed in the presence of the court, or so near thereto as to interfere directly with the administration of justice, and contempts arising from the disobedience of any officer of the court in respect to the writs, orders, or process of the court.

Subsection 8(d).—This subsection states that the act shall not be construed so as to deprive courts of their power to secure compliance with or prevent obstruction of the lawful orders and decrees of the court by civil contempt proceedings without a jury trial. Thus, the right to a jury trial would be given only in case of criminal contempt outside the scope of the exclusion in subsection 8(c). Likewise, as the limitation on fine and imprisonment contained in subsection 8(a) would apply only to criminal contempt cases, detention under civil contempt proceedings would not be limited.

BACKGROUND OF THE LEGISLATION

Civil rights progress is the articulated goal of both major national political parties. Each in 1960 committed itself to a platform and a program of equal opportunity and elimination of racial discrimination.

> In a nation dedicated to the proposition that all men are created equal—racial discrimination has no place. * * * As to those matters within reach of political action and leadership, we pledge ourselves unreservedly to its eradication. * * * We recognize that civil rights is a responsibility not only of States and localities; it is a national problem and a national responsibility. * * * We pledge the full use of the power, resources, and leadership of the Federal Government to eliminate discrimination based on race, color, religion, or national origin * * * ("Building a Better American," Republican platform, 1960).
>
> The peaceful demonstrations for first-class citizenship which have recently taken place in many parts of this country are a signal to all of us to make good at long last the gaurantees of our Constitution. * * * The time has come to assure equal access for all Americans to all areas of community life * * *. ("The Rights of Man," Democratic platform, 1960)

But it was not until the spring and summer of this year—a time period that has become known as the beginning of the Negro revolution of 1963 when the victims of discrimination and their brothers took to the streets—that this country and its Government recognized again the urgent obligation to remove a daily insult to our fellow citizens. The demonstrators took what Prof. Paul Fruend of the Harvard Law School has described as—

> a grave and heroic course by which persons of sensitive conscience put themselves under the penalty of disobedience in order to sear the conscience of their fellow men.

On June 19, 1963, the late President, in a message to Congress, said in part:

> Events of recent weeks have again underlined how deeply our Negro citizens resent the injustice of being arbitrarily denied equal access to those facilities and accommodations which are otherwise open to the general public. That is a daily insult which has no place in a country proud of its heritage—the heritage of the melting pot, of equal rights, of

one nation and one people. No one has been barred on account of his race from fighting or dying for America—there are no "white" or "colored" signs on the foxholes or graveyards of battle. Surely, in 1963, 100 years after emancipation, it should not be necessary for any American citizen to demonstrate in the streets for the opportunity to stop at a hotel, or to eat at a lunch counter in the very department store in which he is shopping, or to enter a motion picture house, on the same terms as any other customer.

This theme was stated another way by Secretary of State Dean Rusk in his appearance before the committee:

> * * * we have reached a point now where the progress itself demands the next step; the essential element of personal dignity is the primary missing piece, and we ought to put that piece into place.

Despite the currency of the demonstrations, the introduction of S. 1732, and the committee consideration; the requirement that public accommodations and facilities serving the general public do so without racial or religious discrimination is neither new nor novel. It is now well established and equally accepted that no public conveyance such as a bus, railroad, airline, or the facilities adjacent thereto may discriminate against or segregate its patrons. The doctrines that to a large extent sustain this result are deeply rooted in English common law but by no means limited to common carriers. In the 17th century, Lord Chief Justice Hale expressed the authority that the public, through its Government, can exert over commercial enterprises dealing with the public:

> Property does become clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in the use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. (1 Harg. Law Tracts 78, cited with approval by Mr. Chief Justice Waite in *Munn* v. *Illinois*, 94 U.S. 113, 126 (1877))

This potential for regulation of businesses established to serve the public evolved into the actual obligations of such establishments to serve all members of the public equally:

> Whenever any subject takes upon himself a public trust for the benefit of the rest of his fellow subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him * * * If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his

> trade. If the innkeeper refuse to entertain a guest, when his house is not full, an action will lie against him; and so against a carrier, if his horses be not loaded, and he refuses to take a packet proper to be sent by a carrier. (Lord Chief Justice Holt in *Lane* v. *Cotton*, 12 Mod. 472, 484 (1701))

The common law rule as to the obligation of an innkeeper was clearly set forth in another early English decision:

> An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him or such circumstances occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, "You shall come to my inn," and to another, "You shall not," as everyone coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servant, they having in return a kind of privilege of entertaining travelers and supplying them with what they want. (Mr. Justice Coleridge in *Rex* v. *Ivens*, 7 Carrington & Payne 213 (1835))

The English rule that, because an innkeeper is engaged in a business in which the public has an interest and enjoys certain privileges not given the public generally, he cannot discriminate for or against any class or pick and choose his guests also became the American rule. In fact the presence of this rule, either by express statute or adoption of the common law duties, was significant to the Supreme Court that held unconstitutional the 1875 statute which guaranteed full and equal enjoyment of public accommodations and facilities. Mr. Justice Bradley wrote in the majority opinion:

> Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them. (The *Civil Rights* cases, 109 U.S. 3, 25 (1883))

It should be noted that this decision of the Supreme Court was handed down 10 years before the adoption of State laws, statutes, or ordinances requiring segregation. There is historical evidence to indicate that in 1885 a Negro could use railroad, dining, and saloon facilities without discrimination in the Carolinas, Virginia, and Georgia. As late as 1954, Louisiana repealed a statute requiring places of business and public resorts to serve all persons "without distinction or discrimination on account of race or color." And in 1959 Alabama repealed that part of its code which incorporated the common law duties of innkeepers and hotelkeepers.

Immediately after World War II, in 1946, President Truman appointed a Special Committee To Review Civil Rights. The task force found that progress in this field fell far short of the requirements of the Nation's conscience, the possible achievements under the Constitution, and the rightful demands of the victims of discrimination. Their report in 1947 pointed out that segregation is economically wasteful and quoted the late Eric Johnston who, as president of the U.S. Chamber of Commerce said: "Intolerance is a species of boycott and any

business or job boycott is a cancer in the economic body of the Nation." The report further recommended the enactment by the States of laws guaranteeing equal access to places of public accommodation, broadly defined, for persons of all races, colors, creeds, and national origins. At that time 18 States had enacted statutes in the field of public accommodations; to date, only 14 other States, for a total of 32, now protect against discrimination and segregation in public accommodations and facilities.

This bill, then, is the second attempt to achieve Federal legislation and the third time equal access to public accommodations has been recommended as a national goal. It is not possible to measure with mathematical certainty the costs of discrimination; and even if it were, these figures would never reveal the highest cost of all: that to national unity and self-respect. All citizens and all regions can agree that the pattern of race relations that has developed in recent months—boycotts and counterboycotts, economic retaliations, demonstrations—must be terminated. Of equal certainty is the fact that the systematic denials of service directed at certain of our citizens in facilities otherwise available to the public are a powerful force behind this unrest.

In the absence of affirmative action now there can be little doubt that there will be repercussions in the near future, repercussions that may affect the Nation's economy, welfare, and international prestige. On this issue the Nation has a common and an immediate interest.

COMMITTEE ACTION

The public accommodations civil rights bill was transmitted to the Senate by the President on June 19, 1963. On July 1, the committee began a series of hearings that culminated on August 2. There were 23 separate sessions in which statements from 40 witnesses were received. In addition, comments were requested from law school professors and deans throughout the country and from the Governors of each of the States. And, as is usual in issues of this kind that are so deeply felt, many interested individuals and organizations sent in prepared views that made a valuable contribution to the committee's consideration.

It would be too facile to describe the issue confronting the committee as simply a question of the kind of world in which we want to live. There were necessarily involved profound legal, constitutional, and policy questions. These questions were pursued in hearings free of partisanship and by witnesses not limited by region or point of view. The witnesses from the administration, uniformly supporting the bill and its purposes, included the following: Attorney General Robert Kennedy, Secretary of State Dean Rusk, Secretary of Labor Willard Wirtz, Under Secretary of Commerce Franklin Roosevelt, Jr., and Assistant Attorney General for Civil Rights, Burke Marshall. Also invited to appear were those whose positions or experience provided insights into the issues at hand. These included: Erwin N. Griswold, a member of the U.S. Civil Rights Commission and dean of the Harvard Law School; Hon. Frank Morris, mayor of Salisbury, Md., accompanied by John W. T. Webb and the Reverend Charles Mack, chairman and member, respectively, of the Salisbury-Wicomico Biracial Commission; Dr. Eugene Carson Blake, National Council of Churches; Father John F. Cronin, National Catholic Welfare Conference; Rabbi Irwin Blank, Synagogue Council of America; Peter

Rozelle, commissioner, National Football League; Ford Frick, commissioner of baseball; Hon. Joe Foss, commissioner, American Football League; Roy Wilkins, executive secretary, National Association for the Advancement of Colored People; Hon. Ivan Allen, Jr., mayor of Atlanta, Ga.; and Bruce Bromley, attorney.

In addition, Senator Thurmond, of South Carolina, was authorized to invite witnesses. Nineteen appeared at his request, including the Governors of South Carolina, Georgia, Florida, Alabama, and Mississippi; and also the attorneys general of Arkansas, Mississippi, and South Carolina. Furthermore, statements were received for the record from the attorneys general of Georgia and North Carolina.

In this way a full record was developed; a record that seeks as completely as possible to explore the legality, wisdom, and need for a Federal statute securing for all persons the right of equal access to places of business held open to the public.

Does Congress have the authority to end discrimination in places of public accommodation?

At the outset a formidable obstacle to a favorable determination on S. 1732 appeared to be an 1883 decision by the U.S. Supreme Court holding unconstitutional an 1875 statute providing criminal penalties for denials of service by public facilities or accommodations on account of race, color, or religion. This 1875 law was expressly based on the 14th amendment, but the Supreme Court could not find the requisite "State action" in denials of service by privately owned establishments. There is a large body of legal thought that believes the Court would either reverse the earlier decision if the question were again presented or that changed circumstances in the intervening 80 years would make it possible for the earlier decision to be distinguished. That question, however, was not before the committee, for the instant measure is based on the commerce clause (art. 1, sec. 8, clause 3) of the Constitution. The majority opinion of the Court in the 1883 decision carefully stated that they were not foreclosing a statute based on the broad powers of Congress such as are found in the commerce clause. Mr. Justice Bradley wrote:

> Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, and among the several States and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. (109 U.S. 3, 18 (1883))

Attached as an appendix to this report is a brief prepared at the request of the committee by Prof. Paul Freund of the Harvard Law School, a noted authority on the Constitution. In this document Professor Freund concludes that the law proposed by S. 1732 is consistent with the Constitution and the decisions thereunder by the Supreme Court. In the judgment of the committee it would be upheld on review. Similar conclusions were reached by almost all legal

scholars or practitioners consulted by the committee or inquired of by witnesses appearing before the committee. Professor Freund wrote: "The commerce power is clearly adequate and appropriate. No impropriety need be felt in using the commerce clause as a response to a deep moral concern." Where social injustices occur in commercial activities the commerce clause has been used to prevent discrimination; it has been used to prohibit racial discrimination; and it has been used to reach intrastate activities if they have a substantial effect (individually or cumulatively) upon commerce. The committee concludes that there is sufficient authority in the Constitution to uphold S. 1732.

Congress, in the exercise of its plenary power over interstate commerce, may regulate commerce or that which affects it for other than purely economic goals.

> The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. (Mr. Justice Stone in *United States* v. *Darby*, 312 U.S. 100, 115 (1941))

The fact that S. 1732 would accomplish socially oriented objectives by aid of the commerce clause powers would not detract from its validity. There are many instances in which Congress has discouraged practices which it deems evil, dangerous, or unwise by a regulation of interstate commerce. Examples of this are found in Federal legislation keeping the channels of commerce free from the transportation of tickets used in lottery schemes, sustained in *Champion* v. *Ames*, 188 U.S. 321 (1903); the Pure Food and Drug Act, sustained in *Hipolite Egg Co.* v. *United States*, 220 U.S. 45 (1911); the "White Slave Traffic Act," upheld in *Hoke* v. *United States*, 227 U.S. 308 (1913); strict regulation of the transportation of intoxicating liquors, sustained in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311 (1917); and the Fair Labor Standards Act, imposing wages and hours requirements, sustained in *United States* v. *Darby*, 312 U.S. 100 (1941).

As broad and as deep as are the powers of Congress, there is presented the more difficult problem of how those powers should be utilized. Gov. Farris Bryant of Florida, speaking in opposition to the bill said: "My position is purely and simply that while I believe that the Federal Government has the power to do, I do not believe it has the right to do what it is suggesting be done here." The chairman of the committee, Senator Magnuson, in the initial stages of the public hearings, stated the issue in another way. He observed:

> This is a question of public policy and how far Congress wants to go under the authority of the commerce provision of the Constitution.

The commerce power has served as the basis for Federal action on such national policies as the regulation of agricultural production; requirement of collective bargaining; prohibition of industrial monopolies and unfair trade practices; regulation of the sale of stocks, bonds, and other securities; establishment of hydroelectric, flood control and navigation projects; and an attack upon such crimes as white slavery, kidnaping, trade in narcotics, theft of automobiles, and

shipments of gambling devices and lottery tickets. Should it now be used to prohibit denials of service in public facilities when the exclusive reason for the denial is the race, religion, or national origin of the would-be patron?

Determinations of appropriate public policy are rarely susceptible to scientific, clinical measurement. More often than not these judgments involve an evaluation of competing, sometimes conflicting, considerations. In the case at hand, the first finding that had to be made by the committee was the need for Federal legislation.

THE NEED FOR FEDERAL LEGISLATION

> Race discrimination hampers our economic growth by preventing the maximum development of our manpower, by contradicting at home the message we preach abroad. It mars the atmosphere of a united and classless society in which this Nation rose to greatness. It increases the cost of public welfare, crime, delinquency, and disorder. Above all, it is wrong. (President John F. Kennedy, Feb. 28, 1963)

State law

As noted earlier in this report, the Supreme Court in 1883 believed that all States had in effect laws guaranteeing "proper accommodations to all unobjectionable persons who in good faith apply for them." Yet by 1947 the Truman Commission report, noting that 18 States did have public accommodations laws, recommended a renewed effort at the State level to eliminate such discrimination by legislation. It is now 80 years after the Supreme Court decision and 16 years after the Truman Commission report and only 14 additional States have made discrimination in public accommodations and facilities a prohibited act.

Many of these 32 States have adopted statutes more comprehensive in coverage and severe in penalty than what is contemplated by S. 1732. These State laws would be specifically preserved and relied on for effective enforcement of the proposed Federal statute. Wherever a remedy is available at the State level, for example, S. 1732 provides that such remedy would be pursued before injunctive relief under this bill is sought.

Despite the action in 32 States attempting to secure equal access to public accommodations, there is obviously a broad statutory gap that has fueled and fired racial and religious tensions. This fact was neither contested nor controverted during the course of the committee hearings. And the conclusion has been inescapable: the problem is one national in scope requiring Federal legislation. The time has now past when discrimination was susceptible to local treatment alone without a residual right of enforcement. As John W. T. Webb, chairman of the Salisbury (Md.) Biracial Commission noted:

> We started working with the restaurants in the fall of 1960 and at that time tempers were not as short, lines were not as drawn, and the situation was enormously easier than it is today in communities that have this problem of discriminatory service.

His fellow commission member, the Reverend Charles Mack, made a similar observation:

> But for God's sake, have some bill, something to fall back on in the case where everything is stopped, where people are sitting around not doing anything about the situation at all.

And finally the mayor of Atlanta, Ga., Ivan Allen, Jr., summed up the possible futility of past progress if Congress fails to enact this bill:

> Surely the Congress realizes that after having failed to take any definite action on this subject in the last 10 years, to fail to pass this bill would amount to an endorsement of private business setting up an entirely new status of discrimination throughout the Nation. Cities like Atlanta might slip backward.
>
> Hotels and restaurants that have already taken this issue upon themselves and opened their doors might find it convenient to go back to the old status. Failure by Congress to take definite action at this time is by inference an endorsement of the right of private business to practice racial discrimination and, in my opinion, would start the same old round of squabbles and demonstrations that we have had in the past.

Human dignity

Americans do not adjust to segregated living; nor should they.

Several witnesses before the committee described the nature of the affront; the effects of the systematic and arbitrary exclusion of an individual from public facilities for no reason other than the color of his skin. Roy Wilkins, executive secretary of the National Association for the Advancement of Colored People, commented as follows:

> The truth is that the affronts and denials that this section, if enacted, would correct are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity.
>
> It must be remembered that while we talk here today, while we talked last week, and while the Congress will be debating in the next weeks, Negro Americans throughout our country will be bruised in nearly every waking hour by differential treatment in, or exclusion from, public accommodations of every description. From the time they leave their homes in the morning, en route to school or to work, to shopping, or to visiting, until they return home at night, humiliation stalks them. Public transportation, eating establishments, hotels, lodginghouses, theaters, motels, arenas, stadiums, retail stores, markets, and various other places and services catering to the general public offer them either differentiated service or none at all.
>
> For millions of Americans this is vacation time. Swarms of families load their automobiles and trek across country. I invite the members of this committee to imagine themselves darker in color and to plan an auto trip from Norfolk, Va.,

to the gulf coast of Mississippi, say, to Biloxi. Or one from Terre Haute, Ind., to Charleston, S.C., or from Jacksonville, Fla., to Tyler, Tex.

How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white?

Later in the same hearing, Mr. Wilkins added:

You just live uncomfortably, from day to day. It must be remembered, that the players in this drama of frustration and indignity are not commas or semicolons in a legislative thesis; they are people, human beings, citizens of the United States of America. This is their country. They were born here, as were their fathers and grandfathers before them, and their great-grandfathers. They have done everything for their country that has been asked of them, even to standing back and waiting patiently, under pressure and persecution, for that which they should have had at the very beginning of their citizenship.

The Reverend Eugene Carson Blake, appearing on behalf of the National Council of Churches, gave the committee a specific example during the testimony. He recounted the following experience:

I traveled with a distinguished Negro pastor for three night stands. We were speaking on "international peace" in 1948, I believe it was, and we were traveling through the Pacific Northwest.

No bad incident happened as far as the race of my companion was concerned during that half a week that we spent together. But, I never was the same again, because I, for the first time in my life, realized what it would be to be a Negro traveling, because he didn't know each time as to whether he would be received. There was just this edginess which no human being ought to be subjected to.

The primary purpose of S. 1732, then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.

On this point, Mayor Allen of Atlanta comments as follows:

* * * the elimination of segregation, which is slavery's stepchild, is a challenge to all of us to make every American free in fact as well as in theory—and again to establish our Nation as the true champion of the free world.

Economic aspects

As discussed earlier, the fundamental purpose of S. 1732 is directed at meeting a problem of human dignity; and such an objective has been and can be readily achieved by congressional action based on the commerce power of the Constitution. In addition, though, the committee is convinced that the measure is a sound approach to the economic burdens created by discrimination in public establishments.

Dean Griswold, addressing himself to the question of whether or not there was a valid connection between discrimination and interstate commerce, made the following statement:

> In the United States of 1963, it does not require any fiction to see the relationship of places of public accommodation to interstate commerce. In 1961, commercial airlines flew more than 18 billion revenue passenger-miles in the Nation during the first half of the year. More than 350 million passengers traveled on the 218,000 miles of railroad routes in 1958. Intercity buslines in 1959 carried 170 million passengers over 208,000 miles of route. The 41,000-mile Interstate Highway System, which reaches into every corner of the land, crosses the boundaries of 673 cities and passes close to many hundreds of others.
>
> With the growth of metropolitan complexes, many thousands of citizens travel across State lines for business or pleasure, not periodically but on a daily basis. And at the same time, a great volume of the goods and appliances used by businesses which serve the public move in interstate commerce.

Public establishments presently discriminating or segregating on account of race, color, religion, or national origin are enjoying the benefits of access to and participation in commerce. The business of such establishments is fostered and made more profitable because of the advantages afforded them by utilizing these various channels of commerce. However, when the discriminatory practices employed by such establishments lead to demonstrations or boycotts in addition to the humiliation of those subject to discrimination, the economy of our Nation suffers.

For example, such practices have a stifling effect on the business of providing accommodations for conventions. Mr. Ray Bennison, convention manager of the Dallas (Tex.) Chamber of Commerce was quoted in the Wall Street Journal, July 15, 1963, as stating:

> This year we've probably added $8 to $10 million of future bookings because we're integrated.

Within 1 day after 14 Atlanta hotels recently announced they would accept Negro convention guests, the Atlanta Convention Bureau had received commitments from three organizations including 3,000 delegates that would not have otherwise visited Atlanta, according to the same source.

The adverse economic effect of discrimination by public accommodations is not limited to the convention business. Discrimination or segregation by establishments dealing with the interstate traveler subjects members of minority groups to hardship and inconvenience as well as humiliation, and in that way seriously decreases all forms

of travel by those subject to such discrimination. Surely a family is not encouraged to travel along a route or into an area where, because of the color of their skin, they will be denied suitable lodging or other facilities. According to Mrs. Marion Jackson, publisher of Go-Guide to Pleasant Motoring, a Negro traveling by car from Washington, D.C., to New Orleans must travel an average of 174 miles between establishments that will provide him with suitable lodging. Many of these establishments are small and there is often no vacancy for the traveler who seeks accommodations in the latter part of the day. Not only is this an afront to human dignity; it is also a detriment to the economy of this Nation.

The reluctance of industry to locate in areas where such discrimination occurs is another manifestation of the burden on our economy resulting from discriminatory practices. Employees do not wish to work in an environment where they will be subject to such humiliation. There is a lack of local skilled labor available in such areas because many workers, rather than be subject to discriminatory practices, have relocated in other regions.

The Honorable Franklin D. Roosevelt, Jr., Under Secretary of Commerce, in his statement before the committee, pointed out that—

> In the 2 years before the crisis over schools and desegregation of public accommodations erupted into violence in Little Rock in September 1957, industrial investments totaled $248 million in Arkansas. During the period, Little Rock alone gained 10 new plants, worth $3.4 million, which added 1,072 jobs in the city. In the 2 years after the turbulence which brought Federal troops to the city, not a single company employing more than 15 workers moved into the Little Rock area. Industrial investments in the State as a whole dropped to $190 million from $248 million of the 2 years before desegregation.

Mr. Glenn E. Taylor, Birmingham (Ala.) Chamber of Commerce official, was quoted in the Wall Street Journal, September 19, 1963, as saying shortly after the bomb blast in that city killing four Negro children:

> We haven't had a commitment for a new industry all summer, but we had hopes that things were going to improve. I was planning to take a trip next week to contact some prospects. But what's the use now?

Not only is industry discouraged from locating where discrimination is practiced, but physicians, lawyers, and other professional persons are deterred from engaging in their professions where the advantages of membership in local professional associations, or other benefits, will be refused them because of the color of their skin. Included in the statement of the Under Secretary of Commerce, before the committee, was this quotation from a statement by the provost for medical affairs of the University of Arkansas:

> The university medical center, being within the community of Little Rock, could not help but be affected by the disturbance. I think it would be only fair to say that because of this complicating social change, the medical center has had its faculty recruitment program brought to a virtual standstill.

Discriminatory practices in places of amusement and retail establishments often leads to the withholding of patronage by those affected, and in that way the normal demand for goods or entertainment is restricted. Other patrons, even though not themselves subject to discrimination, also avoid establishments employing such practices when picketing or boycotting occurs because of fear of possible violence. In his statement before the committee, the Under Secretary of Commerce said:

> Retail sales in Birmingham were reported off 30 percent or more during the protest riots in the spring of 1963. That is just retail sales, gentlemen. One local businessman said several retailers had told him their books had shown a net loss for the first time in a generation. Another businessman of 35 years experience said there were more stores for rent in Birmingham last fall than there had been during the depression.
>
> The Federal Reserve bank in Atlanta reported that in the 4-week period ended May 18, 1963, department store sales in Birmingham were down 15 percent below the same period in 1962. Since January 1, 1963, the city's department store sales dropped 5 percent from 1962. During the same 4½ months, department store sales were up 7 percent in Atlanta, up 10 percent in New Orleans, and up 15 percent in Jacksonville, Fla.

The Honorable Frank Morris, mayor of the city of Salisbury, Md., appearing before the committee, commented on the effect of recent demonstrations in Cambridge on its economy. Mr. Morris said:

> I am engaged in the wholesale plumbing, heating, and supply business in Salisbury, a family-owned business. We have a branch store—we have seven of them, and one is in Cambridge. Our own particular business is there, we sell to the plumbing and heating contractors. We do not sell to the retail public. Our business there has dropped very substantially, as much as 80 percent off from when it was on its peak, as far as the demonstration.
>
> Also, our council in Salisbury has the district manager of the Acme Stores. Their food business in Cambridge dropped as much as 30 to 40 percent during the peak of the demonstrations.
>
> I have been told by a shoestore manager, a national chain shoestore manager, that he was working on his quota, and he worked on a quota basis—I had one conversation with the gentleman, so I am going secondhand with it, so to speak—anyway, he was going on a quota basis, and on his quota, he was 165 percent ahead of his quota for the first 4 months. And then the freedom riders came into town, and his business dropped and within the next 3 months he was down to less than 40 percent of his quota. He had gone from 165 down to 40 percent on a yearly quota.
>
> Definitely the demonstrations have a real effect. Certainly when demonstrations are at their peak, you are not going to take your family, normally speaking, down on the street to see what is going on. You are going to leave your children home. You want your wife to stay home. If you have to

go some place, buy something, or do something, you do only the necessities. And if you can avoid the area that is troubled, you are going to avoid it. It very definitely has an effect.

The Under Secretary of Commerce told the committee that discriminatory practices in places of entertainment or amusement not only artificially restrict the demand for entertainment, but also that—

> Where segregation is practiced in theaters and auditoriums, the entire community, both white and Negro, is denied access to a variety of cultural and entertainment activities. The Metropolitan Opera Co. canceled its annual season in Birmingham because municipal authorities failed to desegregate theater facilities. Although they had formerly had very successful seasons in Birmingham, there are no plans for resumption in the immediate future.
>
> Actors' Equity adopted a rule about a year ago, written into every contract, that performers need not perform in theaters where discrimination is practiced either against performers or patrons.
>
> Entertainers in the American Guild of Variety Artists have also been refusing to book where either the stage or the audience is segregated. The guild's resolution is fairly recent, but many of the booking agencies have insisted upon this clause for a long time.

Ford Frick, commissioner of baseball, directed the attention of the committee to the contrast between the disbanding of the Southern Association largely due to segregation in the cities holding franchises and the experience in 1962 on the reopening of a professional baseball team in Little Rock, Ark. It was determined by the board of directors of the new club that there should be integration on the playing field as well as in the stands. Commissioner Frick inserted in the hearing record a report from the general manager of the new team that said in part:

> The Southern Association of which Little Rock was a member for many years never did integrate at any time. We did considerable groundwork and study before applying for a franchise in the International League. We were assured by the four larger hotels in the city that they would take care of all visiting Negro players in the rooms, coffeeshops, and dining rooms exactly as they would provide for the white players. We selected the Hotel Marion because of its all-night coffeeshop.
>
> The local NAACP field secretary requested that we integrate the park. We answered them that we would sell tickets to the general public. When the board of directors of the club met, it decided to integrate the park on opening night, April 16. No public mention of this decision was made although local TV and radio sports announcers and newspaper sportswriters were aware that the decision had been made.
>
> The park was quietly integrated on opening night with 6,966 paid admissions of which several hundred were Negro patrons. There was no trouble, no commotion, and no com-

plaint, except one lone man with a sign who moved up and down in front of the park. No one paid any attention to him. He tried it again the second night for a short time and then gave up.

Negro players on the home team and visiting teams have been applauded from the start, and sometimes louder than the white players. Visiting managers report better treatment here in hotels and coffeeshops than elsewhere. One visiting team has as many as six Negro players.

Our Negro players are popular with our fans. They came here in fear, but a large group of white fans met the team on their arrival here from spring training and took them on tour in private cars over the city. They are much at home now.

We sold $114,330 worth of preseason tickets early in the spring. Tickets were sold in 90 cities and towns in Arkansas outside of Little Rock. Enthusiasm and support have been steady and general throughout the State.

Integration in Little Rock has been smooth. It came about naturally and is a normal part of Arkansas baseball now.

This is an indication that progress has been made. But there are other cities and other areas where resistance is stronger. Gov. George Wallace of Alabama, for example, after noting that segregation in his State is a matter of "custom and usage," made the following reply to a question about the likelihood of voluntary desegregation of public establishments in Alabama:

No, sir; they can integrate. Let them go ahead and integrate. One or two have talked about integrating in Birmingham, Ala. They have had Negro boycotts, now they have white boycotts.

Mayor Allen of Atlanta similarly cast doubt on reliance on voluntary action to achieve effective desegregation. He prophesied a return to "the old turmoil of riots, strife, demonstrations, boycotts, and picketing" if S. 1732 failed of enactment.

It is, moreover, clear that where desegregation in public establishments has been achieved either by community biracial efforts or legislation or ordinance, it has been done without the adverse economic results that had been forecast by its opponents. Richard Marshall, an attorney of El Paso, Tex., advised the committee by letter of the actual experience in his city with a public accommodations statute similar to S. 1732. He wrote as follows:

Although such legislation, on a State and local basis, is nothing new but has existed for over 75 years, it was noteworthy that El Paso, Tex., adopted such an ordinance last year since this was the first such enactment in any of the 11 traditional Southern States.

Our experience has been gratifying. Our four aldermen were all in favor of it, but the mayor vetoed it and the ordinance was passed over his veto. There was no violence, there were no demonstrations, and there was acceptance of the ordinance by the hotels, theaters, and restaurants of El Paso. Many of the theaters and restaurants welcomed with relief the passage of the ordinance, since they had the force of law

behind their natural desire to serve all patrons without causing arguments on their business premises.

I do not think that even the most fervent 1962 opponents of the ordinance among the restaurants and hotel people would today be able to state that this legislation had either harmed their business, taken any of their property or profits from them, deprived them of any of their liberties, or created any super police power in the community.

CONCLUSION

Much of the dialog about public accommodations legislation has involved the assertion that such a law would infringe upon traditional private property rights. Because of the importance of our private property system, and its traditional role in the American concept of individual freedom, such an argument has strong emotional appeal. However, emotion is not to be the guide in determining the desirability of or need for public accommodations legislation. The question is far too serious and of far too great a magnitude to be determined without recourse to reason and reflection upon the meaning and purpose of private property.

Does the owner of private property devoted to use as a public establishment enjoy a property right to refuse to deal with any member of the public because of that member's race, religion, or national origin? As noted previously, the English common law answered this question in the negative. It reasoned that one who employed his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain. It is to be remembered that the right of the private property owner to serve or sell to whom he pleased was never claimed when laws were enacted prohibiting the private property owner from dealing with persons of a particular race. Nor were such laws ever struck down as an infringement upon this supposed right of the property owner.

But there are stronger and more persuasive reasons for not allowing concepts of private property to defeat public accommodations legislation. The institution of private property exists for the purpose of enhancing the individual freedom and liberty of human beings. This institution assures that the individual need not be at the mercy of others, including government, in order to earn a livelihood and prosper from his individual efforts. Private property provides the individual with something of value that will serve him well in obtaining what he desires or requires in his daily life.

Is this time honored means to freedom and liberty now to be twisted so as to defeat individual freedom and liberty? Certainly denial of a right to discriminate or segregate by race or religion would not weaken the attributes of private property that make it an effective means of obtaining individual freedom. In fact, in order to assure that the institution of private property serves the end of individual freedom and liberty it has been restricted in many instances. The most striking example of this is the abolition of slavery. Slaves were treated as items of private property, yet surely no man dedicated to the cause of individual freedom could contend that individual freedom and liberty suffered by emancipation of the slaves.

There is not any question that ordinary zoning laws place far greater restrictions upon the rights of private property owners than would public accommodations legislation. Zoning laws tell the owner of private property to what type of business his property may be devoted, what structures he may erect upon that property, and even whether he may devote his private property to any business purpose whatsoever. Such laws and regulations restricting private property are necessary so that human beings may develop their communities in a reasonable and peaceful manner. Surely the presence of such restrictions does not detract from the role of private property in securing individual liberty and freedom.

Nor can it be reasonably argued that racial or religious discrimination is a vital factor in the ability of private property to constitute an effective vehicle for assuring personal freedom. The pledge of this Nation is to secure freedom for every individual; that pledge will be furthered by elimination of such practices. The committee concurs in the analysis of Secretary of State Rusk who made the following response to the question of whether this law would restrict property rights:

> Well, I could not agree, sir, that such a law would diminish freedom. The purpose of law in a free society is to enlarge freedom by letting each know what kind of conduct to expect from the other. And it is through our laws that personal freedom is not only protected but constantly enlarged, so we can pursue our respective orbits with a minimum of collisions.
>
> I am thinking also of the private rights of those who seek normal public services and accommodations, and are denied them for reasons which I cannot see, for reasons which I don't believe our Constitution can recognize.

In addition, much of the questioning concerned the nature, type, and extent of the precedent established by favorable action on S. 1732. When Dean Griswold was asked if this measure could serve as the forerunner for legislation requiring the sale of kosher foods or fish on Friday, he replied:

> I think I would like to add, with respect to these other things, too, Senator, that I don't think that we have to defend against every conceivable bill that Congress might some time have to consider. One of the reasons we have the Congress is to make decisions. And I assume that Congress will not pass bills which are foolish or improper or go too far.

Later in the same hearing this line of inquiry was pursued further with respect to equal public accommodations for dogs or children. Dean Griswold, in the following answer, observed:

> I don't think we need to be absolute, that we need to be utterly comprehensive in everything we do. There isn't a major national problem with respect to age and dogs and various other things. There is a major national problem with respect to race. There is a problem which is on the doorstep of this Congress and which must be faced and resolved by this Congress with respect to race.

In view of the committee this is the heart of the matter; Congress should not be so fearful of its future judgment that it fails to meet present responsibilities. Brave men, women, and children have forced this Nation and the world to recognize an intolerable condition. The resolution of this condition is a major, immediate, and critical matter.

AGENCY REPORTS

The reports of the agencies and departments follow:

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, July 29, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: We refer again to your letter of June 26, 1963, in which you asked for our comments on S. 1732.

S. 1732, introduced as part of the President's civil rights program, aims at preventing racial and religious discrimination in public accommodations in or affecting interstate commerce. The bill authorizes civil actions for preventive relief by the aggrieved parties, or by the Attorney General in the name of the United States, and also, prior to the institution of such actions, provides for procedures to seek voluntary compliance with the nondiscrimination prohibitions of section IV.

S. 1732, if enacted, would not directly affect the functions and operations of the General Accounting Office and we have no objection to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, July 29, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U.S. Senate.

DEAR MR. CHAIRMAN: In your letter of June 27, 1963, you asked for our comment on the amendments to S. 1732 (in the nature of a substitute), introduced by Senator Dirksen on June 26, 1963. The proposed amendments would substitute for the public accommodations bill contained in S. 1732 as originally introduced provisions relating to and establishing a Community Relations Service similar to that proposed in title IV of S. 1731, the administration's package bill on civil rights.

This proposal would not directly affect the functions and operations of our office, and we have no objection to its favorable consideration by your committee. We suggest that there be considered the inclusion of the words "subject to civil service and classification laws" after the word "appoint" at the end of line 8, page 4 of the bill.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, July 29, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U.S. Senate.

DEAR MR. CHAIRMAN: We refer again to your letter of July 17, 1963, in which you asked for our comment on the amendment to S. 1732 introduced by Senator Goldwater on July 16, 1963.

This proposal represents that part of the President's civil rights program relating to discrimination in places of public accommodations. Senator Goldwater's amendment would permit injunctive relief against a labor union which engages in or is about to engage in violation of the rights guaranteed in section 101 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411). The amendment would also add a new section 7 to S. 1732 whose effect would be to deny exclusive bargaining power to a labor union which maintains exclusionary membership policies.

These amendments, if enacted, would not affect the functions and operations of our office, and we have no objection to their favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 8, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: In your letter of July 23, 1963, you requested our comment on an amendment (No. 134) to S. 1732, intended to be proposed by Senator Keating.

The proposed amendment would add a new section 5 prohibiting the publishing, circulation, display, or mailing of notices, advertisements, or communications representing that certain goods, services, facilities, privileges, advantages, or accommodations offered or held out to the public for sale, use, rent, or hire, shall be refused, withheld from, or denied to any person on account of race, color, religion, or national origin by any person acting under color of any law, statute, ordinance, regulation, custom, or usage. The bill would further prohibit any person so acting from committing certain specified acts in denial of such goods, services, or facilities to any customers on account of their race, color, religion, or national origin.

The proposed amendment would not affect the functions and operations of the General Accounting Office, and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 8, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: In your letter of July 23, 1963, you requested our comment on an amendment (No. 135) to S. 1732, intended to be proposed by Senator Keating.

The proposed amendment would insert in section 4 of S. 1732 a provision which would prohibit the direct or indirect publishing, circulation, or display of any notice, advertisement, or written or printed communication to the effect that any of the goods, services, facilities, privileges, advantages, or accommodations of any public establishment to which the provisions of section 3 of the bill apply shall be refused, withheld from, or denied to any person on account of race, color, religion, or national origin.

The proposed amendment would not affect the functions and operations of the General Accounting Office, and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 8, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: In your letter of July 25, 1963, you requested our comment on an amendment (No. 136) to S. 1732, intended to be proposed by Senator Keating.

The proposed amendment would add to section 3 of S. 1732 a new subsection (c) which would make it clear that the enumeration of any public establishment in subsection (a) of section 3 shall not be construed to exclude its application to other similar establishments not listed.

The proposed amendment would not affect the functions and operations of the General Accounting Office, and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, October 11, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: In your letter of October 4, 1963, you asked for our comments on an amendment (No. 212) to S. 1732, intended to be proposed by Senator Cooper and Senator Dodd.

The proposed amendment would add to S. 1732, between line 24 on page 4, and line 1 on page 5, a new section 3(a) and would provide for the renumbering of the remaining sections of the bill. The new section would guarantee the right to nondiscrimination in public establishments operated under State authority.

The proposed amendment, if enacted, would not affect the functions and operations of the General Accounting Office and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., July 10, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of Defense with respect to S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

Executive Order 9981, issued by President Truman on July 26, 1948, declared it to be a policy of the President that there should be equality of treatment and opportunity for all persons in the armed services without regard of race, color, religion, or national origin. The Department of Defense took steps to assure compliance with Executive Order 9981, and it is the policy of the Department of Defense to provide equality of treatment and opportunity for all members of the Armed Forces. In furtherance of efforts in this area, the Department is currently studying means for adopting recommendations of the President's Committee on Equal Opportunity in the Armed Forces. While the military departments have established a fine record over the past 15 years, these recommendations are designed to further improve existing programs. One of the major items included in the report of this committee concerns problems encountered as a result of off-base discrimination.

Off-base discrimination against minority groups within the Armed Forces generates a serious morale problem for the military. In consideration of the purpose and the mission of the Military Establishment, it is neither feasible, expedient, nor justifiable to assign personnel to duty stations on the basis of race, color, or national origin. Consequently, servicemen belonging to minority groups have been forced to accept a set of standards, and have been denied privileges enjoyed by other military personnel in those areas where local custom supports discriminatory practices.

It is understood that the establishments covered by S. 1732 are those which serve the general public, including hotels, motels, restaurants, lunch counters, theaters and other places of amusement, department and other retail stores, drugstores, gasoline stations and the like. Military personnel, like other members of the American public, must rely upon the availability of public accommodations when traveling to new duty stations, when living in a civilian community adjacent to

their duty station, or when on temporary duty in connection with military maneuvers. Unlike most civilians, military personnel are required to move their families upon completion of a 3- to 4-year tour of duty. As a matter of military necessity, the serviceman moves when and where ordered. When servicemen, who are members of a minority group, encounter discriminatory practices in the course of a move, or upon arrival at their new duty station, they are required to assume additional problems which constitute an unnecessary and unjustifiable burden. The morale and discipline problems caused by such inequities can only have an adverse effect on military operations.

The Department of Defense fully concurs in the purposes of S. 1732 and supports its enactment as a needed supplement to its own existing policies. This legislation would assure minority groups within the Armed Forces the same equality of treatment during periods of travel, and during off-duty time that is now being afforded on-base.

The Bureau of the Budget advises that there is no objection to the presentation of this report for the consideration of the committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely,

JOHN T. MCNAUGHTON.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
August 9, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your recent requests for reports on S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce and a proposed amendment, in the nature of a substitute, by Senator Dirksen together with S. 1217 and S. 1622 dealing with the same topic.

Thoughtful persons are aware that the patterns of racial discrimination imposed upon the colored tenth of our population have had debilitating effects upon those who have endured them. Many have been caught in the cycle of poverty and hopelessness reflected in the often-quoted statistics on school dropouts, welfare rolls, health standards, juvenile delinquency, and unemployment.

The President, with the wholehearted support of myself and the Department of Health, Education, and Welfare, seeks now to dedicate the Nation to the elimination of the more flagrant forms of discrimination practiced against the Negro. At the same time the President has urged substantial increases in funds for basic adult education, welfare work training, vocational education, youth and manpower training to assist all of our citizens with limited educational and cultural attainments to break out of the round of inadequate skills, unemployment, and indifference. The Department of Health, Education, and Welfare will assume major responsibility for this enhanced educational effort under legislation now pending before this Congress. We welcome the challenge which these programs will create for us.

For the Negro who takes advantage of fresh opportunities to augment his education and skills to meet the requirements of today's

industry, the knowledge that racial barriers are being removed from public accommodations, education, employment, housing and in numerous other areas of our daily life will provide him with strong motivation for success. Full opportunity will spark ambition. An earnest ongoing effort to eliminate all forms of racial discrimination by both public and private action is an inseparable part of the proposed program to combat the illiteracy and inadequate skills of a substantial fraction of our populace. If we can do these things simultaneously, the momentum of our efforts will be rewarded by a more secure America where every man will be measured by his own worth.

For these reasons, therefore, the Department of Health, Education, and Welfare urges enactment of S. 1732. This bill is a part of the omnibus civil rights program proposed by the President and places the enforcement powers of the Federal Government squarely behind the eradication of discrimination in public accommodations. The suggested amendment of Senator Dirksen would be a substitute for the administration's bill and we do not support it. S. 1217, proposed by Senator Javits and S. 1622, by Senator Hart, lack numerous significant features of S. 1732. We defer to the views of the Department of Labor on the amendment to S. 1732, introduced by Senator Goldwater.

We are advised by the Bureau of the Budget that there is no objection to the presentation of this report from the standpoint of the administration's program, and that enactment of S. 1732 would be in accord with the President's program.

Sincerely,

ANTHONY J. CELEBREZZE, *Secretary.*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., August 21, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on the amendments to S. 1732 offered by Senator Goldwater on July 16, 1963.

The first amendment would extend the enforcement provisions of S. 1732 to cover actions to redress violations of section 101 of the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act). Section 101 affords to union members equal rights to participate in union affairs, freedom of speech and assembly, safeguards against unjust dues and assessments, protection of the right to sue, testify, or petition and safeguards against improper disciplinary action. The effect of the proposed amendment would be to permit the Attorney General to bring suit for violations of section 101, where heretofore such suits only could be brought by individuals.

The second amendment proposed by Senator Goldwater would amend the National Labor Relations Act to preclude the NLRB from certifying as an exclusive bargaining agent any union "which does not admit to membership all of the employees it seeks to represent in a unit

appropriate for that purpose, on the same terms and conditions generally and uniformly applicable to and with the same rights and privileges generally and uniformly accorded to all members thereof. * * *"

We do not believe it is advisable to attempt to deal with labor union practices as part of legislation directed at places of public accommodations. Legislation affecting our basic labor law should evolve from an investigation of the particular problems in that area, and should be adopted only in response to a demonstrable need.

There has been no indication that the proposed amendments are needed. Indeed, insofar as the second proposed amendment is concerned, the NLRB already has the authority which the amendment would confer upon it, as the Department of Justice pointed out in an amicus curiae brief filed with the Board in a case involving the Hughes Tool Co., of Houston, Tex., and the Independent Metal Workers Union.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

NICHOLAS DEB. KATZENBACH,
Deputy Attorney General.

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, August 7, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further response to your request for our views on amendments intended to be proposed by Mr. Goldwater to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce.

The first of the proposed amendments would, in our opinion, constitute an irrelevant addition to S. 1732. It, in effect, amends section 101 of the Labor-Management Reporting and Disclosure Act of 1959, and deals with matters which are inappropriate for inclusion in this public accommodations proposal, as well as legally incongruous with its stated purpose.

S. 1732 concerns the right of access to public accommodations particularly as they relate to interstate travel and commerce. On the other hand, section 101 of the Labor-Management Reporting and Disclosure Act pertains to the internal affairs of labor unions. Section 101 does establish certain rights for union members, and it also prohibits certain discriminations in disciplinary and other matters. However, none of these rights and safeguards under section 101 are germane in any way to the right of being served in public establishments.

The proposed amendment seeks to revive an approach which the Congress considered but rejected when it enacted the Labor-Management Reporting and Disclosure Act in 1959. As originally proposed in the Senate, the Secretary of Labor was empowered to enforce the provisions of title I. As the bill was finally passed, however, private

actions were substituted to remedy all violations of this title, with several exceptions. Approximately 275 private actions have been instituted under the title in the less than 4 years the Labor-Management Reporting and Disclosure Act has been in existence, thus indicating the extent to which union members have exercised their rights.

Another point for consideration is that many title I rights under the act are also title IV duties on labor organizations and are protected through civil actions of the Secretary of Labor. Since the enactment of the act, the Secretary has initiated 95 actions to enforce these rights. Taking into account this close relationship between title I and title IV, we believe that a further division of responsibility in civil litigation between the Departments of Labor and Justice would lead to confusion in the act's administration and be detrimental to its basic objectives.

We are in basic agreement with the objective of the proposed new section to S. 1732 entitled "Bargaining Rights of Labor Organizations With Exclusionary Membership Policies." However, a recent ruling by an NLRB hearing examiner (*Hughes Tool Co.* (Case No. 23–CB–429)) indicates that this amendment may simply be declaratory of existing law.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Yours sincerely,

W. WILLARD WIRTZ,
Secretary of Labor.

DEPARTMENT OF STATE,
Washington, July 12, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: Your letters of June 26 and June 27, 1963, enclosed for the comment of the Department of State a copy of the bill, S. 1732, the Interstate Public Accommodations Act of 1963, and a copy of the amendments in the nature of a substitute intended to be proposed by Senator Dirksen to S. 1732.

The Department's views on this matter were presented by the Secretary of State during his testimony before your committee on July 10 and we have no further comments on the foreign policy implications of this legislation and the reasons why we must attack the problems of discrimination. The Department of State defers to the views of other agencies primarily concerned with respect to the detailed questions of this legislation and its enforcement; we are, as the Secretary pointed out, concerned with the underlying purpose of the proposals and the adverse effects of the present situation.

The Bureau of the Budget advises that there is no objection to the submission of this report and that enactment of S. 1732 would be in accord with the administration's program.

Sincerely yours,

FREDERICK G. DUTTON,
Assistant Secretary.

FEDERAL AVIATION AGENCY,
Washington, D.C., July 19, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request of June 27, 1963, for the views of this Agency with respect to S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

You also asked for our views on S. 1217 and S. 1622, other public accommodations bills. This report constitutes our response to all three requests.

I am obviously aware of the fundamental issues which prompted the introduction of S. 1732. Both as a member of this administration and as an American citizen I am greatly concerned that all our fellow citizens, and particularly those who travel in interstate commerce, will be treated with dignity in selecting public accommodations.

However, I assume that your request for my comments relates specifically to my responsibilities under the Federal Aviation Act of 1958, to encourage and foster the development of air commerce. Pursuant to that responsibility, I strongly recommend enactment of S. 1732.

The movement of the air traveler from point to point provides only one of the services he needs as he moves in air commerce. Additionally, and at the very least, he needs food and lodging. He usually has a variety of other needs. For most travelers those needs are met in a fashion designed to afford comfort and convenience. But if restaurants and hotels are not available to the air traveler, if they are available only at an inconvenience, or if they are unattractive or otherwise undesirable, he is not getting the services he needs and should be able to expect. The natural consequence is that he is reluctant to travel and does so only when necessity outweighs the inconvenience and other unpleasantness involved. So that this reluctance may be overcome, the same facilities which are already available to most air travelers, must be made available to all of them. The same high-quality, convenient, and pleasant accommodations that most of us insist on in the usual course of traveling must be made available to all who would travel. This is essential if air commerce is to reach its fullest development.

In sum, it is my belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations.

The Bureau of the Budget has advised that there is no objection to the submission of this report and enactment of S. 1732 would be in accord with the program of the President.

Sincerely,

N. E. HALABY, *Administrator.*

FEDERAL AVIATION AGENCY,
Washington, D.C., August 20, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request of July 17, 1963, for the views of this Agency with respect to the amendments pro-

posed by Senator Goldwater to S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

The substance of these amendments is not within the area of this Agency's expertise, and we therefore offer no comment on them. I continue, as I indicated in my report of July 19, 1963, on S. 1732, to favor the bill in the form proposed by the President.

The Bureau of the Budget has advised that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely,

N. E. HALABY, *Administrator.*

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., July 26, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of June 26, 1963, requested the views of the General Services Administration on S. 1732, 88th Congress, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

The purpose of the proposed legislation is stated in the title of the bill. It would, with respect to all persons traveling interstate, prohibit discrimination or segregation based on race, color, religion, or national origin in certain public establishments.

We wish to point out in this connection that, in fiscal year 1964, it is estimated the civilian agencies of the Federal Government will spend approximately $348,231,710 for passenger travel within the continental United States. It is our firm conviction that all Federal employees traveling interstate on Government business should be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of certain public establishments, as would be provided by the proposed legislation.

The General Services Administration strongly endorses the objective of S. 1732 and urges early enactment of the bill.

The enactment of the proposed legislation would not affect the budgetary requirements of this agency.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely yours,

BERNARD L. BOUTIN, *Administrator.*

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., August 16, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of June 27, 1936, requested the views of the General Services Administration on certain amendments

in the nature of a substitute for S. 1732 which amendments would amend all after the enacting clause of the bill and amend its title to read "A bill to establish a Community Relations Service to assist in securing full access by all persons without regard to race, color, religion, or national origin, to the public services and accommodations provided by private establishments, and to provide conciliation assistance to communities in resolving certain disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, religion, or national origin."

For the reasons stated in our letter to you of July 26, 1963, commenting on S. 1732, as introduced, the General Services Administration strongly endorses the objective of this bill.

We believe that S. 1732 is better designed to achieve its objective of eliminating discrimination based on race, color, religion, or national origin in public accommodations affecting interstate commerce than are these amendments proposed as substitute therefor and, consequently, urge early enactment of the bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely yours,

LAWSON B. KNOTT, JR.,
Acting Administrator.

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., August 27, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of July 17, 1963, requested the views of the General Services Administration on certain proposed amendments (designated No. 127) to S. 1732, 88th Congress, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

For the reason stated in our letter to you of July 26, 1963, commenting on S. 1732, as introduced, the General Services Administration strongly endorses the objectives of this bill and urges its early enactment.

The first of these proposed amendments to the bill would amend section 5(a) thereof so as to extend civil action for preventive relief under that section to members of labor organizations who are denied by such organizations those rights and privileges guaranteed by section 101 of the Labor-Management Act of 1959. The second of these proposed amendments would amend section 9(a) of the National Labor Relations Act, as amended, so as to provide that a labor organization which does not admit to membership, on an equal basis with all other members, all of the employees it seeks to represent shall not be the exclusive representative of such employees for the purpose of collective bargaining within the meaning of that section.

Since these proposed amendments to S. 1732 are outside the scope of GSA's responsibilities and functions and are of more direct concern to the Department of Labor, we would defer to the views of that

Department with respect to the relevancy of and the neecssity for such amendments.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely yours,

BERNARD L. BOUTIN, *Administrator.*

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., September 4, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of July 25, 1963, requested the views of the General Services Administration on proposed amendment No. 136 to S. 1732, 88th Congress, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

For the reasons stated in our letter to you of July 26, 1963, commenting on S. 1732 as introduced, the General Services Administration strongly endorses the objectives of this bill and urges its early enactment.

This proposed amendment (designated No. 136) would add a subsection (c) to section 3 of S. 1732 so as to expand the construction of the term "public establishments" as enumerated in subsection (a) of that section to include any other public establishment not listed therein, but which is similar to an enumerated establishment.

In our opinion such an amendment to S. 1732 is unnecessary in view of the fact that S. 1732 in enumerating the places of public accommodation which would be covered by the proposed legislation uses the phrase "or other public place" in each of the categories.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely yours,

BERNARD L. BOUTIN, *Administrator.*

INTERSTATE COMMERCE COMMISSION,
COMMITTEE ON LEGISLATION,
Washington, D.C., July 9, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U.S. Senate,
Washington, D.C.

DEAR CHAIRMAN MAGNUSON: Your letter of June 27, 1963, addressed to the Chairman of the Commission, and requesting comments on a bill, S. 1732, introduced by Senator Mansfield (for himself and 45 other Senators), to eliminate discrimination in public accommodations affecting interstate commerce, and on amendments (in the nature of a substitute) to S. 1732 intended to be proposed by Senator Dirksen, has been referred to our Committee on Legislation. After consideration by that committee, I am authorized to submit the following comments in its behalf:

I

S. 1732, as introduced, would establish the right of all persons, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of public establishments serving interstate travelers or substantially affecting interstate travel or the interstate movement of goods in commerce. While the term "public establishments" is not fully defined, among the establishments explicitly covered by the bill are hotels, motels, restaurants, theaters, and other places of amusement; retail and department stores, drugstores, lunchrooms, lunch counters, gasoline stations, and the like. Bona fide private clubs are not included.

Any deprivation of or interference with the right to use the public facilities covered by the proposed measure is specifically prohibited, and aggrieved persons are granted the right to sue for an injunction or other preventive relief. In addition, the bill would authorize the Attorney General to bring a civil suit for preventive relief when, in his judgment, the person aggrieved is unable to initiate and maintain appropriate legal proceedings and the purposes of the bill will be materially furthered by the filing of such an action.

The term "public establishments" as used in the bill as introduced is broad in scope, and it is not clear to what extent S. 1732 is intended to apply to common carriers and other persons subject to the Interstate Commerce Act and related statutes administered by this Commission. Insofar as the proposed measure may be construed to apply to such carriers and other persons, it should be noted that it is now unlawful under section 3(1) of the act.

> for any common carrier subject to this part [part I] * * * to make, give, or cause any undue or unreasonable preference or advantage to any particular person * * * or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

While this provision relates to rail carriers, there are similar provisions in the other parts of the act applicable to motor or water common carriers. These provisions have been interpreted in a series of decisions by the Federal courts and this Commission as prohibiting the segregation by such carriers of passengers traveling on interstate trains or buses, or using related terminal facilities. *Mitchell* v. *United States*, 313 U.S. 80 (1941); *Henderson* v. *United States*, 339 U.S. 816 (1950); *Boynton* v. *Virginia*, 364 U.S. 454 (1960); *United States* v. *Lassiter*, 203 F. Supp. 20, aff'd per curiam, 371 U.S. 10 (1962); *Lewis* v. *The Greyhound Corp.*, 199 F. Supp. 210 (1961); *National Assn. for A.O.C.P.* v. *St. Louis-S.F. Ry. Co.*, 297 I.C.C. 335 (1955); *Keys* v. *Carolina Coach Co.*, 64 M.C.C. 769 (1955); and *Discrimination—Interstate M. Carriers of Passengers*, 86 M.C.C. 743 (1961).

In the last cited proceeding, this Commission, upon petition of the Attorney General of the United States, promulgated a number of general regulations designed to implement further the provisions of section 216(d) of the act with respect to the nonsegregated use of motorbuses and related facilities operated and utilized in the interstate common carrier transportation of passengers. The lawfulness

of the regulations thus issued was upheld by the courts in the *State of Georgia* v. *United States*, 201 F. Supp. 813, aff'd per curiam, 371 U.S. 9 (1962); and the Attorney General has since reported that all railroad stations and bus terminals have been desegregated. In view of these decisions, the racial segregation of passengers using interstate transportation or terminal facilities by common carriers subject to the Interstate Commerce Act is clearly established as a violation of that act. In the words of the Supreme Court: "The question is no longer open; it is foreclosed as a litigable issue." *Baily* v. *Patterson*, 369 U.S. 31, 33.

To the extent, therefore, that S. 1732 might be construed as prohibiting discrimination or segregation by common carriers subject to the Interstate Commerce Act, its enactment would permit the accomplishment of the same substantive result as that reached by this Commission and the courts in the aforementioned cases. Insofar as its prohibitions would apply to persons other than common carriers subject to our jurisdiction under the Interstate Commerce Act and related statutes, its enactment would not appear to affect directly the jurisdiction or functions of this Commission or to impair our administration of the laws entrusted to us. In either case, however, the bill's passage into law, under the circumstances here disclosed, is, in our view, a matter of broad congressional policy. Accordingly, we make no recommendation either for or against S. 1732 as introduced.

II

The amendments (in the nature of a substitute) to S. 1732 intended to be introduced by Senator Dirksen would declare "legal and consonant with the right of private property, but nevertheless * * * not in keeping with the concept and spirit of equality * * *." the denial to any person, because of race, color, religion, or national origin, of free and full access to the public services and accommodations provided by private establishments, except public utilities and common carriers, when done within the descretion of the owners and operators thereof and not under compulsion of State and local laws. The substitute proposal would create a Community Relations Service to assist in securing the full and nondiscriminatory access by all persons to the public services and accommodations of private establishments, and to provide conciliation assistance to communities in resolving certain disputes, disagreements, or difficulties based on race, color, or national origin.

As the proposed amendments are expressly made inapplicable to the services and accommodations provided by public utilities and common carriers, their passage into law would not affect the prohibitions now embraced in the Interstate Commerce Act relating to racial discrimination or segregation by common carriers subject to the jurisdiction of this Commission. Accordingly, their enactment also is, in our view, a matter which the Congress must decide on the basis of broad policy considerations.

Respectfully submitted.

ABE MCGREGOR GOFF,
Acting Chairman.

RUPERT L. MURPHY.

28-062—64——6

INTERSTATE COMMERCE COMMISSION,
COMMITTEE ON LEGISLATION,
Washington, D.C., July 31, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate,
Washington, D.C.

DEAR CHAIRMAN MAGNUSON: Your letters of July 23 and July 25, 1963, addressed to the Chairman of the Commission, and requesting comments on amendments Nos. 134, 135, and 136, intended to be proposed by Senator Keating to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, have been referred to our Committee on Legislation. After consideration by that Committee, I am authorized to submit the following comments in its behalf:

The amendments intended to be introduced by Senator Keating would prohibit the direct or indirect publication, circulation, issuance, display, or mailing of any notice, advertisement, or written or printed communication, to the effect that any of the goods, services, facilities, privileges, advantages, or accommodations of any public establishment subject to section 3 of S. 1732 shall be refused to or withheld from any person on account of race, color, religion, or national origin. In addition, such amendments would in substance preclude all persons from engaging in the discriminatory practices otherwise forbidden by S. 1732, as so amended, under color of any law, statute, ordinance, regulation, custom, or usage.

In our previous comments upon S. 1732 and certain amendments thereto intended to be introduced by Senators Dirksen and Goldwater, we expressed the view that enactment of that legislation with or without such amendments, would not affect the substantial functions or jurisdiction of this Commission and represents a matter which Congress itself must decide on the basis of broad policy considerations. The amendments intended to be proposed by Senator Keating, likewise, would have no material effect upon the provisions of the Interstate Commerce Act relative to racial discrimination or segregation by common carriers subject to our jurisdiction, discussed in our prior letters, and we therefore take no position for or against their passage into law.

Respectfully submitted.

LAURENCE K. WALRATH,
Chairman.
ABE MCGREGOR GOFF.
RUPERT L. MURPHY.

INTERSTATE COMMERCE COMMISSION,
COMMITTEE ON LEGISLATION,
Washington, D.C., July 24, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U.S. Senate,
Washington, D.C.

DEAR CHAIRMAN MAGNUSON: Your letter of July 17, 1963, addressed to the Chairman of the Commission, and requesting comments on

amendments intended to be proposed by Senator Goldwater, to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, has been referred to our Committee on Legislation. After consideration by that committee, I am authorized to submit the following comments in its behalf:

In our letter of July 9, 1963, concerning S. 1732 and certain amendments (in the nature of a substitute) intended to be introduced by Senator Dirksen, we expressed the view that enactment of either the original or the proposed substitute bill would not directly affect the substantial functions or jurisdiction of this Commission and constitutes a matter which Congress itself must decide on the basis of broad policy considerations. The amendments intended to be proposed by Senator Goldwater relate exclusively to labor organizations and have as their fundamental purpose the extension of such organizations of full and equal membership rights and privileges to all of the employees they seek to represent in a unit appropriate for that purpose. Such amendments would not modify or affect the provisions of the Interstate Commerce Act, discussed in our prior letter, relating to racial discrimination or segregation by common carriers subject to the jurisdiction of this Commission, and their passage into law also is, in our view, a matter of broad congressional policy in respect of which we take no position.

Respectfully submitted.

LAURENCE K. WALRATH,
Chairman.
ABE MCGREGOR GOFF.
RUPERT L. MURPHY.

INDIVIDUAL VIEWS OF SENATOR A. S. MIKE MONRONEY

I concur in the need for reporting this bill to the Senate. This legislation is a matter of grave national concern. It merits full consideration by all the Members of the Senate. It deserves the most comprehensive and thorough debate of which the Senate is capable.

I cannot agree with the concept of the bill which would ignore what I consider to be the limitation of congressional power to regulate interstate commerce. The committee view of interstate commerce goes too far. In its extension of Federal regulation and control over purely local affairs, the bill exceeds and transcends any legislation ever before proposed under the commerce clause. The evils it seeks to correct are certainly odious and shameful to a nation founded on principles of equality. Yet the laudatory purpose of eliminating segregation and discrimination should not be achieved through abuse of constitutional authority.

I do not reject entirely the regulation of commerce as a basis for such legislation, but I would not use the commerce clause in such a way that Federal regulation is forced on virtually every retail business establishment in this country, no matter what its size or connection with interstate commerce.

Let us make no mistake about the scope of this measure. It covers all hotels, motels, and similar establishments, no matter where located and no matter what the nature of their business or clientele. It covers all places of amusement and entertainment, whose source of entertainment has moved in interstate commerce. It covers all retail establishments selling goods and services to the public.

The word "substantial," which is used to qualify the application of the interstate commerce clause, has been discussed at great length. I seriously doubt that the meaning which some members of the committee have assigned this word, and the meaning which has been given or will be given to it by the courts, will serve to eliminate confusion or to avoid unending controversy. The Attorney General told the committee that to the courts the word "substantial" means "more than minimal." I am opposed to the application of the interstate commerce clause based on an insubstantial definition of the word "substantial."

If the commerce clause must be used, if it is the only sound legal basis for this legislation, then the urgency of the problem requires its exercise. But it should be exercised within the framework of our constitutional system of government. I do not believe that Congress power under the commerce clause is limitless, regardless of previous legislation and Supreme Court decisions to the contrary. My colleagues and the Attorney General say that there are limits which are clearly defined. But these limits mentioned can be summed up as being activities affecting commerce which are "less than minimal."

An amendment which I offered in the committee was defeated. This amendment is also based on the commerce clause and would go as far as I believe the Congress can and should go under that clause. It would cover movie houses and theaters, hotels, motels, and the retail establishments enumerated in the committee bill, if (1) the goods or services are provided primarily to persons traveling in interstate commerce or (2) the establishment is owned, operated, licenses, or franchised in two or more States. These are the businesses which are actually engaged in interstate commerce or which affect such commerce to the degree necessary to warrant Federal regulation. I believe this amendment would be broad enough to include as many as 70 percent of the establishments providing goods, services, entertainment, and accommodations to the public. I also believe that, if these establishments were required to comply, many of the small, local establishments would voluntarily comply.

It has been pointed out to me that my amendment cannot be totally effective; that it does not completely eliminate and eradicate segregation and discrimination; that its compulsion is not universal. That is true. But it is equally true that my amendment does not compromise our dual system of government; that it does not extend the hand of Central Government into every local drugstore, grocery store, lunch counter, or soda fountain; that it does maintain a line of demarcation between what the Congress can and cannot legitimately do; that it does provide an impetus for the voluntary abolishment of segregation and discrimination by small, local establishments, which, after all, is the only lasting and truly effective way.

I shall offer my amendment on the floor. Admittedly, it does not go as far as the committee bill with respect to the number of establishments covered. Yet it goes as far as the Congress may legitimately and wisely go, and it does not set the awesome precedent of the committee bill. Under my amendment there would still remain some clearly defined areas for control by State and local governments, some areas of freedom from regulation and supervision by the Federal Government. It would provide for the expansion of constitutional rights without sacrificing constitutional integrity.

I favor the enactment of civil rights legislation by this Congress this year, including a public accommodations measure. But to achieve the highly desirable objectives of this legislation through questionable constitutional means is both unwise and unsound. To my mind, the committee bill presents the Members of the Senate a hard and unnecessary choice between laudable goals and undesirable methods. My amendment rests upon sound and tested constitutional bases and would accomplish substantially all that is sought. I urge the Senate to give careful and thoughtful consideration to my amendment, bearing in mind that the choice of means is often as important as the ends to be attained.

Mike Monroney

A. S. MIKE MONRONEY, *U.S. Senator.*

INDIVIDUAL VIEWS OF SENATOR STROM THURMOND

My opposition to S. 1732 is evident to anyone who attended any of the 22 days of hearings held on this measure by the Senate Commerce Committee or who has taken the time to peruse the printed record. First and foremost, I consider the measure to be unconstitutional for a number of reasons, all of which will be discussed later in greater detail. S. 1732 is an unconstitutional and unwarranted invasion of an individual's right to hold, enjoy, and utilize private property. The characterization of the businesses involved as public accommodations is, in itself, calculated to deceive. The affected facilities and accommodations are privately owned and operated and bear no resemblance to public utilities which operate by virtue of a public franchise. In attempting to create a riglit in favor of a class of individuals, the constitutional rights of every American are being trampled. Completely aside from the question of unconstitutionality, I consider this legislation to be both unwise and unnecessary.

A casual observer to the events of this past summer could only conclude, based on an objective analysis of coincurrences, that this legislative proposal is in reality no different from "ticker tape" legislation, conceived and nurtured from overinflamed passions. It is this type legislation which demands the most careful and unimpassioned scrutiny, and yet which is most unlikely to receive it. Several questions of no small moment arose during the consideration of S. 1732 which were either completely overlooked or did not receive the consideration they deserved. All of these points bear further discussion in this report and on the floor of the Senate.

It cannot be too strongly emphasized that the issues involved in the consideration of S. 1732 are far more significant than our personal feelings about racial matters, or any Senator's individual convictions on segregation or integration, whatever they may be. The preservation of the Constitution and the principles of Government which flow from that document should be a matter which transcends personal preferences on racial issues. So important are the questions involved, so entangled and perplexing are the obscure and tenuous theses of the constitutional alegations in support of S. 1732, that we must have recourse to certain well-defined, safe, and fundamental principles.

CONSTITUTIONAL ISSUES

Whereas in the past legislation of this type has been largely predicated upon either one or a combination of the 13th, 14th, or 15th amendments, S. 1732 represents a new departure in the so-called civil rights field. S. 1732 is based on a combination of the 14th amendment to the Constitution and the powers granted to Congress in the commerce clause of the 8th section of article I of the Constitution. This provision reads as follows: "The Congress shall have power * * * To regulate commerce with foreign nations, and among the several

states, and with the Indian tribes." Over the years since the ratification of the Constitution, the commerce clause has been the basis for many congressional enactments, some very beneficial and some of more questionable benefit. (A representative list of acts of Congress based upon the commerce clause can be found on page 19 of the hearings.) However, it is important to note that never before has this clause of the Constitution been considered as a possible or appropriate one upon which to base civil rights legislation. While it was contended throughout the hearings that the commerce clause alone was sufficient constitutional authority for the enactment of S. 1732, the 14th amendment was nevertheless also included for reasons that have yet to be adequately explained. Also, during the hearings the 13th amendment was prominently mentioned as a further basis for the constitutionality of this measure. The 13th amendment to the Constitution reads as follows:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

This amendment was intended to abolish slavery as it existed up to and during the War Between the States. There is no merit in the contention that it can now be relied upon as a constitutional basis for S. 1732. On the contrary, its only valid application in this instance is as further proof of the unconstitutionality of this measure. In this same vein, the 5th, 10th, and 14th amendments contain provisions which mitigate against the constitutionality of S. 1732.

Perhaps the most important and certainly the most fundamental principle of the Constitution which should concern us is the doctrine of the separation of powers. The doctrine of separation of powers is basic to our federated system of government. There was wide recognition among the Founding Fathers that local self-government was preferable for the large majority of governmental functions. The need for a central government, however, was paramount for those things which, by their very nature, demanded national attention and uniformity. In accordance with this irrefutable logic, the doctrine of the separation of powers was implemented so that the Central Government was granted specific, but limited, governmental functions; but the powers not specifically granted to the Central Government in the Constitution were understood to have been retained by the individual States, local communities and the people. Even though this was clearly understood at that time, the 10th amendment to the Constitution was insisted upon in order to insure the perpetuation of the separation of powers doctrine. The 10th amendment was intended to be a bulwark against the eroding effects of the passage of time, faulty memories and an ever-grasping Central Government.

In implementing the time-tested and proven doctrine of the separation of powers, the Founding Fathers adhered closely to the rule that that which could best be dealt with locally should be left to local control. Those things which are basically national in scope and in functional utility were specifically placed in the Federal domain. For example, the defense of the country against external attack, the coin-

ing of money, the conduct of foreign relations, the raising and supporting of armies, and the operation of a postal service were all considered of a national nature and were therefore delegated to the Central Government. The framers of the Constitution did not consider it necessary or wise to enumerate those things which were essentially local in nature nor those areas in which the local governmental bodies were to be the sole and decisive authority. Instead, it was deemed sufficient to expressly state that all powers not specifically delegated to the Central Government in the Constitution were reserved to the States or to the people.

> The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers. This is apparent * * * from the history of the proceedings of the convention, which framed it; and has formed the admitted basis of all legislative and judicial reasoning upon it. * * * (Story, "Commentaries on the Constitution," sec. 900.

The postulate upon which this governmental system was constructed was formulated by these words:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

As the Supreme Court observed in *United States* v. *Darby*, this amendment states but a truism; for it is declaratory of the true relationship between the Central Government and the States as it was established by the Constitution. (*United States* v. *Darby*, 312 U.S. 100, 1041.) However, this is a truism which carries with it the vitality of the ages and cannot be restated or revered enough, for upon this truism rests the solidarity of our Government. In considering S. 1732, questions of expediency, considerations of practicality, or messages of social urgency are all secondary to the primary issue: whether the Constitution confers upon the Federal Government the power to pass this legislation.

THE 14TH AMENDMENT

There is no question but that S. 1782 has no constitutional basis in the 14th amendment. Even its most ardent supporters must be forced to this conclusion.

The pertinent provisions of the 14th amendment read as follows:

ARTICLE XIV

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

In 1875 the 43d Congress enacted a statute entitled "An Act to Protect All Citizens in Their Civil and Legal Rights." This act, which had as its constitutional basis the 14th amendment, stated in part as follows:

> * * * All persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; * * * applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Eight years later, in 1883, the Supreme Court, in the celebrated *Civil Rights* cases, 109 U.S. 3, held this statute unconstitutional. The holding of the Court in the *Civil Rights* cases is the definitive statement on the lack of power in Congress to enact a measure of the nature of S. 1732, on the basis of the 14th amendment. The Court construed the 14th amendment to be a prohibition upon State action, and State action only. In speaking for the Court, Mr. Justice Bradley said:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the 14th amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must

> necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. * * *

This language clearly states that the 14th amendment prohibits only State action and was never intended to encompass purely private action by individuals. The act which the Supreme Court held unconstitutional 80 years ago is the same type of measure which the 88th Congress is presently considering in S. 1732.

The decision in the *Civil Rights* cases is the landmark decision insofar as the proper meaning of the 14th amendment is concerned. Not only has it not been overruled, but it has been repeatedly reaffirmed by the Supreme Court. This decision is a sound one and Congress should consider it a valid precedent, as should the Supreme Court.

And yet, there has been much conjecture, as well as insistence, that the present Supreme Court would overrule this decision if it were given the opportunity to do so. In fact, the Attorney General in testifying before the Commerce Committee stated:

> In my personal judgment, basing it (S. 1732) on the 14th amendment would also be constitutional.

The Attorney General made this statement in spite of the fact that he seemed to have a general understanding of the holding in the *Civil Rights* cases. On the strength of objective principles of constitutional interpretation, it can be categorically stated that the rule of the *Civil Rights* cases is as good law today as it was when enunciated in 1883. The 14th amendment can no more support legislation of this nature in 1964 than it could three-quarters of a century ago. It is regrettable that anyone should entertain the notion that the present Supreme Court would not be guided in its decision by such a clear and correct precedent in the field. Such insinuations do little toward generating a feeling of confidence among the public in its attitude toward the Court. Even among laymen not so well attuned to the niceties of constitutional law, there is the knowledge that a court should be guided by its prior decisions, except under most unusual circumstances. The constant assertion that the Supreme Court in this instance would cast aside firmly established principles of constitutional law casts a reflection upon the Court. In fact, the correct interpretation of the 14th amendment as established in the *Civil Rights* cases was reaffirmed as recently as May 20, 1963, in *Peterson* v. *City of Greenville*, 373 U.S. 244. In that case the Court stated: "Individual invasion of individual rights" is not within the purview of the 14th amendment, and "private conduct abridging individual rights does no violence to the equal protection clause * * *."

In a separate concurring opinion in the *Peterson* case, Mr. Justice Harlan went even further when he said:

> Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference.

This is a correct statement of the law as it applies to personal action and attitudes as contrasted with that of the State or local govern-

mental body. The 14th amendment has absolutely no application to individual action.

The holding of the Supreme Court in the *Civil Rights* cases was specifically reaffirmed by the Fourth Circuit Court of Appeals as recently as 1959. In the case of *Williams* v. *Howard Johnson Restaurants*, U.S.C.A. 4th, 268 F. 2d 845, which arose out of the denial of service to a Negro by a Virginia restaurant, the plaintiff alleged a cause of action based on both the 1875 statute and the commerce clause of the Constitution. The Court reaffirmed the doctrine of the *Civil Rights* cases and said:

> Sections 1 and 2 of the Civil Rights Act of 1875, upon which the plaintiff's position is based in part, provided that all persons in the United States should be entitled to the full and equal enjoyment of accommodations, advantages, facilities, and privileges of inns, public conveyances, and places of amusement, and that any person who should violate this provision by denying to any citizen the full enjoyment of any of the enumerated accommodations, facilities, or privileges should for every such offense forfeit and pay the sum of $500 to the person aggrieved. The Supreme Court of the United States, however, held in *Civil Rights* cases, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835, that these sections of the act were unconstitutional and were not authorized by either the 13th or 14th amendments of the Constitution. The Court pointed out that the 14th amendment was prohibitory upon the States only, so as to invalidate all State statutes which abridge the privileges and immunities of citizens of the United States or deprive them of life, liberty, or property without due process of law, or deny to any person the equal protection of the laws; but that the amendment did not invest Congress with power to legislate upon the actions of individuals, which are within the domain of State legislation.

Again, as late as 1961, the Supreme Court restated this principle:

> It is clear, as it always has been since the *Civil Rights* cases * * * that individual invasion of individual rights is not the subject matter of the (14th) amendment * * * and that private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it. (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 1961.)

Those who would sustain this measure on the grounds of the 14th amendment are hard pressed to find any substantial State involvement sufficient to uphold its constitutionality under the doctrine laid down time after time by the Supreme Court. These individuals are forced to admit that the 14th amendment reaches only State action, and to date they have not been so revolutionary as to suggest that it be read to apply to individual action as well. The argument relied upon is that State action encompasses individual action where the action of the individual would be unconstitutional if committed by the State and the State does not likewise prohibit such

action when committed by individuals. Any more circuitous and specious reasoning is difficult to imagine, even in the wildest of dreams. The question which is posed can be best stated as follows: Is failure of a State to act to prevent individuals from doing that which they have the right to do as individuals tantamount to State action? The answer to this is, obviously, "No." An affirmative answer would be to require a State to take positive action. Positive action is not required by the 14th amendment. All that this amendment requires of the State is that it remain neutral.

States and local governmental bodies in many instances confer the privilege of operating a business by the act of licensing. This is frequently a grant which is a necessary condition precedent for the maintenance of a private business. Likewise, many States which require a business establishment to obtain a license do so, not for purposes of regulation, but to raise revenue. In these instances the license fee is no more than a tax and is in no way a form of regulation. However, the argument advanced to sustain this measure on this theory of the 14th amendment assumes that the operation of any private enterprise becomes State business and subject to all the limitations and conditions imposed upon the States by the 14th amendment by the mere act of licensing. Particularly pertinent at this point is the comment of Prof. Herbert Wechler, Harland Fiske Stone Professor of Constitutional Law at Columbia University. In answer to this argument he said:

> One need not be a lawyer to perceive that the fact that a State requires a lunchroom to obtain a license as a means of protecting the public health does not make the lunchroom a State agency. Are all private corporations to be viewed as organs of the State because their corporate existence is conferred by their State charters? It puts the matter with excessive charity to say that this is a submission which is most unlikely to persuade the Supreme Court and, what is more important, should not do so. In the entire history of the judicial interpretation of the 14th amendment, only Justice Douglas has accorded the position color of support in an opinion.

Calm reflection and the extension of this same logic will reveal how far afield this tortuous method of finding State action will lead. State governments, either directly or through a municipal or county governmental subdivision, usually require that dogs be licensed. The regulation of the canine population generally is considered necessary for the health, safety, and welfare of the people of the State. Yet who would contend that this act of licensing on the part of the State or any political subdivision of the State enhances the pooch with any semblance of State authority? Who would argue that a master walking his dog is tantamount to State action? However, this analogy is no more absurd than the suggestion that the proprietor of the corner drugstore, or the local tourist home is carrying on State business and is therefore subject to the full force and effect of the 14th amendment merely because he has previously obtained a license to do so. S. 1732 seeks to find State action by concluding that where the State, through routine licensing, per-

mits the owner of a business to conduct his business free of restraints other than those imposed for health or safety reasons, the State is encouraging, fostering, and tolerating the way the proprietor conducts his business. In actuality, the States are doing exactly what the 14th amendment requires. They are remaining completely neutral.

In some instances the courts have found that discrimination by a business with a franchise (an exclusive permit from the State to operate a business affected with a substantial public interest, i.e. a public utility) is prohibited by the 14th amendment. However, to find State discriminatory action in a State's refusal to intermeddle in the conduct of a privately owned business is stretching the thread of logic beyond all reasonable bounds. If such action by individual businessmen can now be reached under the 14th amendment, why have not the courts stricken it down previously? This novel theory on State action was summarily rejected in *Williams* v. *Howard Johnson's Restaurant*, (ibid.). In that case the Fourt Circuit Court of Appeals stated:

> This argument fails to observe the important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of State law they do not furnish a basis for the pending complaint. The license laws do not fill the void * * * The (licensing) statute is obviously designed to protect the health of the community but it does not authorize State officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a State do not constitute State action within the prohibition of the 14th amendment. (268 F. 2d 847–848.)

To contend that the 14th amendment places an affirmative burden upon a State to police private business establishments according to the dictates of the Federal Government can find no backing in either logic or the law. Under no valid interpretation of the 14th amendment can S. 1732 be constitutionally upheld.

THE 13TH AMENDMENT

Repeated assertions have been made that constitutional authority for S. 1732 can be found in the 13th amendment. Both the Attorney General and the Assistant Attorney General in charge of the Civil Rights Division testified before the Commerce Committee that S. 1732 would be constitutional on the basis of the 13th amendment. Even though neither the preamble to the bill nor the bill itself cites the 13th amendment as constitutional authority, the misplaced reliance on this amendment should not go unanswered.

The 13th amendment reads as follows:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have

> been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

In characterizing this amendment the Attorney General said:

> I think under the 13th amendment—which deals with servitude and freedom of the slaves—that involved in all of that were all the rights, privileges, immunities. When the 13th amendment was written, it involved granting to the Negroes all the privileges, rights, and immunities of all the other citizens.

Had this been the intention of the framers of the 13th amendment, and we must at least assume that they were aware of what they were trying to do, it hardly seems likely that they would have included the privileges and immunities clause in the 14th amendment. If they had understood the 13th amendment to mean what the present Attorney General says that it means, then they certainly would have considered the inclusion of the same provision in the 14th amendment to have been redundant and unnecessary. It seems more logical that the framers of the amendment were quite well aware of what they were attempting to do—abolish the legal institution of slavery and all other forms of involuntary servitude imposed by law.

In answer to a question the Assistant Attorney General in charge of the Civil Rights Division, Burke Marshall, said of the 13th amendment:

> The 13th amendment abolished slavery and it also gave Congress the power to enact appropriate legislation to achieve the purpose of the amendment. Now, the Supreme Court, in the *Civil Rights* cases, in the majority opinion, said they believed that that gave Congress the power, not only to enact legislation against the institution of slavery itself, as such, but against the badges, the remaining badges left over from the previous condition of servitude. One of the badges, one of the remnants of the institution of slavery, based on race in this country, was the denial of access to these places covered by this bill. So that is why I think the 13th amendment positively gives the Congress power to move in this area.

It is true that this argument was advanced to the Supreme Court by the petitioners in the *Civil Rights* cases, but there is no more validity to it now than the Court conceded to it in the opinion handed down in 1883. The brief of the Solicitor General of the United States in arguing for the constitutionality of that measure, which was in many respects identical in S. 1732, contained these paragraphs:

> The 13th amendment forbids all sorts of involuntary personal servitude except penal, as to all sorts of men, the word servitude taking some color from the historical fact that the United States were then engaged in dealing with African slavery, as well as from the signification of the 14th and 15th amendments, which must be construed as advancing constitutional rights previously existing.

> Granting that by involuntary servitude, as prohibited in the 13th amendment, is intended some institution, viz, custom, etc., of that sort, and not primarily mere scattered trespasses against liberty committed by private persons, yet, considering what must be the social tendency in at least large parts of the country, it is "appropriate legislation" against such an institution to forbid any action by private persons which in the light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi-public occupations, to create an institution.

Even though the Assistant Attorney General cited the *Civil Rights* cases in support of his argument, in reality the Court in that case completely rejected the entire proposition. In speaking of the 13th amendment, the Court said:

> This amendment, as well as the 14th, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.

As to the soundness of the argument that the 13th amendment was constitutional authority for the congressional enactment in question, the Court posed this question and answer:

> Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant * * *?
>
> After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude * * *.
>
> It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.

The date of this decision must be kept in mind at this point. This decision was handed down in 1883, less than two decades after the purported abolition of the institution of slavery, and even less time than that since the adoption of the 13th, 14th, and 15th amendments. All of these occurrences were within the lifetime of all the Justices participating in the decision, and a clear understanding of the purposes of the amendments can be attributed to them. These Justices, none of whom came from the South, did not suffer from the distortion of meaning which frequently comes with the passage of time.

On numerous occasions during the hearings, statements were made to the effect that it is not the South alone that is guilty of the discrimination which is so roundly condemned. The Assistant Attorney General listed several cities in which demonstrations have occurred protesting what he called "this kind of discrimination." Included in the list were such cities as Sacramento, Calif.; Stamford, Conn.; Chicago, Ill.; Des Moines, Iowa; Englewood, N.J.; Philadelphia, Pa.; Buffalo, N.Y.; Detroit, and Grosse Pointe, Mich.; Denver, Colo.; and Beloit,

Wis. The Acting Secretary of Commerce, Franklin D. Roosevelt, Jr., in his testimony before the committee, stated:

> Even in the North, Midwest, and the Far West, where the denial of equal treatment is less obvious than in the South, all public accommodations are by no means fully available.

Are we to believe by these statements that the treatment that is being demonstrated against is a vestige of slavery which the framers of the 13th amendment intended to abolish? In these areas which have never known slavery, I hardly think this an applicable argument. And yet, if this is a valid argument as it applies to the South, why is it not equally applicable to other areas of the country?

In his testimony before the committee, the Secretary of State, Dean Rusk, several times made the statement that discrimination on account of race, color, religion, or national origin is not unique to the United States, but may be found in many other countries. Specifically, he stated that:

> I think there have been tensions where different groups that are different in any important respect live side by side. I think that has been a general experience of mankind.

Although it is true that slavery has existed in many other countries, it hardly seems likely that this discrimination on account of race in other countries can be characterized as a badge of slavery.

Granting that slavery as an institution authorized by law no longer exists by virtue of the 13th amendment, the amendment still has a very pertinent application to S. 1732. Not only did the amendment abolish slavery, but it prohibited from that day forward "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted * * *." S. 1732 is not in the nature of a criminal statute, although an individual who did not conform to its dictates could, and probably would, end up in jail. However, the legal recourse provided in the bill is in the nature of a civil proceeding in equity. Since there would be no crime involved in violating the provisions of S. 1732, there is no constitutional basis for the involuntary servitude which this bill establishes by law. Make no mistake, S. 1732 does authorize, even necessitate, involuntary servitude. The Attorney General has admitted, in his testimony before the committee, that there is no constitutional right for any individual to demand service in the purely private establishments which would be covered by this bill. There does now exist a right of ownership of private property, however, and the cases clearly indicate to what extent an individual may be "irrational, arbitrary, capricious, even unjust in his personal relations" and still be free from arbitrary governmental interference (*Peterson* v. *City of Greenville*, 373 U.S. 244, 1963).

S. 1732 gives legal sanction to a totally new and dangerous principle. It constricts the personal and property rights of all American individuals in an attempt to create a privilege for the favored few. Those who would patronize these private establishments would retain their right to pick and choose among the many. However, the counterbalancing right; the right to pick and choose one's customers would forever be done away with. It should be noted that this is just as much a personal right as a property right. Who can deny that this amounts to involuntary servitude?

The unconstitutionality of so-called antidiscrimination laws which compel one person to serve another was pointed out in a dissenting opinion in a Washington State case, *Browning* v. *Slenderella System* (54 Wash. 2d. 440, 1959). Judge Joseph H. Mallery correctly recognized the conflict between legislation similar to S. 1732 and the 13th amendment to the Constitution. Of the 13th amendment, Judge Mallery stated:

> It provides, inter alia: "Neither slavery nor *involuntary servitude* * * * shall exist within the United States * * *." [Italics by court.] Negroes should be familiar with this amendment. Since its passage, they have not been compelled to serve any man against their will. When a white woman is compelled against her will to give a Negress a Swedish massage, that too is involuntary servitude * * *.
>
> Through what an arc the pendulum of Negro rights has swung since the extreme position of the *Dred Scott* decision. Those rights reached dead center when the 13th amendment to the U.S. Constitution abolished the ancient wrong of Negro slavery. This court has now swung to the opposite extreme in its opinion subjecting white people to "involuntary servitude" to Negroes.

A very scholarly and well-prepared brief on this point was submitted for the record by Mr. Alfred Avins, on behalf of the liberty lobby. This brief can be found on page 1202 of the hearings.

Rather than forming a constitutional basis for S. 1732, it is readily apparent that the 13th amendment amounts to an insurmountable constitutional barrier to its passage by Congress.

THE COMMERCE CLAUSE

The principal constitutional basis relied upon to uphold S. 1732 is the commerce clause. This is found in article 1, section 8, clause 3 of the Constitution and reads as follows:

> The Congress shall have power * * *. To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.

It has been said that this is the most important grant of peacetime power contained in the Constitution. The commerce clause has a twofold purpose; one is a specific grant of power to the Congress and the second is the limitation which it places over the exercise of power by the States. In order to fully comprehend the scope of the commerce clause and the extent of its intended object, it is necessary to have recourse to the history surrounding its inclusion in the Constitution.

In the Constitutional Convention of 1787, this proposed power was commonly referred to as the power to pass navigation acts. Rivers were the highways of the day and formed the mainstream of commercial intercourse between the States. Until 150 years ago, "to ship" invariably meant "to send by ship." The traditional means of oppressing a group of people was to block the navigation of the

river upon which they depended to supply them their needs. One provision of the Magna Carta stated:

> And the city of London shall have its ancient liberties and free customs, as well by land as by water: furthermore, we will and grant that all other cities and boroughs, and towns and ports, shall have all their liberties and free customs.

The commerce clause of the Constitution was a direct carryover from the recognition that in order to maintain personal and political liberty, the freedom of commercial intercourse had to be preserved.

The Articles of Confederation, proposed in 1778 and adopted in 1781, required unanimous consent of the States for the adoption of any regulation of shipping. As is well known, most of the seaboard States, during and immediately after the Revolution, adopted commercial regulations which served the selfish interests of the people of those particular States and restrained the commerce of neighboring States. The frictions and animosities resulting from the adoption of partial and separate regulations by the various States threatened to disrupt the Union shortly after the Revolution. Those separate regulations resulted in the Mount Vernon Convention of 1785 at which delegates from Virginia met with delegates from Maryland in the home of George Washington. The navigation of the Potomac was the subject of that convention. An agreement was concluded there with respect to shipping on the Potomac, the boundaries between Virginia and Maryland, and several other matters. That agreement is still in effect today and is still enforceable in the courts.

In November 1785, a resolution was adopted in the Virginia House of Delegates proposing that as a method of preventing animosities which were bound to arise among the several States from the interference of partial and separate regulations, authority ought to be vested in the Continental Congress to forbid the individual States from imposing duties upon goods, wares, or merchandise imported by land or by water from any other State or from foreign countries. The third clause of that resolution provided:

> That no act of Congress, that may be authorized as hereby proposed, shall be entered into by less than two-thirds of the Confederate States, nor be in force longer than 13 years.

After the adoption of this resolution, it was decided that the matter might be better handled in a general conference of all the States and a motion to table the original resolution was carried in the house of delegates. The new resolution was adopted by the full Virginia General Assembly on January 21, 1786, appointing Commissioners and inviting other States to appoint Commissioners to meet in the fall of 1786 in Annapolis, Md. The resolution adopted, although broad in its scope, was concerned only with commercial matters. It empowered the Commissioners—

> to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several

> States, such an act relative to this great object, as when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same.

The attendance at the convention was disappointing, with only five States—Virginia, Pennsylvania, Delaware, New York, and New Jersey—represented. Consequently, it was decided that the delegates would report to their respective States the unanimously agreed upon suggestion that a general convention of all the States be held to examine the defects in the existing system of government and formulate a plan to make it adequate to meet the exigencies of the Union. The Convention was scheduled to be held at Philadelphia on the second Monday in May 1787.

While most of the States acted rapidly to designate delegates to the Convention, some of the States were reluctant to act, on the grounds that, without the consent of the Continental Congress, the work on the Convention would be extra legal; in that Congress alone could propose amendments to the Articles of Confederation. George Washington, in particular, was quite unwilling to attend an irregular convention. For this reason, the approval of the Continental Congress became of utmost importance. The approval of Congress was finally forthcoming, but only for the purpose of proposing amendments to the Articles of Confederation and reporting back to the Congress for their approval and then confirmation by the States.

It is therefore seen that the subject of commercial intercourse was the primary moving force behind the calling of the Constitutional Convention which brought forth our present Constitution.

During the first 2 months of the Convention, substantially all references to the power to regulate commerce were as to the power to pass "navigation acts." As first proposed it differed little from the procedures under the Articles of Confederation, as it required a two-thirds majority of the Congress to enact such a law.

There was considerable debate on the subject of whether navigation acts should have the approval of two-thirds of Congress or only a simple majority. Many of the delegates feared the consequences of action by a simple majority of the Members of Congress. However, due to other complicating factors, a simple majority vote was approved instead of a two-thirds majority.

Neither in the Constitutional Convention nor in any of the ratifying conventions was there anything said or even hinted at which indicated that the power to regulate commerce might be perverted into the power to regulate the use of purely private property at rest within the confines of any particular State.

For many years after the ratification of the Constitution, even up until 1900, the overwhelming majority of the cases which reached the Supreme Court under the commerce clause stemmed from State legislation regulating commerce. During this period of time the most important aspect of the clause was its negative effect on State legislation and regulation. The landmark case delineating the scope of the power of the commerce clause during this period is *Gibbons* v. *Ogden*. Chief Justice John Marshall, speaking for the Court, asked:

> What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be govern.ed.

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. (*Gibbons* v. *Ogden*, 9 Wheat. 1, 196–197, 1824.)

The Constitution speaks of commerce among the several States, and the proceeding of the Constitutional Convention indicate that this was the preoccupation of the delegates to that Convention. It has long been recognized that this phrase was "not one which would probably have been selected to indicate the completely interior traffic of a State." For the genius and character of the Federal Government is—

> that its action is to be applied to all external concerns which affect the States generally; but not those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the Government. (Ibid., p. 195.)

Although Chief Justice Marshall recognized and affirmed the existence of an area of commerce which was outside of the jurisdictional limits of the commerce clause, the decision in *Gibbons* v. *Ogden* is generally considered to be one of the broadest interpretations of the clause ever handed down by the Court. However, it is necessary to remember that which the Court was passing on in that case. The State of New York had passed legislation conferring upon certain individuals exclusive rights to navigate the waters of that State with steam-propelled vessels. A competitor from the State of New Jersey challenged this monopoly by sending a steam-propelled vessel into New York waters. The argument of the counsel for Ogden, who was an assignee of the original monopoly holders, was in essence, that since the New Jersey carrier was engaged in carrying passengers only and not goods, he was not engaged in "commerce," in the sense the word is used in the Constitution. This argument Chief Justice Marshall answered as follows:

> The subject to be regulated is commerce; * * * The counsel for appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. (Ibid., p. 189, 192.)

The conclusion in this case, judging from the obvious purposes of the commerce clause as aduced from the Constitutional Convention, was correct. Nevertheless, this broad interpretation of the clause was directed toward the negative effect of the clause as a shield against State power and not as a basis for an affirmative congressional enactment.

Although the scope of the commerce clause was determined in that case to be vast, it was not until the latter half of the 19th century that Congress began to take affirmative action based on the clause. In the case of *Wabash, St. Louis and Pacific R. Co.* v. *Illinois* (118 U.S. 557, 1886), the Supreme Court held that a State could not regulate charges for the carriage even within its own boundaries of goods brought from

without the State or destined for points outside of that State. Largely, as a result of this Supreme Court decision, Congress enacted the original Interstate Commerce Act the following year, 1887. The Interstate Commerce Act established a Commission of five and gave them authority to pass on the reasonablenes of charges by the railroads for the transportation of goods or persons in interstate commerce. This was the first major enactment by Congress dealing with the means of transportation, and others too numerous to mention have since been enacted.

After Congress had this first taste of its affirmative regulatory powers under the commerce clause, other areas were soon entered. A second area which Congress entered on the basis of the commerce clause was the regulation of the goods themselves which were to be transported in interstate commerce. The form of the regulations in this area vary, but the method most frequently resorted to is the prohibition of their transportation in interstate commerce. Legislation which falls into this general category includes the False Branding and Marketing Act, the Federal Explosives Act, the Food, Drug, and Cosmetics Act, the Hazardous Substances Labeling Act, the Fur Products Labeling Act, the Meat Inspection Acts, the Poultry Products Inspection Act, and the Cotton and Grain Standards Acts. One act upon which the Attorney General, during his testimony before the committee, relied heavily was the act regulating the transportation and sale of oleomargarine. He indicated that he considered it to be a valid precedent for the enactment of S. 1732.

Section 347 of title 21 of the United States Code, a part of what is generally referred to as the Pure Food and Drug Act, contains the congressional regulations relating to oleomargarine. Paragraph (c) of section 347 concerns its sale in public eating places in these words:

> No person shall possess in a form ready for serving colored oleomargarine or colored margarine at a public eating place unless a notice that oleomargarine or margarine is served is displayed prominently and conspicuously in such place and in such manner as to render it likely to be read and understood by the ordinary individual being served in such eating place or is printed or is otherwise set forth on the menu in type or lettering not smaller than that normally used to designate the serving of other food items. No person shall serve colored oleomargarine or colored margarine at a public eating place, whether or not any charge is made therefor, unless (1) each separate serving bears or is accompanied by labeling identifying it as oleomargarine or margarine or (2) each separate serving thereof is triangular in shape.

This statute varies substantially in both degree and scope from the provisions of S. 1732. It is only a partial, and by no means a complete, prohibition on the serving of colored oleomargarine or margarine. The individual proprietors of the numerous eating places covered, both large and small, are left free to continue their previous practices of serving or not serving colored oleomargarine, as the case may be. This statute does not "create" a right where before none existed, as S. 1732 attempts to do. It in no way affects the relationship between the proprietor and customer as S. 1732 would do. This

statute could not be a valid precedent for S. 1732 unless it stated that colored oleomargarine or colored margarine had to be served in all eating establishments.

And yet, there is a more basic ground for distinguishing between this statute and S. 1732. This statute falls into the category of regulation relating to the goods themselves, a category which has a long line of precedents for congressional enactments.

Another area of regulation under the provisions of the commerce clause which Congress has entered is the regulation of the conditions under which goods which are destined for interstate commerce are manufactured or otherwise produced. Under this theory Congress has passed such acts as the Fair Labor Standards Act, the child labor laws, the Federal Coal Mine Safety Act, the minimum wage laws, and the National Labor Relations Act, among others. In none of these acts, however, is there to be found any precedent for the constitutionality of S. 1732. They relate solely to the conditions under which goods are to be manufactured or sold, and not to whom they must be sold.

These are the three categories of commerce with which Congress has dealt primarily—(1) the means of transportation, (2) the goods subject to the transportation, and (3) the conditions under which these goods are manufactured. In S. 1732 we find a distinctly new and radical category—regulation as to who must be served with these goods. This is a requirement to sell or to serve, and with but one exception has never before been successfully attempted by Congress.

The one exception to this time-honored rule is the public service corporation. They are, as the name indicates, dedicated to public service and it is only natural that they be required to extend their services to all. These corporations operate in an area closely affecting the public interest and in most instances operate by virtue of a grant or franchise from a duly constituted governmental body. These are truly "public" concerns and should be required to serve all who need and are able to pay for their services. However, S. 1732 attempts to equate the corner drugstore, the family restaurant, or the five-bedroom boardinghouse with American Telephone & Telegraph. This is an extension of the commerce power which is absurd on its face.

The establishments which would bear the greatest burden upon the enactment of S. 1732 are the smaller establishments which have the least, if any, effect on interstate commerce. As a matter of fact, an establishment which decided to cater only to customers from within that particular State, and therefore have absolutely no effect upon interstate commerce, could not escape the harsh effects of this measure. During the hearings Senator Yarborough asked this question of the Attorney General: "A Texan this past weekend again posed this question to me and said: 'If I take my motel and put up a sign over it, "Texans only; no out-of-State visitors accepted," would the law apply to me if it passed?' This is the question he had propounded there." The Attorney General replied that the bill would still apply to him, on the basis of some fancied and as yet undisclosed effect upon interstate commerce. Also, under the terms of the bill as it is drawn, its provisions would be applicable to the situation where the person demanding service or accommodations was from that particular State, and had not traveled out of that State. This is likewise defended on the grounds that there would be a "substantial effect" upon interstate commerce to refuse him.

The classic definition of what constitutes interstate commerce was discussed during the hearing by Mr. R. Carter Pittman. In his statement, Mr. Pittman quoted no less a scholar than Woodrow Wilson as follows:

> While Woodrow Wilson was president at Princeton, he delivered a series of lectures on "Constitutional Government in the United States" at Columbia in 1908. In one of his lectures Mr. Wilson discussed the true meaning of the commerce clause as contrasted with the meaning sought to be attributed to it at that day by those who wished to destroy all lines of demarcation between the fields of State and Federal legislation. It was his view that the commerce clause had to do only with the movement of merchandise from State to State, and that it has no application to merchandise or people before movement starts or after movement ends. In that connection he said:
>
> "If the Federal power does not end with the regulation of the actual movements of trade, it ends nowhere, and the line between State and Federal jurisdiction is obliterated. But this is not universally seen or admitted. It is, therefore, one of the things upon which the conscience of the Nation must make test of itself, to see if it still retains that spirit of constitutional understanding which is the only ultimate prop and support of constitutional government."
>
> One sleeping in a motel or eating in a restaurant, for example, is at rest—not moving. He is neither navigating or being navigated. To stretch the commerce clause far enough to make it applicable to one while sleeping or eating would reflect credit upon the ingenuity of a newly appointed Justice of the Supreme Court, seeking to please his sponsor.
>
> That which is happening today was happening, though in less degree, when Mr. Wilson lectured. In speaking of the congressional power, invoked by this bill, he said:
>
> "Its power is 'to regulate commerce between the States,' and the attempts now made during every session of Congress to carry the implications of that power beyond the utmost boundaries of reasonable and honest inference show that the only limits likely to be observed by politicians are those set by the good sense and conservative temper of the country."
>
> In the same lecture, he cautioned against the destruction of divisions of power institutionalized in the Constitution, which in his times and in all ages have been necessary to preserve liberty. He did not speak of the "atomic age," of course, but he spoke of the fact that we had moved from ships to wagon, to buggies, to railroads, and were citing such progress to excuse our impatience with the delays necessary in a government designed to preserve liberty. He said:
>
> "We are intensely 'practical,' moreover, and insist that every obstacle, whether of law or fact, be swept out of the way. It is not the right temper for constitutional understandings. Too 'practical' a purpose may give us a government such as we never should have chosen had we made the choice more thoughtfully and deliberately. We cannot

> afford to belie our reputation for political sagacity and self-possession by any such hasty processes as those into which such a temper of mere impatience seems likely to hurry us."

The power of Congress to enact this type legislation under the commerce clause has been considered by the Supreme Court. In the *Civil Rights* cases of 1883, this was one of the arguments advanced to the Court as grounds for the constitutionality of the 1875 public accommodations bill. The preamble of the act of 1875 is very short and concise. It contains no recitals of great length, nor does it refer to any particular provision of this Constitution as authority for its passage. Therefore, in the brief for the United States before the Supreme Court, every possible argument was made. In the second paragraph of the brief, resort was had to the commerce clause:

> Inns are provided for the accommodation of travelers; for those passing from place to place. They are essential instrumentalities of commerce (especially as now carried on by "drummers"), which it was the province of the United States to regulate even prior to the recent amendments to the Constitution.

The Supreme Court rejected this contention summarily. In answer to its own rhetorical question as to whether Congress possessed the power to enact the law, the Court said:

> Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments.

The last three amendments referred to were, of course, the 13th, 14th, and 15th. The commerce clause had been a part of the Constitution from the date of its ratification and therefore the Court was saying that the commerce clause did not empower Congress to enact the Public Accommodations Act of 1875.

As a guide to our inquiry on the existence of congressional authority to pass a law of this nature the statement of the Court in *Swift* v. *United States* (196 U.S. 375, 1905), must be borne in mind. "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." Thus an establishment is subject to regulation of Congress under the commerce clause if it is engaged in interstate commerce, or substantially affects interstate commerce. The relation to commerce of the subject or object to be regulated must be such that its regulation is indispensable for the effective regulation of interstate commerce. The effect upon interstate commerce must be more than merely "accidental, secondary, remote, or merely probable" (*Swift* v. *U.S.*, 196 U.S. at 397). Local activities may be regulated under the commerce power only where these local activities form an integral part of interstate commerce.

This very question presented itself in *Williams* v. *Howard Johnson's Restaurant* (U.S.C.A. 4th, 268 F. 2d 845, 1959). In that case the complainant contended that the failure of the restaurant to serve him constituted a burden on interstate commerce and was therefore unconstitutional. In answer to this contention, the Court said:

> We do not find that a restaurant is engaged in interstate commerce merely because in the course of its business of fur-

> nishing accommodations to the general public it serves persons who are traveling from State to State. As an instrument of local commerce the restaurant is not subject to the constitutional and statutory provisions discussed above and, thus, is at liberty to deal with such persons as it may select.

Since the particular restaurant in question in this case was part of a national chain, this reasoning can be extended with even greater validity to all privately and locally owned places of public accommodation.

The fact that a place of public accommodation numbers among its normal visitors, some who come from out of State, does not bring that establishment within the ambit of the commerce clause for purposes of regulation by Congress. In *Elizabeth Hospital, Inc.* v. *Richardson* (U.S.C.A. 8th, 269 F. 2d 167, 1959), the Court held that the treatment of some patients who were traveling in interstate commerce did not destroy the purely local character of the services furnished by the hospital, and said:

> The fact that some of plaintiff's patients might travel in interstate commerce does not alter the local character of plaintiff's hospital. If the converse were true, every country store that obtains its goods from or serves customers residing outside the State would be selling in interstate commerce. Uniformly, the courts have held to the contrary.

Merely making services available to individuals from out of State does not conclusively prove, or tend to prove, that the activities of the establishment substantially effect interstate commerce.

Although S. 1732 is predicated upon the power of Congress to regulate commerce among the States, very little evidence was presented to the committee which tended to show that the practices complained of have any adverse effect upon interstate commerce. Certain isolated instances were discussed and the boycotts and public demonstrations were mentioned as having a serious effect upon interstate commerce. While it is true that selective boycotts and mass public demonstrations by organized Negro groups have hurt the business of individual concerns, or perhaps of some chainstores which operate in more than one city, the adverse effect upon interstate commerce as a whole has been negligible. The only administration witnesses who offered evidence to the committee purporting to prove an adverse effect upon interstate commerce were the Acting Secretary of Commerce, Franklin D. Roosevelt, Jr., and the Secretary of Labor, W. Willard Wirtz. The "proof" which they produced for the use of the committee falls far short of that required to invoke the power of Congress under the commerce clause. Unquestionably, the South, being the principal target of S. 1732, should show the worst economic effects of segregation, if the preconceived conclusions are to be borne out by the facts. The true facts, however, which were brought out on cross-examination, show that the South has considerably outstripped other areas of the country in terms of industrial and business growth since 1940. Nonagricultural employment in the Nation as a whole increased 71 percent from 1940 to 1962, but in the Southeast it increased 94 percent. From 1957 to 1962, the average increase in nonagricultural employment for the Nation as a whole was 5 percent, but for the Southeast it was 9 percent. This was next to the highest for any region in the country. From 1940 to

1962, personal income in the country increased 458 percent, but in the Southeast personal income increased 567 percent over the same period. The increase in personal income from 1957 to 1962 in the Southeast was considerably above the national average.

In recent years, the South and Southeast have been most successful in attracting new and expanding industry. Virtually all of the Southern States have undergone a change in their basic economic structure from sole reliance upon agriculture to a balance between industry and agriculture. Necessarily this has come about at the expense of other regions of the country, as more and more businesses move to the South. The practice of segregation in the South which is well known to everyone, has not impeded the steady march of industry southward. The true facts simply do not sustain the contention that the practices sought to be prevented by S. 1732 are having a substantially adverse effect upon commerce. These facts do, however, tend to prove that these local customs are having no effect upon the orderly flow of goods and people in these areas of the country.

Clearly, S. 1732 is based upon a misconception of Congress power to regulate commerce. This proposal is no more than an attempt to regulate the use of private property which is entirely within the borders of one State, and to infringe upon the right of persons engaged in the operation of public accommodations to select their own customers. This measure constitutes a radical departure from previous areas of regulation which Congress has seen fit to authorize under the commerce clause. S. 1732 does not regulate the means of transportation, the goods which are transported, nor the methods under which the goods are either manufactured or produced. It would regulate the very method of operation which an individual businessman, of his own free will and accord, has elected to follow. Such an attempt does violence to the intent of the commerce power and would pave the way for further encroachments upon private business.

THE RIGHT OF PRIVATE PROPERTY AND DUE PROCESS OF LAW CONSIDERATIONS

No consideration of S. 1732 would be complete without a discussion of its relation to the right of private property. Undoubtedly this legislation would seriously impair the right of a private property owner to use his property as he may wish, and as he presently has the constitutional right to do. Since the right of property is fundamental in our American jurisprudence, the enactment of S. 1732 under the commerce clause which, as Mr. Justice Marshall stated in *Gibbons v. Ogden* is subject to the limitations expressed in the Constitution, would contravene a fundamental right granted in the Constitution and would therefore be unconstitutional.

The Founding Fathers considered the right of property to be on a par with life and liberty. The fifth amendment to the Constitution declares: "Nor shall (any person) be deprived of life, liberty, or property, without due process of law." The protection of the right to hold and use private property is one of the most fundamental and important objects of government. John Locke, in his essay "Of the Beginning of Political Societies," said:

> Men being, as has been said, by Nature, all free, equal, and independent, no one can be put out of this Estate, and

> subjected to the political power of another, without his own consent. The only way whereby any one devests himself of his natural Liberty, and puts on the Bonds of civil Society is by agreeing with other Men to join and unite into a Community, for their comfortable, safe, and peaceable Living one amongst another, in a *secure Enjoyment of their properties*, * * *.

And again in "Of Civil Government," he said:

> The Supreme Power cannot take from any Man any part of his Property without his own consent. For the preservation of Property being the end of Government, and that for which men enter society, it necessarily supposes and requires, that the People should have property, without which they must be suppos'd to lose that, by entering into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own.

S. 1732 without question represents a loss of private property rights such as John Locke would consider to be a "gross absurdity."

In viewing the long trek down the road of limiting the freedom of the individual which has accompanied the centralization of power in our country, the conclusion is incontrovertible that the framers of the Constitution would be astounded at the inroads that have been made upon the right of private property. The inroads have been made largely through the influence of a utilitarian philosophy that ignores constitutional principles and submerges man's aspirations toward individualism.

The fundamental attribute of property is the right to exclude others (Blackstone, 1 Commentaries, p. 138). In advocating legislation to limit the right of an owner to use and enjoy property as he sees fit, it should be remembered that the erosion of property rights for one class of people only makes easier the erosion of the rights of another class, and eventually every man's rights to hold and enjoy property. The breaking down of the traditional constitutional restraints on the legislature in regulation of private property in one area renders other constitutional safeguards vulnerable to the changing whims of the crowd, and the tyrannies of mob rule. If the Congress can, on the pretext of providing for the public good, determine the uses to which private property should be devoted against the consent of the owner, the constitutional rights of all are no longer inviolable against confiscation and destruction.

Regulations which are permitted today because the curtailment of individual rights are thought relatively minor in terms of their benefit to what the majority terms the "common good," may tomorrow, by force of the erosive precedent thereby started, destroy the freedom of the individual entirely. To be sure, inroads have been made on many of the rights of freemen which were considered as such at the time of the drafting of the Constitution. Of all these rights, however, the right to property, which is being jeopardized by S. 1732, is the most basic and is the very essence of our constitutional jurisprudence. Indeed, it was the primary object for the protection of which the social compact was formed (*Van Horne's Lessee* v. *Dorrance*, 2 Dall. 304, 1795).

There is no question of the fact that the establishments which are intended to be the subject of S. 1732 are the locally owned and operated private business establishments. During the hearings this was brought out very clearly by administration witnesses, principally Attorney General Kennedy and the Assistant Attorney General, Burke Marshall. Establishments which are connected with interstate travel facilities, such as restaurants in bus terminals and railway terminals, are already subject to this type regulation.

The Commerce Committee emphasized its intention to cover these smaller, completely locally owned establishments when it rejected an amendment offered by the Senator from Oklahoma, Mr. Monroney. This amendment would have narrowed the scope of coverage under the commerce clause to those establishments which operated primarily in interstate commerce, or which were owned, operated, licensed, or franchised in two or more States. The rejection of this amendment places Congress in the position of regulating, as an integral part of interstate commerce, the smallest of the locally owned drugstores simply because the equipment they use and the goods they sell came to them from out of State. It is equating the corner market, or bar and grill with the A. & P. or a national restaurant chain.

This is an unbridled use of a police power by the Central Government where, in fact, no such power exists. The Central Government has no general police powers, as do the States. Any legislation of a general regulatory, or police function nature must be predicated upon some specific grant of authority under the Constitution. Congress has the right to regulate interstate commerce. The local stores, barber shops, beauty parlors, and restaurants are not items in interstate commerce and only the States and their political subdivisions may exercise general police regulatory powers over them.

The argument is made that liberty and freedom of choice are not trammeled by legislation such as S. 1732. The basis for this spurious argument is that a person operating a place of public accommodation or entertainment may, if he does not wish to submit to rules, regulating whom he will serve, discontinue his business whenever he so desires. This line of reasoning holds that the private owner is not obligated to submit himself to the conditions that would be imposed by this measure. He is not so compelled, but he may not operate his business if he does not comply.

In striking down a statute exerting this very type of duress, the Supreme Court made some pertinent observations. The case was *Frost Trucking Co.* v. *R.R. Comm.* (271 U.S. 583, 1926), and involved an analogous condition imposed by a State on a private carrier for the use of public highways. (For the sake of relevancy, in the following quotations "public establishments" are substituted for "public highways" and "property owner" replaces "carrier.")

> There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of public establishments in proper cases—the State possesses; and the other—the power to compel a private property owner to assume against his will the duties and burdens of public property the State does not possess. It is clear that any attempt to exert the latter separately and substantively, must fall before the paramount authority of the Constitution. May

> it stand in ... conditional form in which it is here made? If so, constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private property owner of a privilege, which the Government may grant or deny, upon a condition, which the property owner is free to accept or reject. In reality the property owner is given no choice between the rock and the whirlpool—an option to forgo a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

The proscription of the fifth amendment commands that the Federal Government not deprive any person of his life, liberty, or property without due process of law. These guarantees are as operative against the legislature as against the courts. Due process requires that legislative findings support and justify the legislation which would curtail the right of a property owner to use his property as he sees fit. Due process demands that the legislature act in response to informed evaluation calmly reached in a rational, logical manner.

Where proposed legislation is on its face within a specific prohibition of the Constitution, our constitutional duty is to subject the proposals to the most exacting scrutiny to discover, on one hand, if it bears a reasonable and adequate relation to the power granted to the Federal legislature in the Constitution, and to discover, on the other, if it infringes rights secured by the fundamental law. The foregoing analysis clearly reveals that this measure bears neither a reasonable nor an adequate relation to the power granted to Congress in the Constitution. The discussion of the right of private property as one of the basic tenets of Anglo-American jurisprudence reveals how deeply S. 1732 would infringe rights secured by our fundamental law.

The fifth amendment guarantees the right of individual liberty. This means that the Federal Government cannot in the interest of a nebulous and highly arbitrary concept of the public welfare pass a law dictating the customers a business establishment must serve. It means that a private property owner has the liberty of choosing, according to his own even arbitrary, capricious, or irrational desires, the persons with whom he desires to deal. Freedom of individual choice would be forever done away with by S. 1732, with Federal compulsion taking its place.

ORIGIN OF S. 1732

From the very nature of S. 1732, it is obvious that it constitutes a radical departure from constitutional principles, and is an innovation into uncharted paths of blind experimentation in political and social relations. Philosophic indifference and simple expediency can, and do, result in legislative erosion of constitutional principals; but drastic departures, such as those embodied in S. 1732, can find roots only in desperate circumstances and conditions. This bill has all the earmarks of emotional desperation, but none of mature deliberation.

The circumstances to which the bill purports to address itself—the unavailability of the services and accommodations of private businesses to persons of minority races—has existed throughout the history of the Nation. Indeed, the number of businesses, the services and accommodations of which are not so available, has constantly diminished so that the so-called discrimination by privately owned businesses is at the lowest point in our history.

Nor have the provisions of S. 1732 been the subject of previous legislative efforts, which now come again before the Congress with an increase in support since the last consideration by Congress of similar proposals. There have been no similar legislative proposals considered by the Congress in this century, despite the fact that so-called civil rights bills have been before the Congress almost every year in recent times, and many of them have been very far reaching.

In view of these facts, it should be obvious that there exist some very special and newly arisen circumstances which prompted this drastic proposal to be conceived and proposed by the administration, and accorded priority consideration by the Congress. If the bill has resulted from such special circumstances, then the purpose of the legislation must necessarily also be wrapped up in those same special circumstances.

The special circumstances which brought about the conception, introduction, and consideration of this bill are the mass demonstrations, agitation, and riots which have occurred in cities across the country. And whether admitted or denied, the desperate purpose of this bill is to terminate the disorders and demonstrations before the elections of 1964.

The reestablishment of law and order is a noble and admirable purpose, with which no one in this body would disagree. A noble purpose is not enough, however; for good intentions do not necessarily lead to good results.

Even if Congress is so desperate as to ignore the constitutional principles it would flout, it is essential that the Congress look behind and beyond the purpose of this legislation, and determine why the breakdown of law and order now exists, and whether this legislative proposal would, in fact, end the agitation, riots, and demonstrations.

The mass demonstrations, which have recently become all too familiar, have been pursued in violation of laws against trespass on private property and are calculated to provoke violence and disorder. Under normal circumstances, such acts would be adequately dealt with by local police enforcing local laws and ordinances. Unfortunately, local law enforcement has been frustrated. The demonstrators have sought and, unfortunately, received encouragement from officials of the National Government to conduct and continue their mass agitation and defiance of local laws and police. The Supreme Court of the United States has turned its back on law and legal considerations, and has become an accomplice to the unlawfullness by aiding and abetting the offenders of the law to escape and evade punishment by decisions which vacate every conviction for offenses committed in the conduct of the demonstrations. This is why the breakdown in law and order has occurred, and why it has not been prevented by the normal operation of our constitutional system. It is no justification for abandoning the system, or sabotaging it as would the passage of S. 1732.

There still remains the question of whether the drastic and unconstitutional step embodied in S. 1732, even at the cost of abandonment of fundamental property rights of all citizens, would bring an end to the lawlessness taking the form of mass demonstrations.

If the sole purpose of the mass demonstrations is to gain previously denied access to private establishments, and if the measure, once enacted, is enforceable and not avoidable through subterfuges such as private membership clubs, it is conceivable that the demonstrations would end upon passage of this proposal. If, however, any substantial motivation behind the demonstrations is the accomplishment of different or more devious goals, the passage of even this drastic and unconstitutional proposal would not stop the agitation.

During the hearings, charges were made that there was Communist involvement in the demonstrations. The evidence presented was not refuted, nor did the committee invite the individuals who were charged by name to appear and testify.

The witnesses who charged Communist involvement in the Negro agitation, demonstrations, and riots relied for the most part on public records such as hearings and reports of the House of Representatives Committee on Un-American Activities and the Senate Subcommittee on Internal Security, and news articles in the public press. The witnesses were not persons who had specialized facilities available to determine the extent of Communist involvement in the widespread disorders. The committee was urged to use its facilities to investigate the matter thoroughly.

The committee declined to investigate the subject, but one Senator, on behalf of the committee, did direct an inquiry to Mr. J. Edgar Hoover, Director of the Federal Bureau of Investigation. The inquiry was not answered by Mr. Hoover. Attorney General Robert F. Kennedy, however, who supervised the drafting of the legislation, and is the chief proponent of the legislation in the administration, volunteered the following reply:

> DEAR SENATOR: This is in response to your inquiry of the Federal Bureau of Investigation concerning the charges made at the hearings on S. 1732 that the racial problems in this country, particularly in the South, were created or are being exploited by the Communist Party.
>
> Based on all available information from the FBI and other sources, we have no evidence that any of the top leaders of the major civil rights groups are Communists, or Communist controlled. This is true as to Dr. Martin Luther King, Jr., to whom particular accusations were made, as well as other leaders.
>
> It is natural and inevitable that Communists have made efforts to infiltrate the civil rights groups and to exploit the current racial situation. In view of the real injustices that exist and the resentment against them, these efforts have been remarkably unsuccessful.
>
> I hope that this provides the information you were seeking.
>
> Sincerely,
>
> ROBERT F. KENNEDY, *Attorney General.*

The Attorney General's letter must, of course, be read in the full context of his role as a principal proponent of S. 1732 and the chief

administration witness on behalf of the legislation. Comparison of the Attorney General's volunteered comments with testimony previously given by the Director of the Federal Bureau of Investigation is significant. On January 16, 1958, Mr. Hoover told an Appropriations Subcommittee of the House of Representatives:

> The Negro situation is also being exploited fully and continuously by Communists on a national scale. Current reports include intensified attempts to infiltrate Negro mass organizations. The party's objectives are not to aid the Negroes—but a design to take advantage of all controversial issues on the race question so as to create unrest, dissension, and confusion in the minds of the American people.

On January 24, 1962, Mr. Hoover testified before the same subcommittee, and said:

> Since its inception the Communist Party, U.S.A., has been alert to capitalize on every possible issue or event which could be used to exploit the American Negro in furtherance of the party aims. In its effort to influence the American Negro, the party attempts to infiltrate the legitimate Negro organizations for the purpose of stirring up racial prejudice and hatred. In this way, the party strikes a blow at our democratic form of government by attempting to influence public opinion throughout the world against the United States.

Despite the fact that the committee received no direct answer from Mr. Hoover, no efforts have been made by the committee to determine the extent of Communist involvement in the disorders. Without such a determination, the Congress cannot know whether the passage of even this drastic and unconstitutional legislation would, indeed, bring an end to the widespread, organized disorders across the country. If the Communist involvement in these matters is substantial, the agitatiton and disorders will continue until the Communist purpose of destruction of the political order in the United States is accomplished. There can be no doubt that such is the Communist purpose. On February 25 and 26, 1957, the Internal Security Subcommittee of the Senate Judiciary Committee held hearings on the scope of Soviet activities in the United States. Among the witnesses was Mr. Frank S. Meyer of Woodstock, N.Y., a former member of the Communist Party, who testified specifically with reference to the actions taken at the Communist Party, U.S.A., convention in late 1956. Mr. Meyer stated in part:

> But on one question the stand of the convention is extremely clear in all its resolutions, and that is the main campaign of the Communist Party at this point must be, to use their verbiage, the extension of democratization in the South. That is to say, the main point made by the convention in terms of an immediate program fits in very well with an old line of Communist attitude toward constitutional processes in America.
>
> It goes back, to my knowledge, 15 years or so when I was rather deeply involved in some theoretical work in connection with the so-called Negro question, and it is this: To the Communist Party efforts to utilize mass democratic mob

criterion approaches rather than constitutional ones, to attempt to turn elections into plebiscites, and the main obstacle in the structure, the constitutional checks-and-balances structure.

And they have recognized for 15 years, and clearly now recognize, that that point in the country at which this structure of checks and balances has its greatest support is in the Senate of the United States, and specifically in the States rights structure of the Southern States, which bring it about that the Democratic Party cannot be looked at by them as a totally people's party in their terms, totally a laborish kind of party, but split it up.

Hence, the major drive in the sense of putting themselves at the head, or attempting to put themselves at the head, to penetrate the movement of the Negro people in the various forms it has been taking in recent years and previously, has nothing whatever to do with any interest in the aims and desires of the Negro people, but is a realization by the Communist Party that the movement can be used as the most important and strongest cutting edge against the constitutional structure of the United States, by trying to develop a removal of division of power guarantees in the South, and, secondarily, by the fact that they believe, as it is clear from the resolution, that at this time in a prosperous country this is the only place in which serious trouble can possibly be stirred up, in which there are serious possibilities of developing what they call mass struggles, of building up extraconstitutional and extralegal actions, and so on.

I do want to emphasize, however, that this is not in any sense a humanitarian position. It has nothing whatever to do with any sympathy for the needs of the Negro peoples themselves. But it has to do with a feeling on their part that this is the point of breakthrough in the country at this time.

This testimony was delivered prior to the beginning of the mass organized disorders which have become so familiar in recent months. Mr. Meyer describes precisely the Communist purpose in exploiting the racial situation in the United States as well as the means by which they hope to exploit this situation. Before Congress acts on S. 1732 or any other legislative proposal dealing with the subject, it should appraise itself in detail of the extent to which the Communists are involved and participating in the agitation, riots, and disorders which have prompted introduction and consideration of this legislation.

PRACTICAL CONSIDERATIONS

The consequences which would flow from the enactment of S. 1732 are so sweeping they defy exact definition. Its coverage is broad enough to cover grocery stores, drugstores, hotels, motels, some barbershops and beauty shops, theaters, sports arenas, and countless other places of public accommodation. The impact of this legislation upon these places, although not adequately covered during the hearings, cannot be seriously questioned. Many of them, particularly the small-

er ones, will be forced to close their doors. Their business will be ruined.

One example of what can be expected was related to the committee by Gov. Ross Barnett of Mississippi. Mrs. Marjorie Staley of Winona, Miss., operated a restaurant as part of an interstate bus terminal. She employed seven or eight people, a majority of them colored. She had a considerable investment in equipment, and her payroll was approximately $2,000 per month. She served both colored and white, although in different sections of the restaurant, and from all indications her business was thriving. Then she received orders from the Federal Government to integrate her establishment completely. Rather than close down at once, she tried integration only to lose all her white customers. Soon all her colored customers left her as well, and she was forced out of business. She still has a $20,000 investment in equipment, but absolutely no income accruing from it. Seven or eight individuals, the majority of them colored, have lost their jobs and Mrs. Staley has lost her livelihood as a result of the heavy hand of the Federal Government. This is but an example of what can well be expected should S. 1732 or a similar proposal be enacted.

The argument is advanced to counter these assertions that "of course, there will be a transition period, but business will be back to normal or better in no time at all." Those who seriously contend this are either attempting to assuage their own conscience or are just not aware of the facts. It will take more than a mere transition period to change local customs and habits which have grown up over several hundreds of years. And it will take much more than Federal legislation to convince people that they no longer have the freedom to associate with whom they please, and operate their business establishments as they have always done. A transition period such as is talked about could well last for months, years, an interminable length of time. And what of the proprietors of these places then? Their businesses may well suffer the same plight as did Mrs. Staley's. They probably will no longer have a business.

Several witnesses who represented smaller business establishments in the country appeared before the committee. These were not limited to areas which have traditionally been considered a part of the South. The first such witness was Mr. Sam Hicks who operates a resort ranch in Huzzah, Mo. Mr. Hicks showed himself to be a successful businessman of wide experience. He stated that enactment of S. 1732 would prevent him from being able to attract his steady customers in the future and it would be impossible for his resort to maintain its high standards. His is a family resort and visitors are allowed only after filing an application. Mr. Hicks was not sure that he would be able to continue that practice, which had kept the caliber of his visitors beyond reproach. Mr. Hicks stated that:

> Recent guests at this resort numbered 121, of which 119 stated emphatically that they would not return on a reservation they have for 4 days early in September if we were forced to admit colored people or change our present policy of not admitting the minority group of undesirable white people.

The loss of business which Mr. Hicks would suffer from enactment of S. 1732 would undoubtedly compel the liquidation of his business.

Passage of S. 1732 would create more tensions and difficulties than exist today, rather than decrease them. Numerous witnesses testified that in areas of the country where integration has been accomplished in places of public accommodation, it has been done through voluntary processes. For integration to be accomplished peacefully, it must be done voluntarily. It cannot be forced at the end of a bayonet.

The mayor of the city of Atlanta, Ga., Ivan Allen, although testifying in favor of S. 1732, conceded that in Atlanta the integration which had taken place had come about on a purely voluntary basis. There was no city ordinance or statewide law to force integration. The individual businesses and establishments voluntarily opened their doors to the colored race. This originally had been done without violence and bloodshed. Had it been forced by Government edict, the outcome could well have been greatly different immediately. The long-run result, however, has proved to be far from uneventful.

In the one instance in the city of Atlanta where integration of the races had been brought about other than by voluntary processes, the immediate result was far from peaceful and uneventful. The public swimming pools of the city were ordered by court decree to admit all races. Rather than to conform to the order immediately, for some time the pools were closed. They have since been reopened, but they are being used almost exclusively by colored people. Rather than submit to the dictation of the Federal courts, the white people have voluntarily stayed away from the pools. The amount of revenue taken in since the pools have been reopened has not been sufficient to pay the maintenance costs. This is a clear example of Federal dictation causing an economic burden upon all the local taxpayers.

Three witnesses from the city of Salisbury, Md., appeared before the committee. They were Mayor Frank H. Morris, Mr. John W. T. Webb, chairman of the biracial committee, and Rev. Charles H. Mack, pastor of the St. James A.M.E. Church, a member of the biracial committee. Their testimony dealt primarily with the racial situation as it existed in the city of Salisbury, Md. Through the cooperation of the leaders and businessmen of the city, integration of places of public accommodation had come about without violence. Mayor Morris had this to say about S. 1732 in his statement:

> To me, the bill as now drafted ignores the most important factor—people. In my judgment, the objective everyone wants is an atmosphere where race no longer matters. This cannot be done by law, but only by men. Yet when you have a law, you take men out of the picture and substitute the police court or, in this case, the district court. Progress in racial problems must come from the hearts and heads of people. If we had had in 1960 such a law as this before you, Salisbury would not be where it is today.

This frank statement deserves the serious consideration of every Member of the Senate. It is a recognition of the difficulty and inflamed passions which will ensue should S. 1732 become law. Voluntary action will become passé. Integration of the races at places of public

accommodation will be by force, and this very force is likely to be met by force in far too many instances.

Cambridge, Md., a town very close to Salisbury, provides a striking example of uncontrolled mass demonstrations resulting in the rejection of Negro demands. The forceful and insistent nature of these demands caused the local merchants to respond with adamant resistance, which soon turned to open hostility toward the demonstrators because of the interference with the normal conduct of their business. The violence which erupted required the imposition of martial law and the continued presence of National Guard troops. Even the National Guard was unable to prevent further property damage and personal injury. Had this occurred in the South, undoubtedly Federal troops would have been ordered into town immediately. The final crowning touch was added when the townspeople rejected a public accommodations ordinance. The defeat of this proposed ordinance was brought about largely through the efforts of one Negro leader who persuaded a large majority of the Negroes not to vote. This strange turn of events casts the shadow of doubt over the true purpose of the discontent and large-scale demonstrations. Had all the registered Negroes voted, the ordinance would have carried by a large margin. There would have been no further need for demonstrations, because their stated objective would have been won. But now, probably nothing can ever bridge the gap which has grown between the white and colored people of Cambridge.

Passage of S. 1732 would necessitate the employment of additional personnel within the Justice Department in order to enforce its provisions and bring suits on behalf of aggrieved individuals. It will literally require a national police force to enforce the provisions of S. 1732. The Attorney General testified that passage of the bill would mean that the staff of the Civil Rights Division of the Department of Justice would have to be doubled. The use of Federal marshals will undoubtedly be increased. Private business establishments will have to be checked periodically to see if they are conforming to the provisions of the bill. A huge investigatory staff will have to be employed to check into the complaints which are received by the Justice Department. Since these complaints do not have to be verified or notarized in any way, there will unquestionably be many with no basis in fact. Nevertheless, all of them will require investigation. The Attorney General has probably understated the number of additional employees which will be required by the Department of Justice should S. 1732 become law.

The heaviest burden of S. 1732 will fall upon the smaller, truly independent businesses and the wage-earning public. Section 3(b) of S. 1732 exempts private clubs and establishments as follows:

> The provisions of this Act shall not apply to a bona fide private club or other establishment not open to the public, except to the extent that the facilities of such club or establishment are made available to the customers or patrons of an establishment within the scope of subsection (a).

This exemption, of course, will mean nothing to those who are unable to afford the luxury of joining a private club, or starting a private club of their own. Larger chain restaurants and hotels will be able to

set aside one or more rooms and require membership dues and cards before a person can have access to the facilities. Smaller restaurants, hotels, and motels will be hard pressed to take advantage of this exemption. For those who can afford it, "private" clubs will spring up all over the country.

The committee has significantly broadened the scope of S. 1732 by adding a new section 4 to the bill in executive session. This section 4 purports to prohibit discrimination on the grounds of race, color, religion, or national origin by labor unions, and professional, business, or trade organizations. This section was not recommended by the administration, and therefore was not included in the bill during the hearings. There was no opportunity for the organizations who will be covered by this section to give their views, and the full impact of the section is not adequately known. Nevertheless, it is not difficult to visualize the difficulties which this section will cause the labor unions and their members. No longer will competence at a specific task be the criterion by which admission to a union is determined. The so-called civil rights groups will demand a racial "balance" in all the unions and on particular jobs, as they are presently demanding for the schools in the North. This is a reverse form of racial discrimination, and is much more insidious and detrimental to good race relations than present practices.

The portion of this amendment which covers professional, business, and trade organizations is particularly objectionable. No one, not even the primary sponsor of the amendment, knows the scope of the section, or can name the organizations intended to be covered, with any degree of accuracy. This section reads as follows:

> (*b*) No person shall, on account of race, color, religion, or national origin, be denied membership in a professional, business, or trade association or organization, or the full and equal enjoyment of the privileges, terms, and benefits of membership in a professional, business, or trade association or organization, where such membership would affect the ability of such person to engage in activities affecting interstate commerce.

The last phrase of this amendment establishes a totally new concept of congressional regulation under the aegis of the commerce clause of the Constitution. This section does not attempt to regulate these organizations as a part of interstate commerce. It attempts to dictate the membership policies of purely local organizations on the highly questionable grounds that membership in these organizations would affect the ability of persons to engage in activities affecting interstate commerce. It is difficult to imagine such tortuous or specious reasoning being seriously advocated as a grounds for any legislative proposal.

Organizations and associations which will probably be covered by this section include local chambers of commerce, boards of trade, and medical and bar associations, among others. If this tortuous reasoning is carried to the extreme, it could be contended that this section will cover such fraternal organizations as the Kiwanis Club, Elks Club, or other purely private social groups. It is the height of folly to assume that Congress has the authority or the right to attempt to

dictate the membership policies of groups such as these which are purely local in nature and have obsolutely no connection with interstate commerce.

S. 1732, while aimed ostensibly at increasing the flow of goods in interstate commerce, will have the opposite effect. The many smaller establishments which will be forced out of business will greatly impede the healthy growth of the Nation's economy. Statements have been made that businessmen would welcome the adoption of S. 1732 in order to get this problem behind them. Perhaps there are some in the country who feel this way, but I am certain that the vast majority feel otherwise. The National Retail Merchants Association polled its members concerning S. 1732 at the request of the Attorney General. The vice president of the association wrote me a letter on the result of the poll as follows:

AUGUST 14, 1963.

DEAR SENATOR THURMOND: As the Congress considers the President's proposal in the field of civil rights, we wish to report to you the results of a recent survey by the association.

The National Retail Merchants Association is a voluntary association of department, specialty, and chainstores located in every State in the Union and in most communities. At the request of the Attorney General we asked our members to advise us what progress had been made with regard to problems relating to racial matters. The results of this survey indicated quite clearly that an overwhelming majority of our members had made substantial strides in integrating their operations.

Several of our southern stores reported that for the past 3 years they have been hiring nonwhites in selling and nonselling capacities. One of the largest stores in a nearby Southern State reported that out of 3,000 employees, 400 are Negroes and that some 60 are employed in selling and nonselling functions, with several classified as junior and senior executives. These jobs were formerly held by whites.

On the basis of our study it would seem that a Federal statute such as the one being considered dealing with public accommodations is neither needed nor advisable.

Sincerely,

JOHN C. HAZEN,
Vice President, Government.

This should be conclusive proof that S. 1732 is not needed or wanted by the average businessman in this country.

Another area in which S. 1732 will have a serious economic impact is upon the Negro proprietors of businesses exclusively for Negroes. There are many such establishments in the South, but they are not limited to the South. There are restaurants, hotels, motels, bars, barbershops, beauty shops, and many other such places which cater only to Negro customers. If S. 1732 becomes law, the better customers of these establishments will be siphoned off. The Negro owners will have a difficult time in attempting to secure white customers to take the place of those he loses. His business will necessarily suffer, and in many cases the proprietor will be forced to close his business.

The economic impact of this measure upon the country as a whole, but particularly upon the South, will be anything but beneficial.

Although administration witnesses stated that the bill is designed to increase interstate commerce, the facts prove conclusively that this will not be the case.

CONCLUSION

The crux of the matter, simply stated, is economic and political freedom versus economic and political dictation and coercion. Gov. Farris Bryant, of Florida, stated it very succinctly:

> The real issue you must resolve is between conflicting demands for freedom. On the one hand the traveler demands the freedom to buy what he wishes to buy, in a hotel, a theater or anywhere that there are things for sale.
>
> I believe that he should have the freedom—provided, of course, he does not violate the freedom of others.
>
> There is the crux of the matter.
>
> * * * * * * *
>
> The debate in which we are engaged is over the assertion of a new right: The right of nonowners of property to appropriate it from the owners. The new right is asserted in the name of equality. Differently stated: This is a debate between those who seek to preserve freedom in the use of property by its owners and those who would appropriate a part of the bundle of rights which make up that ownership, without compensation, to the public, in the name of equality.

Gov. Carl E. Sanders, of Georgia, testified in the same vein when he stated:

> The only question before this honorable committee, in my view, is whether accommodation on private property is a public right.
>
> All else is extraneous.
>
> It is your task to determine whether a public desire to enjoy the privileges of private property can override the private right to the ownership and utilization of that property clearly guaranteed and protected by the fourth and fifth amendments.

These two southern Governors have pinpointed the issue involved in the consideration of S. 1732.

The only Governor to testify personally before the committee in support of S. 1732 was the Honorable Carl F. Rolvaag, the Governor of Minnesota. The Negro population of the State of Minnesota constitutes only seven-tenths of 1 percent of the entire population. Nevertheless, the Governor was frank to admit that there have been problems in Minnesota even though the State has a public accommodations law similar to the one provided in S. 1732. The difficulties which the State of Minnesota has encountered could in no way be alleviated by the passage of a Federal public accommodations law.

S. 1732 is but a further step in the continuing trend of centralization of powers by the Federal Government. It constitutes a dangerous deprivation of both human rights and property rights. This measure directs an invasion of private property by a favored class of individuals and assures them the assistance of the Federal Government

in their efforts. It amounts to a first and significant step toward the complete control of private lives and property, obliterating the remaining freedom of the individual. I will oppose it with all the energy at my command.

Strom Thurmond

STROM THURMOND,
U.S. Senator.

INDIVIDUAL VIEWS OF SENATOR NORRIS COTTON

Discrimination because of race or religion is abhorrent to all right thinking men and repugnant to the basic principles of our Republic.

Civil rights is an emotional issue because it involves human dignity, and emotion has now been raised to a fever pitch. Under its stress many sincere people brush aside constitutional objections as mere technicalities and insist that Congress, by the exercise of some mysterious legerdemain, can still the storm by the mere passing of laws.

The Federal Government under the Constitution is not designed for a direct attack on a moral problem, such as is involved here. Basically, the Constitution does not confer upon the Congress authority to remedy moral or spiritual wrongs, nor is the law always a wise and effective means of forcing the morality of the majority on the minority. Political and economic rights can be enforced by law. Brotherhood and tolerance must be won in the hearts of men.

The bill approved by the committee furnishes a striking example of the maze of difficulties and confusions that result when we try to enforce morality and brotherly love with Federal force. The bill approaches a moral problem through its commercial and economic aspects. It would prohibit discrimination or segregation only in those establishments which substantially affect interstate travel or the interstate movement of goods in commerce. Incidentally, the limitation involved in the word "substantially" shows that the proponents of this measure themselves are very chary about universal enforcement and wish to exempt the small establishments. Discrimination is just as wrong when practiced by a hotdog stand in a back country area away from interstate travel as it would be in the Hilton Hotel chain. Drawing this distinction puts a price tag on human rights and dignity and reduces civil rights to a question of dollars and cents.

The result is a patchwork of contradictions, uncertainties, and even "discriminations." The provisions of the bill are vague and fuzzy. Its coverage would be unknown, spotty, and irregular. In many cases, neither the patron nor the proprietor would know in advance whether the bill applied to a particular establishment or not. It would be impossible to enforce. Furthermore, its provisions are wholly unrelated to the moral injustice of racial or religious discrimination.

While no one can say for sure what the bill covers, it is clear from its text and from the committee hearings that it would produce some strange and distorted results. It would cover beer gardens but not bowling alleys, shoestores but not swimming pools, some barbershops but no bathing beaches.

The accidents of geographic location would determine the application of the bill to many types of establishments. It would cover the barbershop in a hotel, but not one down the street. It would cover the beauty parlor in a department store, but not one in the next block. The barbershop, hospital, medical clinic, or restaurant located on an interstate highway near a State border might be covered but an almost

identical establishment located on a side road or in the interior of a State would apparently remain free to discriminate.

Its provisions could be applied to funeral parlors, real estate agents, brokers, and to doctors, dentists, and lawyers, with far-reaching effects on vast areas of American life which have always been regarded as far removed from Federal control or regulation.

Now let us examine more carefully the word "substantial," which is used to qualify the extent to which its provisions apply to interstate commerce or interstate travelers. The word is a model of inconclusive vagueness. The courts have held that 2 percent was "substantial" and the Supreme Court has implied that one-half of 1 percent would be substantial. In many other cases 20 percent has been used as a dividing line between "substantial" and "insubstantial." Many years of expensive and time-consuming litigation undoubtedly await both plaintiffs and defendants before the word or the bill takes on any clearer meaning.

There is another, and perhaps even more important reason for opposing use of the commerce clause for the enactment of a Federal public accommodations statute—its effect on the Constitution itself.

To use the commerce clause as this bill does is to distort it dangerously and expand its use enormously. The logic employed by the committee bill can be applied to virtually every aspect of human activity and behavior, and would enable the Government to control, in minute degree if it chose, the lives, conduct, and habits of every citizen (except perhaps for the few areas specifically ruled out by the first eight amendments to the Constitution). The commerce clause can even be applied to circumstances where the acts of an individual are "trivial" in relation to interstate commerce if, as the Supreme Court has said:

> his contribution, taken together with that of many others similarly situated, is far from trivial.

If this bill is enacted, it could open the door wide to Federal requirements for job quotas on a racial basis or to a Federal open-occupancy law which would deprive any individual of his right to sell his property to whomever he pleased. The regulatory concepts embodied in this bill are so sweeping in application as to be almost without limit. Clearly they could produce a new and strange constitutional system of government, and an economic and political system vastly different from the one we enjoy today, including an appalling concentration of power. The ultimate loss of fundamental freedoms could far outweigh the vague, unenforceable benefits which might accrue under this bill.

When we attempt by legislation to invoke legal remedies for moral wrongs, we must be careful that old and precious rights are not destroyed in creating new ones, nor new discriminations piled on old ones.

Now we come to a second major consideration. This bill marks a complete reversal in the centuries-old fight for human rights and civil liberties. The Constitution and the Bill of Rights spell out protections for our people against oppressive and arbitrary acts of their Government. The protection of individuals against each other has reposed, and properly so, in the police power of the States.

Specifically, what are the civil rights as now found in the Constitution and the Bill of Rights? They are distinctly set down as fol-

lows: freedom of religion, freedom of speech, freedom of press, freedom of assembly, freedom of petition, right to keep arms, freedom from quartering soldiers, freedom from unwarrantable search and seizure, fair trial in court, and the right to vote.

The Founding Fathers had learned from the bitter lessons of history that civil rights enforced by a central government all too soon became oppressive tyrannies. The public accommodations bill ignores these basic truths and attempts to secure a "right" against private infringement, for the first time in Federal law. The full implications of this switch are not clear now, but they cannot be ignored. Justice Brandeis put his finger on the problem:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

In summary, the bill grossly distorts the fabric of the Constitution only to produce a "civil right" which is a patchwork quilt of gaps, loopholes, inconsistencies, and contradictions. For these reasons, I cannot support it.

The basic moral question of discrimination on account of race, color, religion, or national origin can be met in an honest, effective, and forthright manner only by an appropriate amendment to the Constitution. Such an amendment would provide a clean-cut constitutional approach which will advise all our citizens and the world that we condemn discrimination in all establishments, whether publicly or privately owned, which offer goods, services, accommodations, or facilities to the public.

Confined to racial and religious discrimination, such an amendment would not destroy private rights in other respects, nor would it open the door to new and uncharted Federal controls. Federal regulation of private property is a sufficiently grave step that it should not be attempted without a constitutional amendment, ratified by three-forths of the States, providing specific authority for such a step. I intend to offer such an amendment at the proper time.

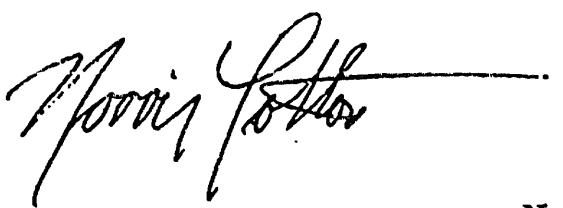
However, we need not wait for the ratification process before taking constructive and constitutional steps against racial and religious discrimination. I proposed in the committee and intend to offer in the Senate a substitute based squarely on the provisions of the 14th amendment, and carrying its provisions to the legal limit permitted by present decisions of the Supreme Court. This approach has two principal features.

1. It would explicitly ban segregation or discrimination on account of race, color, religion, or national origin in all publicly owned facilities and establishments, and would give an aggrieved person or the Attorney General power to institute civil actions for preventive relief. The courts have forthrightly condemned such discrimination, but there is no Federal statute and no direct authority commanding Federal law enforcement officials to secure an end to such discrimination.

2. It would specifically ban segregation or discrimination where imposed by law, ordinance, or regulation, and would give an aggrieved

person or the Attorney General authority to institute civil actions for preventive relief. The Attorney General submitted a list of State or local laws requiring segregation or discrimination, but he currently has no direct authority to proceed against them.

I believe we should walk before we run. We should provide a clear and enforcible Federal prohibition against discrimination in every publicly owned or operated facility from national parks to city playgrounds before we attempt to extend Federal control over privately owned facilities, particularly when such control does not and cannot treat all alike but is in itself shockingly discriminatory.



NORRIS COTTON, *U.S. Senator.*

CHANGES IN EXISTING LAW

There are no changes in existing law.

APPENDIX

Constitutional Bases for the Public Accommodations Bill

I. THE COMMERCE POWER

1. Objectives of legislation enacted under the commerce clause

The mobility of persons and goods in our society has marked many problems, otherwise local, as issues of national concern. Time and again Congress has resopnded by legislating under the commerce clause of the Constitution, to reach what it regarded as an abuse or an evil in the State of origin or production or in the State of destination or consumption. To cope primarily with abuses in the State of origin Congress has enacted such statutes as the Sherman Act, the childd labor law, the Fair Labor Standards Act, and the Labor Relations Act. To deal with abuses or injuries in the State of destination we have had the lottery ticket law, the Mann Act, the pure food and drug legislation, the Federal Trade Commission Act and its supplements. It is clear that the power under the commerce clause is adapted to a wide variety of ends; goods may be excluded from interstate commerce though they are harmless in themselves, if they may be used for harmful or immoral purposes by the recipient (e.g., lottery tickets), and local activities may be regulated even though they do not affect interstate commerce in a competitive way, if they involve a hazard to the consumer of goods that have utilized the channels of interstate commerce (e.g., the retailing of food and drugs).

More particularly, discrimination of one kind or another has been a common target of legislation under the commerce clause, quite apart from the conspicuous case of carriers and facilities connected therewith. Antiunion discrimination in the hiring or discharge of employees is the major object against which the Labor Relations Act is directed. Discrimination in pricing among purchasers is the object against which the Robinson-Patman Act is leveled. Similarly, the protection of consumers or patrons is the aim of much legislation under the commerce power: the protection of the ignorant or gullible against deception, in laws requiring labeling of foods or of textiles and in laws dealing with the marketing of securities; the protection of the physically susceptible against organic harm, in the pure food and drug laws; the protection of the financially incapable against their own propensities, in the lottery law.

Thus the objective of the public accommodations bill—protection against discrimination, and protection at the point of destination of persons or goods, when they are consumers or patrons, is by no means an unparalleled one in the exercise of the commerce power. It remains to consider more closely the patterns of legislation under the clause and the question of coverage, as they bear on the pending bill.

2. Patterns of legislation

Two major legislative techniques have been employed under the commerce clause. One is to regulate practices local in themselves that substantially affect commerce among the States. Familiar instances are the antitrust laws (as applied to contracts, boycotts, or strikes), the Federal wage and hour legislation, and the guarantee of collective bargaining. As the Court said in *United States* v. *Darby*, 312 U.S. 100, 119 (1941), "But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the congressional power over it." The second pattern or technique of legislation under the clause is to prohibit the use of the channels of interstate commerce where such use facilitates or makes more profitable an evil or abuse such as child labor in the State of origin or mislabeling in the State of consumption. The Fair Labor Standards Act utilizes both techniques.

The bill follows the first of these patterns. Its findings are well within the legislative models that rest on the effects of local practices on commerce among the States. In this connection it is worth noting that the constitutional test takes account not merely of the effects of the individual practices of a particular establishment but of the aggregate or cumulative effect of such practices on a national scale. The Supreme Court had occasion just this year to restate this proposition, in a case arising under the National Labor Relations Act. The proceeding involved a New York retailer of fuel oils, whose operations were local, and who had purchased within the State a "substantial amount" of oil products from a supplier who in turn had purchased most of its products from sellers outside the State. The labor practices of the retailer were held to fall within the statute and the constitutional range of Federal power. The Court said, quoting the earlier decision in *Polish National Alliance* v. *N.L.R.B.*, 322 U.S. 648: "Whether or not practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far reaching in its harm to commerce." *N.L.R.B.* v. *Reliance Fuel Oil Corp.*, decided January 7, 1963, unanimously and per curiam, 371 U.S. 224.

3. Statutory coverage; the question of vagueness; suggestions for drafting

The operative definitions in the bill are contained in section 3. Subsections (1) and (2), relating to places of lodging for transient guests and places of entertainment, are straightforward and should not produce any troublesome doubts concerning coverage. The more complex definition relates to retail establishments of various kinds, described in subsection (3). Of the four alternative criteria provided for such establishments, the second (par. (ii)), should afford clear guidance for a great many, i.e., those which sell goods a "substantial portion" of which has moved in interstate commerce. Where this criterion is satisfied, no further test of coverage need be considered.

The problem of vagueness really centers on paragraph (iii), a kind of residual clause for retail establishments: "the activities of such place of business otherwise substantially affect interstate travel or the interstate movement of goods in commerce." Certain points can be made in mitigation, or extenuation, of the element of indefiniteness here. Since this is meant to be coextensive with constitutional power, the decisions under such statutes as the Sherman Act and the Labor Relations Act, which are similarly based, will be useful guides. Moreover, the sanctions provided in the bill are limited to injunctive relief, so that there would be a judicial determination and warning of coverage before any penalties attached for violation; in this respect the problem of indefiniteness is much less severe than, for example, in the Sherman Act, which carries criminal sanctions as well.

Nevertheless, after making these allowances, the question remains whether paragraph (iii) of section 3(a)(3) is really necessary, and whether a different kind of residual clause might be included that would avoid such vagueness as the paragraph entails. The substitution of a phrase such as "in interstate commerce" would aggravate rather than mitigate the difficulty, in view of the wavering and uncertain lines that have been drawn in the application of that concept under the Federal Trade Commission Act and early versions of the Federal Employers Liability Act. See, e.g., *F.T.C.* v. *Bunte Bros.*, 312 U.S. 349 (1941); *F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948); *Shanks* v. *Delaware, L. & W. RR.*, 239 U.S. 556 (1916). A more useful substitute would be a clause providing that in the case of any establishment described in section 3(a)(3) which does not meet the criteria of paragraph (i), (ii), or (iv), and which has engaged or is about to engage in prohibited practices, it shall be enjoined, while such practices occur, from selling goods that have moved in interstate commerce and from acquiring such goods through the channels, directly or indirectly, of interstate commerce. This provision might be added to section 5, the enforcement section.

The constitutional basis for such a provision is found in what was described above as the second pattern of legislation under the commerce clause. In the interest of consumers Congress has recognized the integral nature of the process of distribution, as in the food and drug legislation, and the Court has sanctioned this exercise of power. In an early case under the Food and Drug Act, the Court upheld the application of the labeling provisions of the act to a retailer even after the articles were removed from their original package for sale to local purchasers. *McDermott* v. *Wisconsin*, 228 U.S. 115 (1913). It is now established that the act may be applied to the retailer even though he has purchased the articles from a local wholesaler or distributor, where they reached the wholesaler from another State, and even though they were properly labeled when they reached the retailer. *U.S.* v. *Sullivan*, 332 U.S. 689 (1948).

Such a provision would in principle be a counterpart of the child-labor section of the Fair Labor Standards Act, 29 U.S.C. 212, which prohibits the interstate shipment of goods produced in any establishment where within 30 days prior to removal therefrom "any oppressive child labor has been employed." All products of such an establishment are kept out of interstate commerce, not merely those products on which child labor has been employed. If a producer wishes to preserve

the supposed advantages of child labor, he must confine himself to a market in his own State. Under the suggested provision, if a retail establishment, not otherwise subject to the commerce definitions of the act, wishes to preserve the supposed advantages of a racially selected clientele, it must confine itself to dispensing products of its own State. The interstate shipper himself could be brought into the plan by requiring him to obtain a warranty of nondiscriminatory merchandising from his purchaser, and so on down the line, but this would be needlessly cumbersome and is adverted to here only to show that a more formal linkage to the shipper is possible without varying the substance of the regulation.

Adoption of such a proposal would by no means obliterate the limits on congressional power under the commerce clause. Like the great variety of regulations that have been sustained, this one rests on a functional relationship between the facilities of interstate commerce and the abuse or evil at which the Federal measure is directed. It would thus differ fundamentally from hypothetical excesses of Federal authority such, for example, as a Federal code of marriage or divorce enforced by the closing of the channels of interstate commerce to violators of the code.

The committee may wish to consider two or three other suggestions for drafting, for the sake of greater assurance and clarity. It has been assumed that section 3(a)(3)(iii), as drawn, is an alternative and independent catchall provision, not limiting or qualifying the preceding paragraphs (i) and (ii); that is, that the phrase "otherwise substantially affect interstate commerce" does not imply that in the case of an establishment meeting the tests of (i) and (ii) it must also be shown that its individual practices "substantially affect" interstate commerce. It would be helpful if the findings in section 2 made this plainer, by stating that the cumulative and aggregate effect of the described practices substantially affects commerce among the several States. Cf. *N.L.R.B.* v. *Reliance Fuel Oil Corp.*, discussed above.

The findings might also include a statement that concerted refusals to patronize establishments that discriminate have led to sympathetic consumer boycotts in other States, directed at establishments under the same ownership or control. The commerce clause speaks of commerce "among the several States," which Chief Justice Marshall took to mean "that commerce which concerns more States than one," a concept more encompassing in some respects than the familiar paraphrase "interstate commerce." See *Gibbons* v. *Ogden*, 9 Wheat. 1, 194 (1824); Hughes, J., in *Minnesota Rate Cases*, 230 U.S. 352, 398 (1913). Another finding might state the fact that the channels of interstate commerce are used to facilitate and make more profitable the businesses practicing discrimination. That a discriminatory outlet enjoys the benefits of a nationwide source of supplies is surely relevant to the issue of Federal authority. Such a finding would be particularly relevant if the additional enforcement measure were adopted, but it would be helpful, as it is true, in any event.

4. Rights of property and freedom of association

Every exertion of power under the commerce clause has involved some restriction on the use of property or the exercise of liberty while at the same time enlarging the effective liberties and the proprietary

interests of others. This is true of any significant regulation enacted to promote social justice. It is hardly necessary to pursue this truism here, except to underscore its pertinence to the issue of discrimination. The merchant who is forbidden by the Robinson-Patman Act to discriminate in price among his customers, and the business that is forbidden by the Labor Relations Act to discriminate on the basis of union activities among its employees, bear witness both to the congressional regulatory policy and to its constitutional validity under the guarantee that persons shall not be deprived of liberty or property without due process of law. The employer's claim to be free to set his own terms for his employees' organizational activities, as part of his rights as owner of the business, was rejected, and not for the first time, in the Labor Board cases. The Court relied, for this issue, on an earlier decision under the Railway Labor Act, *Texas & N.O.RR.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548 (1930). The employer's claim was pressed with special force in the *Associated Press* case, coupled as it was with the claim to freedom and independence of the press. But the Court again rejected it, pointing out that the act permits a discharge for any reason other than union activity. *Associated Press* v. *N.L.R.B.*, 301 U.S. 103 (1937). The problem of evidence of motive is, if anything, more intricate and difficult in such cases than in refusals to serve persons of color.

The principle of these cases is not, of course, confined to the employer's side or to the employment relationship. Labor unions themselves may be required to admit to membership on a racially nondiscriminatory basis. When a union attacked this provision of the New York civil rights law as an infringement of its rights of property and liberty, including the right to choose one's associates, the argument was sharply and unanimously rejected. *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88 (1945). Mr. Justice Reed, for the Court, said (pp. 93–94): "We have here a prohibition of discrimination in membership or union services on account of race, creed, or color. A judicial determination that such legislation violated the 14th amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent State legislation designed to perpetuate discrimination on the basis of race or color." Mr. Justice Frankfurter was even more summary in a concurring opinion (p. 98): "Apart from other objections, which are too unsubstantial to require consideration, it is urged that the due process clause of the 14th amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance." The same principle, with a citation to the foregoing case, served to sustain the constitutional validity of the District of Columbia law prohibiting discrimination on account of race or color in a restaurant. *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953). The unanimous opinion, by Mr. Justice Douglas, stated (p. 109): "and certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the States." On the issue of rights of property and association, the same conclusion applies as well to national legislation.

5. An issue of legislative policy, not constitutional power

The judicial history of the commerce clause has been, with the rare exceptions (like the ill-starred child-labor decision, later overruled), a record of support of Congress in dealing with commerce that concerns more States than one. At each step there was a vigorous effort by counsel to limit the power, on the ground that in some aspect the application of the power was novel. Thus it was argued, on various occasions, that the power to regulate did not include the power to prohibit; that only articles harmful or noxious in themselves could be excluded; that commerce signified goods, not the movement of persons; that after goods were removed from their original package and held for local sale they were in the sole control of the State legislature; and that this was true at all events if the goods were both acquired and sold within the State. All of these contentious efforts proved unavailing in the face of a genuine occasion for national regulation. Fifty years ago, in the *White Slave* case, Justice McKenna remarked impatiently on these attempts to circumscribe the power of Congress (*Hoke* v. *U.S.*, 227 U.S. 308, 320): "Congress is given power to regulate commerce with foreign nations and among the several States. The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in one of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercises of it and are made a ground of attack. The present case is an example.

The issue is one of legislative policy, not constitutional power. "The authority of the Federal Government over interstate commerce," the Supreme Court has said, "does not differ in extent or character from that retained by the States over intrastate commerce." *U.S.* v. *Rock Royal Co-operative*, 307 U.S. 533, 569 (1939). The question is whether the same power that has been used in the interest of preventing deception, disease, and immorality, as well as discrimination against members of unions and against small business, shall be utilized in the interest of preventing discrimination among patrons of establishments whose practices have repercussions throughout the land and which take advantage of the facilities of our national commercial market for their patronage or their supplies or both.

Perhaps a word should be added about the refusal of the Supreme Court in the *Civil Rights* cases of 1883 to uphold the Civil Rights Act of 1875 by virtue of the commerce clause. That act was addressed to carriers, hotels and inns, and public places of entertainment. It would undoubtedly have been more difficult then than now, given the nature of the Nation's economy, to frame an effectively comprehensive law under the commerce power. However that may be, the short answer is that the act was not so framed, it was a criminal statute, and the Court was unwilling to recast the operative definitions of coverage in what would have been an ex post facto act. The Court regarded the applicability of the commerce power as "a question which is not now before us, as the sections in question are not conceived in any such view." (109 U.S. at 19).

II. THE 14TH AMENDMENT

The relevant provisions of the amendment are contained in section 1, in the form of prohibitions against the States, and section 5, which empowers Congress to "enforce, by appropriate legislation, the provisions of this article." The immediate purpose of the amendment was to validate the Civil Rights Act of 1866, which was directed to acts under color of State law. When in 1875 Congress undertook to prohibit, not acts under color of State law, but discriminatory practices by public carriers, inns, and theaters, the statute was held to exceed the authority conferred by the amendment. *Civil Rights Cases*, 109 U.S. 3 (1883).

That decision has not been overruled. When it is asked why this is so, and what the prospects of overruling are, the best clues to an answer lie in the cloudiness of the meaning of "overruling" the decision. It is easy enough to state the principle on which the cases were decided: that only acts for which the State is in fact responsible, through one of its agencies, are comprehended by the amendment. But to state the principle that would underlie an overruling is far from easy. The dissent of Justice Harlan is itself not wholly clear, but at all events he did not take the position that all private action could be reached by Congress. What is involved is not simply an ad hoc determination, or an appeal to moral sentiment, or a problem of choice between the slogan of property rights and the slogan of public responsibility of public enterprises. Because the 14th amendment is spacious in its guarantees ("equal protection" and "due process"), and is cast largely in terms of prohibitions that are self-executing (by way at least of injunctive relief and defenses to legal claims, without enforcement legislation), any decision "overruling" the *Civil Rights* cases has implications for judicial power and duty that transcend the immediate controversy. Such a decision would have a momentum of principle that might carry it far beyond the issue of racial discrimination or public accommodations. The point is not that the step should therefore be rejected; it is that if the step is taken, it should be done with clear awareness of its larger implications. In this respect it differs qualitatively from a step taken under the commerce clause, for that is primarily a grant of legislative power to Congress, which can be exercised in large or small measure, flexibly, pragmatically, tentatively, progressively, while guaranteed rights, if they are declared to be conferred by the Constitution, are not to be granted or withheld in fragments. Therefore it is necessary to arrive at some conception of the range of rights which an overruling of the *Civil Rights* cases would create for the courts and the Congress to enforce.

1. Equal protection and due process

These are the guarantees of the amendment which have been most intensively applied against official State action. In considering their possible applications following an overruling of the *Civil Rights* cases, three levels of questions are raised: To what enterprises, to what activities of those enterprises, and by what standards shall the applications be made?

(*a*) *What enterprises.*—If the extension were limited to public utilities in the strict sense, those enterprises having a duty, under the common law or statutes of the State which created them, to serve the public

generally, here might be no constitutional problem, for the State itself would be discriminating in its law if its courts would enforce this duty on behalf of all except members of a particular race or religion. But public utilities in this sense are a narrow class of enterprises: public carriers and inns for lodging; and it would have to be shown (as it was not in the *Civil Rights* cases) that the State made a discrimination in enforcement of the general legal right.

It has been suggested that a right be conferred against all establishments licensed by the State; the license would be the nexus between State and private responsibility. Licensing varies in scope and function from State to State, and from city to city. It may signify that an establishment has paid a tax, or satisfies sanitary or safety standards, or is operated by qualified persons. To make the constitutional right to be served turn on the presence or absence of a license would thus produce some anomalous results. Moreover, a local government would not find it difficult to dispense with the requirement of a license while retaining control over sanitary, safety, and similar conditions as well as over tax liability. The standards imposed on an establishment in these respects could be enforced by injunction or civil and criminal penalties, without the device of a license.

There is one type of license which stands on a different footing: a certificate of convenience and necessity, conferring a monopoly or near-monopoly. When the State grants such a franchise it prevents potential competitors from operating on a possibly nondiscriminatory basis, and so in a special sense the State may be regarded as contributing to the discriminatory policy followed by its franchise holder. This application of the 14th amendment has already been recognized without legislation, in connection with the duties of a union holding an exclusive bargaining position under law and a private busline holding a franchise. *Steele* v. *L. & N. RR.* (323 U.S. 192 (1944)); *Boman* v. *Birmingham Transit Co.* (280 F. 2d 531 (4th Cir. 1960)).

If licensing by itself is a basis for application of the 14th amendment, the question may be raised whether private schools and colleges licensed by a State, or lawyers, or indeed all corporations operating under State charter, can properly be omitted from the coverage of the bill. Similarly, if licensing gives rise to constitutional duties and corresponding rights, it is hard to see how any exemptions could be made on the basis of size, any more than other constitutional rights, like that of freedom from censorship, can be made to turn on the size of an establishment.

An alternative basis for identifying certain enterprises with the State for purposes of the 14th amendment is the concept of businesses affected with a public interest, a category that for many years was used to signify those enterprises that could be subjected to State control over prices and rates. But even for this permissive purpose, the classification proved unsatisfactory and artificial, and when in 1934 this criterion was frankly abandoned by the Court the decision was generally welcomed as clearing the constitutional atmosphere. *Nebbia* v. *N.Y.* (291 U.S. 502 (1934)). Mr. Justice Roberts said (p. 536): "It is clear that there is no closed category of businesses affected with a public interest * * *. In several of the decisions of this Court wherein the expression 'affected with a public interest' and 'clothed with a public use' have been brought forward as the criteria

of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices."

(*b*) *What practices.*—If agreement is reached on a definition of establishments subject to the 14th amendment, the further question must be faced of the activities or practices that are encompassed. Is discrimination in employment included equally with discrimination in service? If one is covered and not the other, is Congress determining the bounds of constitutional guarantees, since injunctive remedies would be open even apart from the statute to restrain threatneed infringements of constitutional rights. If Congress decides to utilize the 14th amendment and does not mean to limit its new coverage to the kinds of practices specified, a saving clause in the bill to that effect would be appropriate. Attention might also be given to the question of jurisdictional amount; under present provisions the $10,000 amount is dispensed with in cases under laws regulating commerce, and actions for violations of civil rights "under color of law."

The amendment relates, of course, to many practices besides discrimination. The due-process clause absorbs all the basic guarantees of the Bill of Rights. Questions will arise over the applicability of these to the establishments that are assimilated to the State: whether, for example, such an establishment could make preferential contributions to a church, and whether its intracorporate procedures must for violations of civil rights "under color of law."

(*c*) *What standards.*—If the private licensee takes on to some extent the constitutional duties of the public licensor, there is the further problem of the standards for defining those duties. If an official licensor gave preference to the sons of licensees a serious issue would be raised under the equal-protection clause. *Kotch* v. *Board of Pilot Commissioners* (330 U.S. 1753 (1947)). If the licensee himself followed a policy of nepotism in his business, would a similar constitutional issue be raised? In all likelihood a new set of constitutional standards would be formulated for private practices covered by the amendment—a set conforming neither to the code of fairness for purely private conduct nor to the constitutional code for governments and their agencies.

The combination of these uncertainties—the class of establishments, the kinds of practices, and the standards to be set, may well account for the Court's adherence to the basic principle of the *Civil Rights* cases. It is not a matter of lack of sympathy for the moral claims asserted; the real problem is an institutional one, whether those claims are to be vindicated, in private relations, through processes of legislation under a congeries of powers (commerce, defense, spending), or whether they are to open up new areas of direct constitutional relationships which will call for judicial creativity on a formidable scale. If the Court is to be persuaded to overrule the *Civil Rights* cases, the most effective approach would be to emphasize the power conferred by section 5 of the amendment on Congress, and to draw as wide a gap as possible between this and the self-executing, judicially enforced prohibitions of section 1. If this is so, the responsibility on Congress is all the greater to think through the implications of its action for constitutional claims that are not precisely those recognized in the bill but in principle may be comparable.

2. Privileges and immunities of citizens

What has been said of the equal protection and due process clauses is also pertinent to the citizenship clause, which is likewise a prohibition against abridgment by the States. The latter clause would not, of course, afford protection to resident or visiting aliens. Ever since the *Slaughterhouse* cases in 1873, moreover, the privileges of national citizenship have been confined to those interests peculiar to the relation of a citizen to the National Government, such as the right to travel to the seat of government, diplomatic protection abroad, safe custody in the hands of a Federal marshal, and the like. Even the interest in traveling from one State to another, irrespective of poverty, was placed by a majority of the Court on the ground of the commerce clause rather than privileges of citizenship. *Edwards* v. *California*, 314 U.S. 160 (1941). The reasons for this reluctance to expand the concept were explained in a dissenting opinion of Justice Stone, Brandeis, and Cardozo (Justices not unsympathetic to claims of civil liberties) in *Colgate* v. *Harvey*, 296 U.S. 404, 445 (1935), overruled in *Madden* v. *Kentucky*, 309 U.S. 83 (1940). They are reasons similar to those which have deterred the Court from overruling the *Civil Rights* cases—the at-large character of the new class of constitutional rights that would be created.

3. "Custom"

The phrase "under color of any law, statute, ordinance, regulation, or custom" goes back to the Civil Rights Act of 1866. In its context the term "custom" evidently refers to official action taken as a matter of usage without formal statutory authority, for the operative provisions of that act were guarantees against legal disabilities—the right to sue, to be a witness, to make and enforce contracts, and the like. The custom of officialdom need not be specially mentioned today, since action by a State officer, taken in the absence or even in violation of State law, is covered by the term "color of law." *Screws* v. *U.S.*, 325 U.S. 91 (1945). To construe "custom" more broadly, to include popular attitudes and practices, would make the existence of constitutional rights turn on an assessment of intangibles community by community; an establishment discriminating against Negroes and Jews might be held to violate the 14th amendment only as to Negroes in one State and only as to Jews in another, depending on prevalent community practices.

The Supreme Court did not find it necessary to adopt the argument based on custom in the *Sit-In* cases of last term. Whether it will do so in the *Sit-In* cases held over until next term is problematical. The cases may be decided on grounds that will again avoid the ultimate issue; e.g., that the criminal trespass statutes are given an unnatural meaning in being applied to sit-in demonstrators. Even if the Court should reach the ultimate issue and decide in favor of the sit-in defendants, the decision may be put on the ground of State involvement through the police and the State courts. At all events, lower courts which have applied the 14th amendment to franchised carriers have declined to extend it to restaurants by equating custom with State responsibilty. *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959); *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835 (D.C. Cir. 1961).

4. Precedents extending 14th amendment to certain "private" action

These decisions fall into several categories. One is the class of cases where the State has delegated certain governmental functions to private groups, and in carrying them out the groups are held to constitutional duties. Instances are the conduct of party primaries, which are an integral part of the political electoral process, and the conduct of a company-owned town. *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Marsh* v. *Alabama*, 326 U.S. 501 (1946). The latter case is of interest because it concerns rights of assembly and religious exercise, illustrating the reach of the amendment beyond acts of discrimination. Another class includes cases where the State may fairly be held responsible for the private conduct, by granting an exclusive or near-exclusive franchise, or by providing special facilities to carry out the private plan. *Steele* v. *L. & N. RR.*, 323 U.S. 192 (1944); *Pennsylvania* v. *Board of City Trusts*, 353 U.S. 230 (1957); cf. same case, 357 U.S. 570 (1958). A further group includes cases where State-owned facilities are involved, through lease or similar arrangement. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). The decision in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), holding unconstitutional the judicial enforcement of a restrictive housing covenant, is susceptible of various interpretations, but the reiteration in the opinion of the fact that there were a willing seller and a willing buyer suggests that the State court was in those circumstances regarded as the effective cause of the discrimination.

CONCLUSION

From this study several conclusions are indicated.

1. The commerce power is clearly adequate and appropriate. In fact, more extensive use of the commerce power can be made if it is desired to broaden the coverage and reduce its uncertainties in marginal cases. No impropriety need be felt in using the commerce clause as a response to a deep moral concern. Where social injustices occur in commercial activities the commerce power is a natural and familiar means for dealing with them.

2. There is no serious question of the right of association or of property or of privacy as a barrier to the legislation, applicable as it is to commercial places of public accommodation.

3. Whether the Supreme Court would sustain the legislation under the 14th amendment is more uncertain, because of the necessity to find principles of inclusion and exclusion in opening up a new class of constitutional claims against private enterprises. The Court may be the readier to accept this basis for the legislation if a consensus is reached as to those principles by the proponents of this constitutional approach.

PAUL A. FREUND.

O

Calendar No. 848

88TH CONGRESS
2d Session

SENATE

REPORT No. 872
Part 2

1580

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

REPORT

OF THE

COMMITTEE ON COMMERCE
UNITED STATES SENATE

ON

S. 1732

TO ELIMINATE DISCRIMINATION IN PUBLIC ACCOMMODATIONS AFFECTING INTERSTATE COMMERCE

PART 2

INDIVIDUAL VIEWS

OF

SENATOR WINSTON L. PROUTY

FEBRUARY 10, 1964.—Ordered to be printed.

U.S. GOVERNMENT PRINTING OFFICE
28-063 O WASHINGTON : 1964

COMMITTEE ON COMMERCE

WARREN G. MAGNUSON, Washington, *Chairman*

JOHN O. PASTORE, Rhode Island
A. S. MIKE MONRONEY, Oklahoma
STROM THURMOND, South Carolina
FRANK J. LAUSCHE, Ohio
RALPH YARBOROUGH Texas
CLAIR ENGLE, California
E. L. BARTLETT, Alaska
VANCE HARTKE, Indiana
GALE W. McGEE, Wyoming
PHILIP A. HART, Michigan
HOWARD W. CANNON, Nevada

NORRIS COTTON, New Hampshire
THRUSTON B. MORTON, Kentucky
HUGH SCOTT, Pennsylvania
WINSTON L. PROUTY, Vermont
J. GLENN BEALL, Maryland

EDWARD JARRETT, *Chief Clerk*
RALPH W. HORTON, *Assistant Chief Clerk*
GERALD B. GRINSTEIN, *Chief Counsel*
JEREMIAH J. KENNEY, Jr., *Assistant Chief Counsel*
STANLEY H. BARER, *Staff Counsel*

CONTENTS

Calendar No. 848

88TH CONGRESS, 2d Session } SENATE { REPT. 872, Part 2

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

FEBRUARY 10, 1964.—Ordered to be printed

Mr. MAGNUSON, from the Committee on Commerce, submitted the following

REPORT

[To accompany S. 1732]

INDIVIDUAL VIEWS OF SENATOR WINSTON L. PROUTY

DECLARATION OF MAN

Man is not an article of commerce. He was created by God in His image, and is like unto no other living thing on the face of the earth.

If a man hunger and be given not to eat, if he thirst and be given not to drink, if he weary and can find no resting place—let there be no sorrow for the losses at the countinghouse.

Let there be tears that the majesty of every human being is diminished.

Then shall we turn our eyes to the words in the Great Charter that speak, not of money, but of men.

May those who unlock the mystery of the law find again the ancient truth: that the toleration of evil and wrong is the denial of goodness and right.

For great is the dignity of man, and greater still the glory of God.

THE RIGHT AND THE REMEDY

What is the nature of the right we now seek to protect? It is my feeling that in all the discussions and deliberations to date the committee has failed to give proper consideration to a very fundamental point.

The evil we seek to remove is the degradation of a man in his use of the common privileges because his skin is not the proper color. The affront is to his dignity. The remedy ought to magnify that

dignity and give a view upon the essence of humanity—brotherhood in the shadow of God.

A CONFLICT OF VALUES

The bill this committee has reported out pays little heed to these higher values. Based solely on the commerce clause it concerns itself not with man as man but with collateral issues relating to the national economy.

Let us examine for a moment some of the ramifications of using the commerce clause as the basis for protecting the human right to equal treatment in the use of the common privileges.

First, by the nature of the protection afforded there would be no protection for the right unless there was, preexisting, interstate commerce on which to hang the remedy. Clearly as a philosophic premise, a human right has merit in itself and free exercise of that right has no rational relationship to the existence of a special form of commerce.

I cannot bring myself to agree with the majority that the reason we can legislate in this area is because we are at a point in history where trains, planes, cars, and buses carry bodies, boxes, and bottles from State to State. The black man's right to be treated like the white man has existed from the creation of time, and this right is not founded on sophistication in industry and transportation.

Secondly, the bill imposes on certain enumerated businesses, which have a substantial effect on interstate commerce, the obligation to serve all parties regardless of their race. Let me point out a few of the inconsistencies in this approach when the right we are seeking to protect is viewed as a human right.

THE COMMERCE CLAUSE: A LEGISLATIVE DEVICE

The bill is limited to certain enumerated businesses. Other establishments are excluded. But, because a human right is at issue why are certain public establishments excluded?

"Mrs. Murphy" is excluded because she is not in a true sense a "public" establishment. But for the other public establishments, wholly intrastate in character, there seems to be no rational basis for exclusion. It is argued that they must be excluded because Congress doesn't have the power to include them. As I developed in the brief I prepared for the committee and which I have attached to these views as appendix A, there is sufficient power under the 13th and 14th amendments to require those excluded establishments to guarantee this human right.

Inasmuch as a business must have a substantial effect on interstate commerce before it comes under the bill, "substantial effect" must have meaning before the bill can have meaning. But, during the hearings we witnessed certain semantical gymnastics with this term, concluding that "substantial" meant "more than minimal," a term equally indefinite in scope.

Once it is determined that a business is in interstate commerce to such a degree that it comes under the bill, the business is to afford equal access to patrons without regard to their race. In court there need not be a showing that the transaction of any particular patron would have a substantial effect on interstate commerce. Nor need there be a showing that the transaction of a particular class of patrons

would have a substantial effect on interstate commerce. The bill only says that if you have a business which by its operation substantially affects interstate commerce, that business must not discriminate against any patrons on the basis of race.

During the hearings we received testimony that present discriminatory practices by certain public accommodations create a burden on interstate commerce. The "findings" of the bill as it was introduced spoke of the harm to interstate commerce because of these discriminatory practices. But, despite the foundation of the bill in the "burden" and "harm" to interstate commerce no "burden" or "harm" need be proved, before the protection of the bill can be invoked. The commerce clause, therefore, clearly is nothing but a device or technique for collaterally protecting a human right.

Inconsistencies flow as a product of this circuitous remedy. A human right is protected because of some possibly fictional harm to interstate commerce; clearly, a single discriminatory act might in itself have no substantial impact on interstate commerce. And, were there but a single Negro in these United States, who suffered the multitude of inhumanities that have been imposed upon his brethern to date, no remedy would be available to him under this approach because Congress could be unable to find a harm or burden to commerce on which to base its legislation.

PROBLEMS OF ADMINISTRATION

Finally, a person seeking the aid and protection of this bill is required to make legal judgment more sophisticated than many courts are able to make with confidence after years of experience.

Once refused service at any establishment, the patron must decide before he protests whether the establishment is one which substantially affects interstate commerce and therefore comes under the bill.

Let us look at the judgments he must make: Does the establishment deal in goods or services or both? If in goods, did the goods come across State lines and if they didn't, were they manufactured from parts that did or were they manufactured or sold in such a way as to otherwise have an effect on commerce? If they had an effect on interstate commerce, was that effect more than minimal? If that establishment deals in services; the patron must ask himself if he constitutes a transient guest by Federal standards of transiency; if he has come to rest too long to be a "transient," can he still be considered in interstate commerce as an interstate traveler? Otherwise, the patron must determine whether the service he seeks has any other substantial effect on interstate commerce.

Can any one of us say in good conscience that the free exercise of a human right should be dependent upon such incalculables? Can we say that human rights should be subject to such legislative and judicial vagaries? When other bases of Federal power are available does it serve the ends of justice to treat our fellow citizens like so many chattels with rights only of, by, and in commerce? Let me say, that were I to be a direct beneficiary of this bill, I would be deeply offended by such treatment.

Throughout the course of the hearings many witnesses expressed the hope that we would act to remove the vicious affronts to human dignity which result from discriminations in public accommodations.

If we accept a bill based on the commerce clause alone we run the risk of supplanting them with new affronts to dignity.

ADDITIONAL CONSIDERATIONS

The problems and intricacies of the commerce clause approach are not unique to the body of the bill itself. A review of the proceedings before this committee will demonstrate how deeply "commerce" imbued our thinking.

The bill as introduced had 79 lines of "findings." These findings spoke of (1) the increasing mobility of people, (2) the difficulty of finding accommodations for minority groups with the resultant reduction in the flow of human commerce, (3) the burdens placed on interstate commerce by such restrictions, (4) limitations on the normal distribution of goods and people, and finally, (5) the loss of mobility of the labor force with a restriction on commercial and industrial expansion. The tenor of these writings was goods, services, and dollars, not human rights, human dignity, and human equality. The stated concern was materialistic rather than human. The committee amended away these findings but declined to amend the commerce clause approach which these findings supported. Now the bill is less commercial in tone but only because its materialistic trappings are gone.

In addition to the findings of the bill the following propositions were set forth during the hearings as reasons for passing this bill:

(1) Discrimination in public accommodations weakens our national defense by harming troop morale.

(2) Discrimination impedes the fight on illiteracy.

(3) Discrimination interferes with the mobility of labor.

(4) Discrimination impairs the conduct of our foreign relations.

(5) Discrimination reduces our gross national product by adversely affecting land, air, and sea transportation and the free flow of goods and services.

(6) Discrimination makes more difficult the selling job of the U.S. Information Agency.

Undoubtedly, these arguments are sound. But they are to be noted for failing to mention the very worth of the man the bill seeks to assist. Are we too timid to legislatively recognize the protection of the dignity and humanity of man as a lawful and proper objective of our powers? Who is to deny that discrimination on the basis of race is an insult to human majesty which ought to be remedied for that reason alone?

WORDS VERSUS DEEDS

There were some bright spots in the hearings. For example, the Attorney General referred to a statement of John Adams on page 22 of the hearing as follows:

> The eternal and immutable laws of justice and morality are paramount to all human legislation.

Again on page 25 the Attorney General said:

> All thinking Americans have grown increasingly aware that discrimination must stop—not only because it is legally insupportable, economically wasteful, and socially destruc-

tive, but *above all* because it is morally wrong. (Emphasis supplied.)

But the bill he supports, which we now report, does not focus on the moral issue.

Later on in the testimony I posed this question to Burke Marshall:

> Mr. Marshall, getting down to fundamentals, is discrimination the basic evil we think it is, because of its effect on commerce or because of its effect on man and his dignity?

Mr. Marshall replied:

> Senator, I think that discrimination is a basic evil because of its effect on *people*. [Emphasis supplied.]

But the bill he supports, which we now report, does not focus on the moral issue.

Mr. Marshall went on to note that discrimination also had an effect on commerce, and Congress had the power to deal with that effort.

Senator Pastore responded to Mr. Marshall's answer:

> I believe in this bill, because I believe in the dignity of man, not because it impedes our commerce * * * Now, it might well be that I can effect the same remedy through the commerce clause. But I like to feel that what we are talking about is a moral issue, an issue that involves the morality of this great country of ours.

Despite the assurances by administration witnesses that they, too, were concerned with moral issues, they made no move to modify the commerce clause approach.

MY PROPOSALS

In response to this variance between words and deeds I prepared two alternative or additional proposals to the bill. Their tenor was one of history and human rights read together. Without any prior consultation with him I asked the most preeminent legal scholar scheduled to come before the committee, Dean Erwin Griswold, dean of the Harvard Law School and a member of the Civil Rights Commission, what he thought of these proposals. Our dialogue on my 14th amendment proposal, together with subsequent comments by Dean Griswold, follows:

> Senator PROUTY. I would like to ask you about an approach which I think has not been suggested heretofore and get your general reaction.
>
> The first clause of section 1 of the 14th amendment provides, and I quote:
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
>
> Section 5 of the 14th amendment provides, and I quote:
>
> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
>
> Would you read, or could you read these two provisions together and conclude that as an incident of the Federal legislative power Congress could describe and define incidents

of national citizenship to include national protection of civil rights?

Mr. GRISWOLD. I don't know, Senator. I have never given thought to that particular question. That seems to me to be stretching the first section of the 14th amendment quite far. But perhaps it is a stretch that can and should be made.

Certainly being a citizen of the United States means something. And Congress might well have power to prescribe what are the essential characteristics of American citizenship which might well include nondiscrimination.

Senator PROUTY. Assuming that the Supreme Court might conclude that Congress has the power to define rights of national citizenship so that civil rights could be protected by the Federal Government, would there be any requirement for a finding of State action before Federal protection could come into play?

Mr. GRISWOLD. No, Senator, to the extent that you could proceed under section 1, the requirement of State action only comes in with respect to the due process and equal protection clauses, which I think are in section 2.

I can only say that I have never given consideration to the possible scope and application of section 1, and the more I think of it, in the few seconds since you first suggested it, the more potentialities it seems to me to have.

And, later in a discussion with Senator Cooper on the 14th amendment, Dean Griswold stated:

Mr. GRISWOLD. Indeed, I am more and more impressed by Senator Prouty's suggestion, and it seems to me it might well be specifically stated that Congress was, in doing this, defining and prescribing the rights of citizens of the United States under the 14th amendment.

And again with Senator Pastore:

Mr. GRISWOLD. Insofar as the 1883 decision involved no State action at all, and insofar as it was relying on only section 2 of the 14th amendment, I think I would agree with the decision. Senator Cooper is talking about a situation where adequate State action is involved. Senator Prouty suggested the relevance of section 1 of the 14th amendment. And one of my associates here has just called my attention to the famous case of *Edwards* v. *California*, which involved the migrants from Oklahoma going to California, and California tried to keep them out. The Supreme Court held that they could not, saying that "the right to move freely from State to State is an incident of national citizenship.

It seems to me that that case furnish strong authority for saying that Congress, under section 1 and section 5 of the 14th amendment, has power to prescribe that the right to move freely from State to State—and that includes being accommodated when you move, because you can't move and just sleep in the ditch by the side of the road—is a right which Congress can prescribe under the 14th amendment.

Senator PASTORE. Would you go so far as to say it is an inherent right of the citizen of the United States under the 14th amendment to be treated equally, without discrimination with regard to race or color under the spirit of the 14th amendment, even in the case of privately owned public facilities?

Mr. GRISWOLD. In places of public accommodations; yes, sir, Senator.

In addition to this unique 14th amendment proposal I included a 13th amendment proposition. Note the very valuable law review article on the subject which appears in appendix F. My conversation with Dean Griswold follows:

Senator PROUTY. Justice Harlan, sitting in the *Civil Rights* cases of 1883, felt it was indisputable that there are burdens and disabilities which constitute badges of slavery and servitude and that Congress had the power to enact legislation of a direct and primary character for the eradication not only of the institution of slavery but also of its badges and incidents. Milton Konvitz, writing in "A Century of Civil Rights" said that the attributes of slavery included the attitude by the slaveowner that (1) the Negro was in his proper status as a slave, that (2) the slaveowner had the obligation to protect the slave, and (3) slavery was good, justified, a blessing to both races, morally right and wholly consistent with justice, reason, and Christianity.

When Governor Wallace was here, he testified that segregation was (1) proper, (2) offered the Negro a good life, (3) was good, justified, a blessing to both races, morally right, and wholly consonant with reason and Christianity.

There is a striking similarity between these two statements.

Would you say that segregation as a system is "slavery" within the contemplation of the framers of the 13th amendment?

Mr. GRISWOLD. Yes, I think so. This is quite consistent with, and is in support of, the position I have suggested here; that in addition to the commerce clause and the 14th amendment, Congress should definitely utilize its powers under the 13th amendment in passing the pending bill.

Justice Harlan used "badges" of slavery. I said "vestiges" of slavery. I think we mean exactly the same thing.

My formalized proposal took the form of the bill, S. 2037, a copy of which is attached as appendix B. S. 2037 would have founded the bill solely on the 13th and 14th amendments. In committee, I offered S. 2037 as an amendment in the nature of a substitute for the administration bill. Subsequent to that time, I prepared another amendment in the nature of a substitute which would, if adopted, have based the bill primarily on the 13th and 14th amendments for protection of the human rights involved while simultaneously offering protection for the commercial rights sought to be protected by the administration bill. That proposal is attached as appendix C.

THE MECHANICS OF MY PROPOSALS

Let us examine S. 2037 and the subsequent proposal for a moment.

S. 2037 first sought to abolish certain discrimination in the use of all truly "public" accommodations. The discrimination to be eliminated was that discrimination which is a vestige or historical outgrowth of the slavery sought to be abolished by the 13th amendment to the U.S. Constitution. This proposition clearly had the 13th amendment as its foundation and therefore was closely related to protection of the Negro in his use of the public accommodations.

Secondly, S. 2037 sought to prevent discrimination against a person seeking to exercise his human right to move freely from place to place, where such discrimination hindered him directly or indirectly in the exercise of this right. Clearly, when a traveler can't find lodging or food for his family on the same basis as such accommodations are offered to other travelers of a different color, the human right to move about is severely diminished.

Thirdly, S. 2037 sought to prohibit discrimination in the use of public accommodations which would deny or impair any right or incident of citizenship protected by the 14th amendment.

Although I have set out what I believe to be a full justification for these proposals in my brief, appendix A, I would like at this point to set forth in a most general way how my proposals would operate, and compare this operation with the administration's bill.

THE FOUNDATION AND OPERATION OF MY PROPOSALS

From my reading of the legislative history of the 13th and 14th amendments to the U.S. Constitution, I concluded that the intention of the framers to elevate the freed slaves to full civil freedom has been sidetracked by history. Various judicial, legislative, and executive obstruction have fallen across the path to full citizenship.

In the last 10 years, however, great transformations have taken place in the courts in their consideration of civil rights problems.

The case of *Brown* v. *Board of Education* established the principle that segregation in itself was a wrong that the Federal courts could enjoin when the State or its agency was involved.

Cases involving sit-in demonstrations overturned State convictions for criminal trespass on the grounds that the statutory or other official State ground for basing the prosecution operated to deny equal protection of the laws.

The development of the Federal power to enjoin State-tainted activities is skillfully and adequately set out in the law review articles on this subject in appendix D. Note also recent Supreme Court decisions in this area set out in appendix E.

Similarly, the executive branch has undertaken some reform in hiring and supervisory practices relating to racial discrimination, but has not yet approached full exercise of its powers in this area.

The Congress, in the Civil Rights Acts of 1957 and 1960 commenced a program of reform leading ultimately toward fulfillment of the objectives of the post-Civil War amendments.

It is notable however that each of the branches of the Federal Government has been called upon to use or has used an indirect means to support a Federal policy against racial discrimination. The judiciary has had to stretch the concept of "State action" close to its

expandable limits. (See article on concurring opinions of Mr. Justice Douglas, app. D.) As carefully noted in the Texas Law Review article in appendix D, State action can be found to some degree in almost every private transaction. Reason dictates that at some point no causal nexus should be found between the State participation and the act sought to be prevented. What is the limit of the court's power at that terminus?

The executive branch, through the Department of Defense, has sought to withhold the purchasing power of individual members of the Armed Forces from communities reluctant to acknowledge this Federal policy. Clearly, a military boycott of segregated accommodations is not a strict defense objective.

Finally, the Congress is being called on to use indirect legislative means to enforce this Federal policy. The Attorney General asked this committee, as reported on page 19 of the hearings, to legislate protections for human beings in their use of the common privileges by using the same source of Federal power as was used in the Federal Insecticide, Fungicide, and Rodenticide Act; the Live Stock Contagious Disease Acts; the Gambling Devices Act of 1962, and other assorted acts which appear in appendix G. A brief look at these previous exercises of Federal legislative power under the commerce clause make it demonstrably clear that the bill we now report out is more than an indirect legislative device. It is an illogical attempt to treat humans as chattels with rights arising only from commerce.

I am unable to find any rational relationship between the previous exercises of Federal legislative power under the commerce clause and the right we now seek to protect. The shortest distance between a wrong and a remedy is a direct legislative approach.

Having cognizance of the wrong and a historical look at the power the post-Civil War amendments vested in Congress I concluded that my approach, as formalized in S. 2037 met most of the needs.

First, S. 2037 was direct. I sought to abolish the historical consequences of slavery and enable the son of the slave to attain the full stature of citizenship. The bill didn't concern itself with commerce. A person seeking protection of the bill wouldn't need to make a series of educated guesses about the establishment's relationship to interstate commerce. The bill applied to all public establishments.

Secondly, the bill called into play a heretofore little used provision of the 14th amendment, the 1st clause of the 1st section. In the light of the legislative history of the 14th amendment I felt that this clause when read together with section 5 of the 14th amendment offered a foundation for a comprehensive public accommodations bill. The first clause states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

The fifth section gave Congress the power to legislate to enforce the amendment.

Federal citizenship was made dominant over State citizenship, reversing the pre-Civil War status of citizenship. Congress acquired new obligations to persons born or naturalized within the jurisdiction of the United States.

To say that there are rights and duties flowing from the status of citizenship is to state the obvious. The rights to protection abroad

and access to public office at home are rights flowing from citizenship. Military service and taxes are typical obligations. Since Federal citizenship is dominant, the Federal Government has the power to define and enumerate the rights inherent in such citizenship and protect those rights with direct and primary legislation. The power of definition and enumeration arises from and is limited by the Constitution.

THE CONSTITUTIONALITY OF MY PROPOSALS

It was clearly an objective of the 13th and 14th amendments to remove the Negro from slavery and elevate him to full citizenship. A reading of the legislative history confirms this. Thus, the 1st clause of the 1st section of the 14th amendment is the proper foundation for my approach.

From both civil rights opponents and proponents I have heard the claim that the 14th amendment cannot sustain this bill because the 14th amendment is a prohibition against State action. Surely, many cases make this point. But no case so saying has had under consideration the first clause of the first section. In the language of that clause there is no requirement that there be State action. (See also the previous mentioned comment of Dean Griswold on this point.)

The *Civil Rights* cases of 1883 are not a bar to this bill. Not only have the foundations on which those decisions were based been repudiated by history, but my bill calls into aid a new and different provision of the 14th amendment. Additionally, the limitations on the 13th amendment which appear in those cases are overcome by my bill's determination that there are vestiges of slavery which Congress can seek to eradicate under section 2 of the 13th amendment. Congress has the power to make such a determination. See the article by tenBroeck, appendix F.

Finally, in order to get the proposal before the Senate, I combined my approach with the administration approach and offered the combination as a substitute in committee. The amendment was tabled. The combination appears as appendix C. As you will notice, the emphasis of the combination approach is still on the moral grounds, the grounds of human rights. The administration approach was in no way weakened; the commerce clause was only put in its proper perspective as a proposal to protect commercial rights, not human rights.

This combination of approaches is broad in scope. It is broader and stronger than the administration bill alone. To my mind it is also more direct and more honest. It treats man as man with rights flowing from his existence. It fills the present void between moral words and legislative deeds. Note the striking similarity between the Attorney General's presentation before the committee and the objectives of my proposals.

The Attorney General recognized the affront to citizenship on page 24 of the hearings when he said:

> * * * for most of the past hundred years we have imposed the duties of *citizenship* on the Negro without allowing him to enjoy the benefits. We have demanded that he obey the same laws as the white man, pay the same taxes, fight and die in the same wars. Yet, in nearly every part of the coun-

> try, he remains the victim of humiliation and deprivation no white *citizen* would tolerate. [Emphasis supplied.]

And, indeed, he alluded to the same combination of 13th and 14th amendment foundations that I have proposed when he said on the same page:

> with the adoption of the 13th, 14th, and 15th amendments, the American Negro was freed from slavery and made a citizen in full standing—on paper at least.

And at page 18 he said:

> Plainly, when a customer is turned away from (a public accommodation) because of the color of his skin, it imposes a *badge of inferiority* on that *citizen* which he has every right to resent.

I hope, if S. 1732 comes to the floor, that those concerned with the dignity of man will give some thought to my proposals, keeping in mind that:

> The issue before the Congress and the people is not so much the right of a dollar to pass from State to State as it is the right of man to pass freely across a great nation regardless of his race.
>
> The issue is not an interstate hamburger at a shabby lunch counter, but the right of a citizen to purchase sustenance.
>
> The issue is not whether an inn or motel is on Route 66 or a country subroad, but whether there is room in any inn for a citizen who happens to be black and weary.
>
> The issue is not whether this great Nation suffers a diminishment in its gross national product, but whether the dignity and humanity of man as man shall be forever chained to slavery's progeny.

Man is not an article of commerce, and as a citizen he deserves to be protected because he is a citizen and not because he has a dollar in his pocket.

APPENDIX A

PUBLIC ACCOMMODATIONS

Brief in support of the amendment proposed by Senator Winston L. Prouty to S. 1732.

I. THE HUMAN RIGHT TO MOVE ABOUT

The fundamental right of the people of the United States to move freely and easily from place to place is a right older than the Constitution itself.

The wide open spaces of the American Colonies had great appeal for English subjects who were the victims of restrictions on freedom of movement in the mother country.

Great unhappiness and frustration was caused by the statute of apprenticeship passed in Queen Elizabeth's reign which kept a man from going to a new town where workmen were badly needed. Indeed, on the eve of our Declaration of Independence it was said of England:

"[It] is often more difficult for a poor man to pass the artificial boundary of a parish, than an arm of the sea or a ridge of high mountains * * *" [1]

Although freedom of movement was universally recognized in the new country, relatively little legislation was enacted by the colonists on this basic freedom. One of the more significant provisions was put into the Massachusetts Body of Liberties in 1641: "Every man of or within this Jurisdiction shall have free libertie, not with standing any Civill power, to remove both himselfe and his familie at their pleasure out of the same, ..."

This generous attitude about outgoing settlers was accompanied by liberality toward incoming persons:

"If any people of other Nations professing the true Christian Religion shall flee to us from the Tiranny or oppression of their persecutors, or from famyne, warres, or the like necessary and compulsarie cause, They shall be entertayned and succoured among us, according to that power and prudence God shall give us."

The people of Rhode Island, viewing the right to move about freely as a fundamental right, got a clause inserted in their charter which gave each person the lawful right "to passe and repasse with freedome, into and through the rest of the English Collonies, upon their lawful and civill occasions."

With or without sanction in law, freedom of movement within the Colonies was nurtured and came into full bloom.

It was given formal recognition in and was guaranteed by the Articles of Confederation. The crystal clear language of the fourth of these articles clothes the right to pass freely from State to State with all those incidents which are necessary to make it a practical, as distinguished from a theoretical, freedom. The language speaks for itself:

[1] Smith, "Wealth of Nations," book 1, near the end of ch. 10.

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States * * * shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce * * *"

In exercising his free ingress and regress to and from other States, the free citizen, under the Articles of Confederation, was entitled to all privileges and immunities of free citizens in the several States and was empowered to enjoy all the privileges of trade and commerce.

The framers of the Articles of Confederation knew that the right to pass freely from State to State would be an empty right if it did not carry with it as an inseparable incident "all the privileges of trade and commerce."

The traveler, however far he journeys, may need food, drink, and repose. The inns and other places of public accommodation of the time were few and far between and one of the necessary privileges of trade and commerce was the privilege of ready access to public accommodations.

It had been well settled for hundreds of years prior to the Articles of Confederation that the innkeeper was absolutely bound to receive and serve persons applying for food and lodging unless he had some reasonable ground for refusing to furnish them. This common law principle was recognized as early as the reign of Henry VI (1422–61) in an anonymous case, as well as in 14 Henry VII, folio 21, in the case of *Rex* v. *Bishop of Chester*.

The principle was also upheld as the law by courts in many of the several States, including Delaware, Virginia, North Carolina, and Alabama.

The most often cited case with respect to the common law duty of innkeepers is *Rex* v. *Ivens*, 7 Car. & P. 213, which states simply: "The Innkeeper is not to select his guests."

In *Beale* v. *Posey*, 72 Ala. 323, 1882, the Alabama court likened the innkeeper to the common carrier and noted that "Each is engaged in *public employment*, bound, in the absence of reasonable grounds for refusal, to serve all having a necessity for their services."

It is obvious that even prior to the adoption of the Constitution of the United States, a free inhabitant thereof could pass freely and easily from State to State and enjoy all the privileges of trade and commerce.

Article IV, section 2 of the Constitution, like article IV of the Articles of Confederation, was designed to guard the liberty of each citizen to travel unhampered and unobstructed throughout the several States.

Opinions of the courts vouchsafe this conclusion. For example, *Corfield* v. *Coryell*, 6 Fed. Cas. 546, 551; *Passenger* cases, 7 How. 283, 492; *Crandall* v. *Nevada*, 6 Wall. 35, 49; *Paul* v. *Virginia*, 8 Wall. 168, 180; *Ward* v. *Maryland*, 12 Wall. 418, 430; *Slaughter-House* cases, 16 Wall. 36, 76; *United States* v. *Wheeler*, 254 U.S. 281, 290, 297; *Truax* v. *Raich*, 239 U.S. 33.

The first paragraph of the second section of the fourth article of the Constitution is in these words:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

The legal consequences of this provision depend—

1. On the personal application of the words, "the citizens of each State, and—

2. On the rights encompassed within the phrase, "all privileges and immunities of citizens.

The interpretation of the term "citizens of each State" in article IV, section 2 of the Constitution, was, in the early history of this country, judicially considered only in cases where the question was: Can persons of The Negro race be citizens within the meaning of this clause?

There were a number of State statutes prohibiting the immigration of free colored persons [1] and their validity was discussed in a number of cases.

According to the cases interpreting these statutes, it was the unanimous view that they would be unconstitutional were Negroes to be held citizens of a State within the meaning of article IV, section 2.

The question of the constitutionality of those State laws which prohibited the immigration of free colored persons, or of those of some seaboard States which subjected free colored persons on board vessels, while within their harbors, to imprisonment, etc., were never brought before the tribunals of the National Government even as late as 1862.

In the case of *Dred Scott* v. *Sanford*, 19 Howard 393, et seq. Chief Justice Taney, delivering the opinion of the Court, held that slaves and descendants of slaves were not intended to be included under the word "citizens" in the Constitution and could, therefore, claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.

Basically, it was the view of Chief Justice Taney that both the Congress and the States were without power to make the Negro a citizen within the meaning of that term in article IV, section 2. He was of the opinion that Negroes were not in the minds of the framers of the Constitution "when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union." [2]

Yet Taney did admit that if colored persons were entitled to the privileges and immunities of citizens, they would be exempt from the operation of the special laws and from the police regulations which affected them. "It would give," he said, "to persons of the Negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, * * *"

Although Taney erred in deciding what persons were entitled to the protection of article IV, section 2 of the Constitution, he was correct in assessing the broad scope of this provision.

[1] See references at bottom of p. 279, Hurd, "Law of Freedom and Bondage in the United States," vol. 2
[2] P. 412, *Dred Scott* decision.

This is brought sharply to focus in his dissenting opinion in the *Passenger*, cases, 7 Howard, 283, 492:

"We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

The right to travel as seen by Taney was the right to move with freedom both between and within the several States.

Justice Curtis in the *Dred Scott* case took sharp issue with the views of Chief Justice Taney. On pages 573 and 574 of the decision, he pointed out that the constitutional law of several of the States made Negroes citizens of such States at the time of the ratification of the Articles of Confederation. He goes on to discuss events that took place when the Articles of Confederation were under consideration by the Congress, and he has this to say:

"The fourth of the fundamental articles of the Confederation was as follows: 'The free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all the privileges and immunities of free citizens in the several States.'

"The fact that free persons of color were citizens of some of the several States, and the consequence, that this fourth article of the Confederation would have the effect to confer on such persons the privileges and immunities of general citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive, that the fourth article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected.

"On the 25th of June, 1778, the Articles of Confederation being under consideration by the Congress, the delegates from South Carolina moved to amend this fourth article, by inserting after the word 'free,' and before the word 'inhabitants,' the word 'white,' so that the privileges and immunities of general citizenship would be secured only to white persons. Two States voted for the amendment, eight States against it, and the vote of one State was divided. The language of the article stood unchanged; and both by its terms of inclusion, 'free inhabitants,' and the strong implication from its terms of exclusion, 'paupers, vagabonds, and fugitives from justice,' who alone were excepted, it is clear that, under the Confederation, and at the time of the adoption of the Constitution, free colored persons of African descent might be, and by reason of their citizenship in certain States, were entitled to the privileges and immunities of general citizenship of the United States."

While Justices Taney and Curtis differed in their interpretation of the words "the citizens of each State," in article IV of the Constitution, they were not at odds on the rights encompassed within the phrase "all privileges and immunities of citizens."

There remains then to ask whether the right of free movement was an incident of State citizenship or of national citizenship prior to the adoption of the 14th amendment in 1868.

Certainly, in the earlier cases there are statements suggesting that the right to move about freely is an incident of State citizenship, guarded against discriminatory State action by article IV, section 2, of the Constitution. See *Corfield* v. *Coryell* 4 Wash. C.C. 371, 381; *Paul* v. *Virginia*, 8 Wall. 168, 180; *Ward* v. *Maryland*, 12 Wall. 418, 430; *U.S.* v. *Wheeler*, 254 U.S. 281, 298.

According to the dicta of those cases, a State could not hinder the free movement of persons who were not residents of that State. This is true because the fourth article forbids a State to discriminate against citizens of other States in favor of its own.

What happens, however, if a State imposes restrictions on freedom of movement which apply alike to both residents and nonresidents? This question arose in the case of *Crandall* v. *Nevada*, 6 Wallace 35, which was decided in 1867 prior to the adoption of the 14th amendment.

The Legislature of Nevada enacted that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and that the proprietors, owners, and corporations so engaged should pay the said tax of one dollar for each and every person so conveyed or transported from the State.

Crandall, who was employed by a stage company, refused to pay the tax. He was arrested and convicted. From the highest court of Nevada, he appealed on the ground that the State law violated the Constitution of the United States. The U.S. Supreme Court struck down the State tax imposed upon "every person leaving the State."

Mr. Justice Miller, in writing the opinion, did not reply upon article IV, section 2. Indeed, he could not so rely because the State statute applied to both citizens and noncitizens.

The reach of the *Crandall* case is at once long and significant. Its holding meant that freedom of movement was not a freedom protected solely by article IV, section 2. It meant as well that a State may not restrict the locomotion of its own citizens.

Crandall had, too, an even greater signification because it held that the right to move anywhere in the land without impediment was a right of national citizenship. The right was seen as essential to the national character of our Government and was no less real because it was implied rather than expressly stated.

Nowhere in the *Crandall* opinion is it said that the right of free movement is a right of State citizenship safeguarded only by article IV, section 2. The right secured in this case was a right of national citizenship, finding its origin in the "implied guarantees" of the Constitution.

This view of the *Crandall* case is reaffirmed in the *Slaughter-House* cases (16 Wallace at pp. 75–79).

What then may Congress do to shield the liberty of transit which Mr. Justice Miller declared to be "protected by implied guarantees" of the Constitution?

We find our answer in the "necessary and proper" clause of article I, section 8, of the fundamental charter, as elucidated by Marshall's classic opinion in *McCulloch* v. *Maryland*, 4 Wheaton 316: "Let the end be legitimate," he wrote, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Indeed, it has been uniformly held that the Federal Government has the power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the Constitution (*United States* v. *Reese*, 92 U.S. 214; *Strauder* v. *W. Va.*, 100 U.S. 303).

In using such power, Congress can enact laws for the protection of citizens both as against the States and individuals in the States.

In the clear language of Mr. Justice Burton: "Cases holding that those clauses [of the 14th amendment] are directed only at State action are not authority for the contention that Congress may not pass laws supporting rights which exist apart from the 14th amendment." [4]

Since there is a right guaranteed by the Constitution to pass freely throughout this broad land of ours, it must be seen as a right in full measure and not as a right in vacuo. In the words of Mr. Justice Field, who spoke for the Supreme Court in *Cummings* v. *Missouri:* "The Constitution deals with substance, not shadows."

We come now to the query: Does the vitality of liberty of transit, a liberty of national citizenship, ebb and flow with every whim of the State and every caprice and bias of the lunch-counter proprietor?

Or to put it another way, is freedom of movement an elusive and ephemeral thing whose journey's end is reached when the citizen traveler is hungry and cannot purchase food or is weary and can find no repose?

Certainly the right of locomotion, on Main Street and on the great highways of the Nation, carries with it the right to secure the sustenance and sleep upon which further locomotion may depend. If liberty of transit means less than that, then it "is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."

II. THE 13TH AMENDMENT AND THE POWER OF CONGRESS

I have shown that before and under the Constitution of the United States as originally adopted, it was the right of each citizen to pass freely from place to place and to enjoy as an attribute of that right all the privileges of trade and commerce.

The purpose of this section is to examine the 13th amendment and to determine whether consistent with its spirit and scope, Congress may pass a valid law to prevent discrimination or segregation in public accommodations where such discrimination or segregation is a vestige or historical outgrowth of slavery.

In construing this constitutional provision, let us follow the precept of *Ex parte Bain*, 121 U.S. 1, 12, that "It is never to be forgotten that, in the construction of the language of the Constitution * * *, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."

The safest rule of interpretation will be found to be to look to the nature and objects of the particular powers, duties, and rights, "with all lights and aids of contemporary history." *Prigg.* v. *Com.*, 16 Peters 60.

So then shall we proceed to consider the state of things which existed before and at the time the 13th amendment was adopted, the mischiefs complained of or apprehended, and the remedy intended to be provided for existing or anticipated evils.

When the Civil War erupted, slavery of the African race existed in 15 States of the Union. The legal code fettering persons in that condition was everywhere harsh and severe. *U.S.* v. *Rhodes*, 27 Fed.

[4] *Collins* v. *Hardyman* (341 U.S. 664), dissenting opinion of Mr. Justice Burton with whom Mr. Justice Black and Mr. Douglas concur.

Cas. p. 793. A distinguished writer said: "They cannot take property by descent or purchase; and all they find and all they own belongs to their master. They cannot make contracts, and they are deprived of civil rights. They are assets for the payment of debts, and cannot be emancipated by will or otherwise to the prejudice of creditors." 2 Kent. Comm. 281, 282.

Indeed, it was held in South Carolina that an indictment would not lie for the homicide of a slave unless a statute so directed. *State* v. *Fleming* (1847) 2 Strobhart's R., 464.

Bizarre and cruel punishments were an accepted fact. In Maryland, slaves could have their ears cropped on order of a justice, and in another State, rewards were given for the scalps of fugitive Negroes.[5]

The eminent Kent, cited previously, tells us that colored persons who tried to write or to read the Scriptures could be punished by flogging. I quote him in part:

"In Georgia, by an act of 1829, no person is permitted to teach a slave, a negro, or a free person of color to read or write. So in Virginia, by a statute of 1830, meetings of free negroes to learn reading or writing are unlawful, and subject them to corporal punishment; and it is unlawful for white persons to assemble with free negroes or slaves to teach them to read or write. The prohibitory act of the legislature of Alabama passed at the session of 1831–2, relative to the instruction to be given to the slaves or free colored population, or exhortation, or preaching to them, or any mischievous influence attempted to be exerted over them, is sufficiently penal. Laws of similar import are presumed to exist in the other slaveholding states, but in Louisiana the law on the subject is armed with tenfold severity. It not only forbids any person teaching slaves to read or write, but it declares that any person using language in any public discourse from the bar, bench, state, or pulpit, or any other place, or in any private conversation, or making use of any sign or actions having a tendency to produce discontent among the free colored population or insubordination among the slaves, or who shall be knowingly instrumental in bringing into the state any paper, book, or pamphlet having a like tendency, shall, on conviction, be punishable with imprisonment or death, at the discretion of the court."

Those who now hold that slavery meant only a "condition of enforced compulsory service of one to another," have turned their eyes from history and their hearts from human rights.

A truer estimate of slavery's scope was possible for judges at the time than distorting distance is likely to vouchsafe.

In the *Dred Scott* case, Mr. Justice Curtis gives us such an estimate: "* * * the status of slavery embraces every condition, from that in which the slave is known to the law simply as a chattel with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor." *Scott* v. *Sanford*, 19 Howard 393, 623 et seq.

Involuntary servitude, then, is not synonymous with slavery. Rather it is only one of its conditions. That more than involuntary servitude is abolished by the 13th amendment is obvious from reading its provisions.

"Section 1. Neither Slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly con-

[5] The former was made possible in Maryland by an act of 1723, the latter by a South Carolina act of 1740 "for the better ordering and governing Negroes and other slaves in this province."

victed, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

The "Black Codes" of the first half of the 19th century are indeed a guide to what slavery was all about and to what the 13th amendment was designed to abolish.

I have made an extensive survey of the State laws in existence prior to December 1865, when ratification of the 13th amendment was proclaimed. In areas where slavery subsisted, all States had on their books statutes restrictive and oppressive of the Negro—both slave and free.[6]

Especially limited was the free mobility of the slave and even the free Negro. He could not ride horseback or leave the plantation of his master without permission duly signed. He was prohibited from assembling to learn, and whites were prohibited from teaching him.

Here in the District of Columbia, the slave had a 10 o'clock curfew and could not frequent the Capitol square without business to perform. The free Negro could not settle where he pleased due to laws which would return him to slavery or make it financially prohibitive to stay.

In Virginia, a free Negro or a slave was prohibited from going at large, and free Negroes could not immigrate into the State.

In Kentucky a slave could not work for hire.

Maryland prevented not only slaves, but also free Negroes from using boats for purposes other than that of the master on the Potomac River.

In North Carolina, a slave could not own or attempt to sell cattle.

In Missouri, Negroes meeting to hold instruction—going to school—was an unlawful assemblage.

And, these "Black Codes" were not confined solely to the States of the South.

The District of Columbia provided for 40 lashes for any meeting of Negroes at night.

The common law made no distinction on account of race or color, and slavery, being contrary to natural right, was developed only by State and local law. Whatever conditions shall attend the status of slavery must depend on the law which creates and upholds it.

Mr. Justice Curtis informs us that "not only may the status of slavery be created and measured by [State and local] law, but the rights, powers, and obligations, which grow out of that status, must be defined, protected, and enforced by such laws."

If then the status of slavery may be measured by State and local law, it would serve us well to examine that law in order to determine what rights slaves had in respect of the facilities of public accommodations.

Under the laws of Georgia, white persons were prohibited from selling provisions or any other commodities to any slave unless the slave could produce a ticket from his or her owner, manager, or employer.[7]

In South Carolina, peddlers were forbidden to deal with slaves. Any slave could not be absent from home without a ticket or purchase

[6] For a complete and detailed analysis of these Black Codes, an excellent study is "The Law of Freedom and Bondage in the United States by John Codman Hurd, Little, Brown & Co., Boston, 1862.

[7] This was by reason of a statute enacted in 1765.

any commodity without a ticket from his master. Slaves without tickets could be seized and punished by any white person.

Tennessee prohibited trading with slaves, and North Carolina even prevented slaves from trading with free Negroes. In Arkansas, tavern keepers and other managers of public accommodations were not permitted to sell liquor and other commodities to slaves.

These and numerous other examples of laws restricting the Negro in his use of public accommodations were part and parcel of the institution of slavery; and as Mr. Justice Curtis said, that institution may be measured by the statutes which created and protected it.

"Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave States. Many of the badges of the bondman's degradation were fastened upon them. Their condition, like his, though not so bad, was helpless and hopeless" (U.S. v. Rhodes, 27 Fed. Cases, 793).

Here, then, is the state of law and here the state of things which existed before and at the time the 13th amendment was adopted. We have reviewed the mischiefs complained of and we shall later look at the remedy intended to be provided for these evils.

Throughout the Civil War, Negroes had shown great sympathy with the Union cause. By the time it was ended, 200,000 had become soldiers in the Union armies. The colored race had strong claims upon the justice and generosity of the Nation. Immense considerations of policy, decency, and right were added factors.

The simple abolition of involuntary servitude, "leaving [antislave] laws and this exclusive power of the States over the emancipated in force, would have been a phantom of delusion." Legislative burdens on the Negro would have been exacerbated:

"Under the guise of police and other regulations, slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing to those intended to be benefitted" (*U.S.* v. *Rhodes*, 27 Fed. Cases 794).

Thus far we have endeavored "to place ourselves as nearly as possible in the condition of the men who framed [the 13th amendment]," using the lights and aids of contemporary history.

Although the Supreme Court has relegated that amendment to a position of insignificance, indicating that it did nothing more than to abolish the ownership of one man by another, such a view does not square with the legislative history of the 13th article.

Few, if any, of the judges who have given the amendment a limited scope have thought it worthwhile to review the proceedings of the Congress which proposed it in order to determine what it was that they were seeking to accomplish.

"There is hardly a question raised as to the true meaning of a provision of the old, original Constitution that resort has not been had to Elliott's Debates, to ascertain what the framers of the instrument declared at the time that they intended to accomplish * * * "[8]

My study of the unhappy events that led up to the 13th amendment, and the statements of those who sponsored and favored, as well as those who objected to its submission and passage, convinces me that

[8] *Royall*, 4 So. L. Rev. (N.S.) 558, 563 (1879).

one of the chief objects that the provisions of the amendment were intended to accomplish was to establish freedom and to protect all men, black and white, bond and free, fully and equally, in the enjoyment of all the essential rights which inhere in and constitute that freedom.

It may be that the Civil War was the immediate cause of the courage of the Congressmen who brought about the adoption of the amendment; but it was the amendment itself, and not the war to which the Negro *both slave and free* might look for the assurances he needed that, as a man with dignity, he would now be afforded the dignity of man.

Senator Trumbull, of Illinois, the leader of the proponents of the amendment and chairman of the Senate Judiciary Committee, left no doubt about it. As he saw it, the task of Congress was "to abolish slavery, not only in name but in fact." Because "it is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights," Congress must "give effect to the provision * * * making all persons free." [9]

Note with care that Trumbull saw in the emancipating amendment congressional power to protect the right of the Negro to come and go, to buy and sell. He did not conceive the right to be so narrow as to exclude the privilege of access, on an equal basis with whites, in the use of public accommodations.

The indictment of the slavery the 13th amendment was intended to abolish was dramatically set forth by Henry Wilson, an eloquent abolitionist Senator from Massachusetts. Wilson declared:

"If this amendment shall be incorporated by the will of the Nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit * * *."

The object of the amendment, then, was to do away with all vestiges of the institution of slavery and not simply to abolish but one of its conditions.

That the opponents of the amendment in Congress recognized this intention is clear from the statements of Representative William S. Holman, of Indiana, an ardent foe of the amendment:

"[The amendment] confera on Congress the power to invade any State to enforce the freedom of the African in war or peace. What is the meaning of all that? Is freedom the simple exemption from personal servitude? No, sir, mere exemption from servitude is a miserable idea of freedom * * *." [10]

Other opponents knew perfectly well that the 13th amendment had within it the means by which the slave would be free in every sense of that term

Specifically, one opponent of the 13th amendment, Anson Herrick of New York, contended that with the 13th amendment,

"The slavery issue * * * is legitimately merged in the higher issue of the right of the States to control their domestic affairs * * *." [11]

Perhaps more succinctly, and more clearly, Robert Mallory of Kentucky, a bitter opponent of the amendment, concluded:

"* * * you propose to leave them [the emancipated Negro] where they are freed, and protect them in their right to remain there. You do not intend, however, to leave them to the tender mercies of those

[9] Congressional Globe, 39th Cong., 1st sess., p. 43 (1865).
[10] Congressional Globe, 38th Cong., 1st sess., p. 2602.
[11] Congressional Globe, 38th Cong., 1st sess., p. 2615.

States. You propose by a most flagrant violation of their rights to hold the control of this large class in these various States in your own hands." [12]

One by one the opponents of the 13th amendment made eloquent declamations about its sweeping scope. They particularized their fears and apprehensions and viewed the measure as utterly revolutionary.

Fernando Wood, Democrat of New York, thought the new article would subvert the whole constitutional system.

The remarks of Representative Kelley of Pennsylvania did nothing to quiet the fears of those who felt the amendment represented a great extension of the power of the Central Government. Kelley had this to say:

"This proposed amendment is designed * * * to accomplish the very purpose with which they charged us in the beginning, namely, the abolition of slavery in the United States and the political and social elevation of Negroes to all the rights of white man." [13]

From all this, are we to conclude that there is no end to the authority of the Congress under the 13th amendment? The Democrats in Congress also feared that the 13th amendment clothed the Congress with limitless power to interfere with the administration of justice and law within the States. Not so, said Representative Joseph Crinnell of Iowa. He insisted that the amendment did not include political enfranchisement of the Negro. Natural rights, to which the amendment speaks, is one thing but political franchises are quite another. The right to vote is not a natural right, not a right of citizenship. "If," said Crinnell, "political rights must necessarily follow the possession of personal liberty, then all but male citizens in our country are slaves." [14]

What the 13th amendment actually meant is perhaps best determined from the debates and speeches of Senator Lyman Trumbull. The Senator from Illinois leaves no doubt as to precisely what that amendment actually means: It recognizes in all citizens of the United States the right to freedom, to the exercise of natural rights of man which exist independently from the adoption even of the Constitution itself, and it provides to the Congress the implements necessary to guarantee and to enforce these special rights for any aggrieved individual.

In a word, the paramount purpose of article XIII was to abolish slavery and to secure for men those rights which slavery denied.

Among those rights which slavery denied the Negro was the right to buy a meal, a loaf of bread, or even a hoe in the accommodation of his choice.

Senator William Stewart, moderate, from Nevada, said that after the 13th amendment Congress could forevermore guarantee the freedman "a chance to live, a chance to hold property, * * * a chance to enjoy his civil rights, a chance to rise in the scale of humanity, a chance to be a man * * *."

We have given him freedom, he said, "and that implies that he shall have all the civil rights necessary to the enjoyment of that freedom."

[12] Congressional Globe, 38th Cong., 1st sess., p. 2982-2983.
[13] Congressional Globe, 38th Cong., 1st sess., p. 2987.
[14] 39 California Law Review, 181, ten Broek "The 13th Amendment," Congressional Globe, 38th Cong. 2d sess., 302 (1865).

Observe the use of the word "all." It is found again in the remarks of Senator Henry S. Lane, from Indiana, who argued:

"They [the Negroes] are free by the constitutional amendment * * *, and entitled to all the privileges * * * of other free citizens of the United States."

He declared that it is the especial duty of Congress by the second section of that amendment, by appropriate legislation to carry out that emancipation.

Senator Lane continues in this vein:

"If that second section were not embraced in the amendment at all your duty would be as strong, the duty would be paramount, to protect them in all rights as free and manumitted people."

Senator John Sherman, of Ohio, maintained that the amendment would protect "the right to go anywhere within the United States" and gave Congress "the power * * * to secure all * * * rights of freedom by appropriate legislation."

The slavery which was within the scope of the 13th article moved way beyond the personal burden of the slaves and the characteristics of immediate bondage. Congressional debates reiterated what the history of the abolition drive had already made unmistakably clear. The free colored person, South and North, was only little less oppressed, imposed upon and restricted then his enslaved brethren. He was bowed by the weight of all the incidents, burdens and badges of slavery save only one, the condition of compulsory labor. "The Great Crusade" had as its object the freedom of the so-called free Negro as well as that of the "hapless bondman" and the liberty of both was intended to be secured by the 13th amendment.[15]

The liberty which the 13th article would bring into being was itemized time and time again in the congressional debates. According to the men in Congress at that time the amendment would "convert into a man that which the law had declared to be a chattel." It would "bring the Constitution into avowed harmony with the Declaration of Independence." It would "secure to the oppressed slave his natural and God-given rights," "the rights of mankind." The amendment would signify that the "rights of mankind without regard to color or race are respected and protected."

Let us turn again to the actual text of the 13th amendment:

"Section 1. Neither Slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

That the first clause of the 13th amendment was self-executing presents no problem to any man who can read. Without any other provision than this section, Congress would have had authority to give complete effect to the abolition of slavery thereby decreed. It would have been authorized to put in requisition the executive and judicial, as well as the legislative power, with all the energy needed for that purpose.

[15] The work of ten Broek previously cited, at p. 179.

In the words of Judge Swayne:

"The second section of the amendment was added out of abundant caution. It authorizes Congress to select, from time to time, the means that might be deemed appropriate to the end."[16]

The second section was intended to give expressly to Congress the power to bestow "practical freedom" upon the Negro and to leave no room for doubt or cavil upon the subject.

Judge Swayne declared that the results have shown the wisdom of this action. "Almost simultaneously with the adoption of the amendment, [a] course of legislative oppression was begun" and the black codes, customs, and practices of the late 19th century became as harsh and severe as those slave codes of the 18th and early 19th centuries.

At least two of the Justices of the Supreme Court, in opinions delivered at circuit before the post-Civil War reaction had set in, took the view that the 13th amendment was broad in scope and carried with it ample authority to undo the continued oppression of the colored people.[17]

It was a Supreme Court nearly two decades removed from the institution of slavery that shafted the heart of the 13th amendment in the *Civil Rights* cases.

It was a court that, save Harlan, paid no heed to the legislative history of that amendment, a practice that had been adhered to by jurisconsultants from the first days of the original Constitution.

Even the misguided decision in the *Civil Rights* cases concedes that: "Under the 13th amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not."

I believe with Senators Trumbull, Stewart, and Lane, and, indeed, the overwhelming majority of the men of the 38th and 39th Congresses, that the 13th amendment gave the Negro *freedom* and the legislative branch *power* to protect all the civil rights necessary for the enjoyment of that freedom. And that high on the scale of these rights is the full and free use of public accommodations, devoid of any discrimination or segregation which is a vestige or historical outgrowth of slavery.

We meet now to consider whether the 13th amendment has all the majesty and force which its authors intended it to possess. We meet to consider a proposal offered pursuant to that amendment which strikes at a type of discrimination and segregation that had its origin in the weltering agony of slavery.

The overriding issue is whether the 13th amendment protects a right which slavery denied.

In evaluating the proposal I have submitted, I ask that you bear clearly in mind the principle in our jurisprudence: that an act of Congress is not to be declared unconstitutional unless the lack of power to pass it is so clear as to admit of no doubt. Every cavil is to be resolved in favor of the validity of the law.

---

[16] *U.S.* v. *Rhodes*, 27 Fed. Cases, 793.

[17] Justice Swayne in *U.S.* v. *Rhodes*, 27 Fed. Cases 785; Chief Justice Chase *In Matter of Elizabeth Turner*, 1 Abb. 85 (U.S. 1867). The *Rhodes* case involved the right of a Negro to testify against a white man in the courts of Kentucky, denied by the laws of that State. In the *Turner* case, the Chief Justice struck down under the "full and equal benefit of the laws" provision of the Civil Rights Act, a Maryland system for apprenticing freed Negro children to their former masters under conditions more rigorous than those applied to other apprentices. See also *Smith* v. *Moody*, 26 Ind. 299, 306 (1866); *People* v. *Washington*, 36 Cal. 658 (1869).

"The opposition between the Constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatability with each other" (*Fletcher* v. *Peck*, 6 Cranch 128).

"The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated" (*Cooper* v. *Telfair*, 4 Dall. (4 U.S.) 18).

"A remedial power in the Constitution is to be construed liberally" (*Chisholm* v. *Georgia*, 2 Dall. (2 U.S.) 476).

Liberty and slavery are opposed one to the other, and if you undo only one of the conditions of slavery, the condition of compulsory labor, you have the shadow of the former and the substance of the latter.

The Constitution, as amended by the 13th article, dedicated this Nation to more than the absence of involuntary labor. It consecrated the republic to freedom in every inch and corner of its vast expanse. Freedom in full measure, freedom for all ages and times, freedom in all public places—these are the aims of the mighty and majestic instrument of the 13th amendment.

Is it, indeed, too much to say that the amendment holds within it a power sufficient to prevent a man from being denied a ham sandwich when he is hungry and has the price to pay for it?

III. THE 14TH AMENDMENT AND THE RIGHTS OF CITIZENS

The scope and purpose of the 14th amendment must be gathered, said the *Slaughter-House* cases (16 Wall. 67, 68), from "the history of the times."

Before that amendment became the law of the land, the Constitution did not declare what persons born within the several States were citizens of the United States and Congress had no express power so to declare.

The only power specifically given Congress to legislate concerning citizenship was confined to the removal of the disabilities of foreign birth.

The Constitution left to the States the determination what persons, born within their respective limits, would acquire by birth citizenship of the United States.

The States rights argument was that insofar as there was a Federal citizenship, it arose out of State citizenship and was subordinate to it.

In debate on the "Force Bill," Mr. Calhoun said in the Senate:

"If by citizen of the United States he [another Senator] means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all the privileges and immunities of citizens in the several states; and it is in this and no other sense that we are citizens of the United States." For Mr. Calhoun's argument on the "Force Bill," see his Works, II, 242.

Afterward came the *Dred Scott* decision, *Scott* v. *Sanford* (19 Howard 393 (1857)). Its effect was to deny that national citizenship was a

necessary result of State citizenship; and it held that no State could confer citizenship upon one of African blood, at birth or later, so as to bring him within the protection of the constitutional provision for the enjoyment of privileges and immunities in the several States on a par with those enjoyed in the State of his citizenship.

The celebrated 14th amendment brought into the Constitution a definition of national citizenship and it made that citizenship the dominant and paramount allegiance among us.[18]

Justice Jackson, in *Edwards* v. *California*, spoke of the object of the citizenship clause when he declared:

"The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: 'Take heed what thou doest: for this man is a Roman.' I suppose none of us doubts that the hope of imparting to American citizenship some of this vitality was the purpose of declaring in the 14th amendment: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'"

Note carefully how the first clause of that amendment gave national citizenship supremacy. By its very terms one could be a citizen of the United States without being a citizen of any State.

Why this sweeping change in the concept of citizenship unless it carries with it certain fundamental rights, the abridgement of which—by man or State—the Constitution would no longer tolerate?

It is to those fundamental rights arising out of the citizenship clause of the 14th amendment that this section will be addressed.

True, there are other provisions of the 14th amendment, but they are largely negative in character and seek to prohibit the States from interfering with the privileges and immunities of citizens of the United States or from denying to any person due process of law or equal protection of the laws.

Since these propositions are negatively stated, the judiciary is their natural guardian and legislation is rarely needed for their implementation.

Clause 1, however, is positive in nature and must lean on an active legislative arm or else wither and lose its vitality. That it was meant to give more than mere nomenclature of citizenship is brought sharply to focus by Mr. Justice Harlan:

"The first clause of the first section—'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside'—is of a distinctly affirmative character. In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the State in which they respectively resided."[19]

The citizenship thereby obtained, by the Negroes, as a result of an affirmative grant from the Nation, may be secured, not solely by the judicial branch of the Government, but by congressional legislation of "a primary direct character."

This is so, said Harlan, "because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or

[18] *Edwards* v. *California*, 314 U.S. 160, 182; Jackson concurring.
[19] Dissenting opinion by Mr. Justice Harlan in the *Civil Rights* cases, 109 U.S. 3, 46 (1883).

State action. It is, in terms distinct and positive, to enforce 'the provisions of this article' of amendment; not simply those of a prohibitive character, but the provisions—all of the provisions—affirmative and prohibitive, of the amendment." [20]

The distinguished legal scholar Horace Edgar Flack, who canvassed newspaper coverage and speeches concerning the popular discussion of the adoption of the 14th amendment, asserts that:

"The declarations and statements of newspapers, writers, and speakers * * * show very clearly * * * the general opinion held in the North. That opinion, briefly stated, was that the amendment embodied the civil rights bill and gave Congress the power to define and secure the privileges of citizens of the United States." [21]

It is no novel theory then to suggest that the legislative branch has clear authority to define and protect the rights of "citizens" and to declare that among these rights is the right to full and equal enjoyment of public accommodations.

Representative Jonathan Bingham, who may without exaggeration be called the James Madison of the 14th amendment, since he wrote virtually all of it, pointed out that before the ratification of the 13th and 14th amendments it was forbidden by law and custom "to help a slave who was ready to perish; to give him shelter, or break with him his crust of bread." [22]

The distinguished and able Bingham would not concede for a minute that the 14th amendment left Congress powerless to act against individuals who deny rights to free citizens. These are his words:

"Who dare say, now that the Constitution has been amended, that the Nation cannot by law provide against all such abuses and denials of right as these in States and by States, or *combinations of persons*?" [23] [Emphasis supplied.]

Since clauses 2, 3, and 4 of the first section of the 14th amendment speak only of what a State may not do, it is patently clear that the Federal Government may move against "combinations of persons" only by virtue of the affirmatively stated citizenship clause and section 5 which gives Congress the power to enforce that clause.

It is small wonder then that Cooley says in his treatise on "Constitutional Limitations" (5th ed., p. 359, star p. 294:)

"The most important clause in the 14th amendment is that part of section 1 which declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. This provision very properly puts an end to any question of the title of the freedman *and others* of their race to the rights of citizenship."

Mr. Dawes, a Member of the 39th Congress which adopted the 14th amendment, placed an equally high value on the citizenship clause of that amendment:

"After the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens who sprang into being, as it were, by the wave of a magic wand. Still further, every person born on the soil was made a citizen and clothed with them all."

[20] Op. cit., note 9.
[21] Flack, "The Adoption of the Fourteenth Amendment" (1908) see pp. 153-154.
[22] Congressional Globe, 42d Cong., 1st sess., (1871), appendix, see pp. 81-85.
[23] Op. cit., note 6.

Dawes goes on to say:

"It is all these, Mr Speaker, which are comprehended in the words 'American citizen,' and it is to protect and to secure him in these rights, privileges, and immunities this bill [a civil rights measure] is before the House." [24]

Senator Howard was a coauthor of the 14th amendment in that it was a Howard modification that added the citizenship clause to that amendment. He gave an important speech on May 23, 1866, explaining what he had intended to accomplish. In summarizing Senator Howard's words, the Boston Daily Advertiser declared:

"The first clause of the first section was intended to secure to the citizens of all the States the privileges which are in their nature fundamental, and which belong of right to all persons in a free government. There was now no power in the Constitution to enforce its guarantees of those rights. They stood simply as declarations * * *. The great object of the first section, fortified by the fifth, was to * * * throw the same shield over the black man as over the white, over the humble man as over the powerful."

I have said that the scope and purpose of the 14th amendment must be gathered from the history of the times. Perhaps nothing indicates more clearly the scope of that amendment than the nature of the civil rights statutes approved by the men who actually framed the constitutional modification.

As an appendix to this section there will be a short survey of these laws, the nature of which spotlights the original understanding of the 14th amendment.

One can cull from these legislative enactments the peripheral intendments of the framers of the 14th amendment. It must be remembered that these civil rights acts above mentioned were enacted contemporaneously with the amendments in question by a Congress made up in good measure by the framers of these same amendments.

That the courts at subsequent times limited some of these enactments does not detract from the question of what was intended by the framers. The restrictive actions of the courts can be explained as the product of many forces—not the least of which was a feeling expressed by President Johnson and implied by Mr. Justice Bradley that the Congress was becoming inordinately powerful. The court undertook to redress the balance.

Another most important force at work was the oft-mentioned but clearly erroneous impression that oppressed Negroes had remedies available from the State.

One can readily see how a court, operating under these assumptions, might think the power balance of dominant importance.

Add to this consideration the fact that most of the statutes in question imposed criminal penalties for situations involving issues of morality and one can lend some sympathy to judicial hesitancy. But, however these decisions may be viewed, "the court departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted." (Justice Harlan, dissenting in the *Civil Rights* cases, 103 U.S. 3, 26.)

Despite the fact "that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction

[24] Congressional Globe, 42d Cong., 1st sess., pt. I (1871), pp. 474, 476.

era (see *Screws* v. *U.S.* (325 U.S. 91, 140) [1945]) * * * [it] was worded to serve as a basis for safeguarding the rights of citizens, black or white, in all parts of the country. The rights singled out for protection were, with few exceptions, rights that enlightened persons have always regarded as fundamentally important to a citizen in a free society. Sectional malice and partisan hatred may have played their part in bringing about the enactment of these laws. But on their face they did no violence to the democratic principle—and offered many possibilities for constructive use in furthering the cause of individual rights." (Carr, "Federal Protection of Civil Rights," p. 40.)

The fact that the Supreme Court gave too narrow an interpretation of the 14th amendment, where the rights of citizens are involved, has been recognized by the Court itself.

Mr. Justice Moody, speaking in the name of the Court in the famous case of *Twining* v. *New Jersey* (211 U.S. 78) said of the *Slaughter House* case:

"Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this Court. Undoubtedly, it gave much less effect to the 14th amendment than some of the public men active in framing it intended, and disappointed many others."

On the other hand, he said, if the views of the minority had prevailed, it is easy to see how far the authority and independence of the States would have been diminished.

In effect Justice Moody was saying we did not give the 14th amendment the effect it was supposed to have because it would give too much power to Congress.

The argument, if a valid one, was one which ought to have been addressed to Congress when the amendment was discussed, or to the State legislatures when considered for ratification. It has no place in any court of law when the language of the Constitution under study contains no ambiguity. If the effect of the 14th amendment was to greatly enlarge the power of Congress it was so because the American people had thus decreed and it was not the function of the Court to defeat their will.

Both the majority and minority in the *Slaughter House* cases were wrong. The true intention of the framers of the 14th amendment was to place all civil rights under the Federal Government but only to the extent of preventing infringement by discrimination.[25]

It should be made unmistakably clear that I have referred to the *Slaughter House* cases only to show how the Supreme Court has gone astray in failing to give the 14th amendment the full intendment of its framers.

Slaughter House dealt with the second clause of the 14th amendment, the "privileges and immunities" clause, which is not affirmatively stated as is the citizenship clause, around which my entire argument revolves.

One last word about the *Slaughter House* cases before we return to the citizenship clause.

We have discussed the narrow interpretation the Supreme Court gave the "privileges and immunities" clause in those cases. It is interesting to note, however, that about 2 years earlier an entirely

[25] See "Government by Judiciary," Louis B. Boudin, p. 121.

different view had been taken by Mr. Justice Woods, who was holding a circuit court in the southern district of Alabama. The decision of this court is striking and takes into full account the objectives of the men who wrote the 14th amendment. What, asks the Justice, are the privileges and immunities of citizens of the United States? He gives this response:

"They are undoubtedly those * * * which belong of right to the citizens of all free States, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign." [26]

Certainly it can be said that from the inception of the Union, citizens have had a right under the common law to partake of the advantages of public accommodations. Slaves, no, but citizens, yes; and by virtue of the 14th amendment the one-time slave became a citizen.

Chief Justice Taney, who was no great champion of human rights, declared that citizens had the right "to go where they pleased at every hour of the day or night."

As American citizens, all of us have the free and absolute right to move about freely in this great country of ours. No State or individual can interfere with this right without becoming subject to possible Federal sanctions. This right, flowing from the very nature of our national existence, has received the protection of our Federal courts.

As early as 1868 the Supreme Court held that a citizen had a right to pass freely through each of the several States (*Crandall* v. *Nevada*, 6 Wallace 351 (1868)).

It ought to be remembered that the *Crandall* case arose before the adoption of the 14th amendment. Subsequent to the 14th amendment, the Supreme Court in *Edwards* v. *California* (314 U.S. 160 (1941)) reaffirmed this right to pass freely from State to State.

Mr. Justice Jackson, in a concurring opinion in that case, expressed the same view which I hold with respect to the administration's civil rights bill.

After other members of the Court had sought to protect Edwards' rights within the scope of the commerce clause, Justice Jackson noted that "to hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights."

He then stated that it was a privilege of citizenship of the United States to enter any State of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof.

In the words of Justice Jackson, "If national citizenship means less than this it means nothing. * * *" (See also *Twining* v. *N.J.*, 211 U.S. 78 at 97.)

Taney, who spoke for the majority of the court in the *Dred Scott* decision, had in earlier cases (*Passenger* cases, 7 Howard 283, 292) said that: "We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

[26] *U.S.* v. *Hall*, 26 Fed. Cases 79, 81, 82.

And from the language of Chief Justice Fuller in *Williams* v. *Fears* (179 U.S. 270, 274): "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily of free transit from or through the territory of any State, is a right secured by the 14th amendment and other provisions of the Constitution."

Therefore, clearly, the right I seek to protect is a right of long-standing judicial recognition.

The declaration of citizenship in the 14th amendment had a collateral effect on rights of persons arising out of residence in a State. Prior to the 14th amendment, a citizen of one State going into another State was to enjoy all the privileges and immunities of the citizens of the host State by virtue of article IV, section 2, of the Constitution. But the *Dred Scott* decision denied that a Negro had such citizenship as would entitle him to all the privileges and immunities of the host State. So article IV, section 2, came to mean that every white citizen of one State shall have all the privileges and immunities of the white citizens of the several States. But, the 14th amendment abolished this distinction and now any citizen of any State shall be accorded the privileges and immunities of the citizens, be they black or white, of the several States.

Since our Constitution does not recognize such concepts as black citizen and white citizen, a Negro traveling from State to State shall have the right to the full and equal enjoyment of all the privileges extended to any citizen of the host State.

We have seen that the right to use inns and other places of public accommodation was a fundamental common law right. We now come to the question of how that right is related to other rights.

Clearly, the liberty to move about in this grand Nation of ours could not be exercised were it not for the availability of food and lodging at the convenience of the traveler. Where persons are denied food and lodging because of their race an arbitrary and irrational barrier is thrown across the road of travel, and these persons are effectively deterred from exercising this basic liberty. The incidental side effects to such deterrence are varied and of national concern.

The mobility of labor is impaired and unemployment in single areas grows inordinately high.

Education and the quest of knowledge are impaired because all our citizens cannot see our great country; they are not permitted to sow the varied seeds of our national character; nor are they able to reap the vast rewards of our geographical treasury.

Interstate commerce is burdened. But, all these harms are only incidental to the fact that an essential national right of one of our citizens is denied him solely because of his race.

Public accommodations are privileges extended, generally, to all citizens of the several States. History has considered as an essential privilege of any citizen the equal privilege of trade and commerce. The common law recognized this fact and offered enforcement machinery.

With the advent of slavery, some of our States saw fit to negate the common law. I have no doubt that but for slavery the law of most, if not all, of our several States would support this privilege today. In some 32 States the law does support that principle. The other States have historical familiarity with the principle and I am sorry they have chosen not to follow its dictates.

Congress has the power to protect a Federally created right from all adverse forces. That Congress has this power was implied in *Collins* v. *Hardyman* (341 U.S. 651) and sustained in *Reese's* case (92 U.S. 214, at 217):

"Rights and immunities created by, or dependent upon, the Constitution of the United States can be protected by Congress. The form and the manner of protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide. These may be varied to meet the necessities of the particular right to be protected."

The fact that much of the 14th amendment speaks in terms of prohibitions upon the States does not negate all possible exercise of Federal legislative power against individual impairment of Federal rights. Federal power over State activities must be expressly given by the Constitution because of the nature of our Federal system. But the very nature of government itself permits the sovereign to protect against all comers the rights that naturally flow from the sovereign's existence. Congress may direct prohibitions against the impairment of certain civil rights by individuals. This does not preclude the State from enacting the same prohibitions. Congress is not now seeking to solely occupy the field of civil rights or trample upon State powers. It is only seeking to redress the infringement of the rights of national citizens in those instances where the States have failed to provide such protection in the 100 years allowed them.

As Justice Wood stated in the *Hall* case (supra, note 26), the 14th amendment is broad enough to protect those privileges that "[were at all times * * * enjoyed by the citizens of the several States * * * from the time of their becoming free, independent, and sovereign" until the time of the adoption of the 14th amendment. Among these rights were the right to obtain food and lodging in a public establishment and the right to travel and enjoy all privileges of trade and commerce.

That the objectives of my bill are legitimate and soundly based on the constitutional powers of Congress itself is self-evident. With 13th and 14th amendment protections joined together, equal access to all the public accommodations enumerated in the bill becomes a valid legislative objective and Federal enforcement of this goal is clearly necessary and proper.

I hold, and it has long been held, that positive rights and privileges were intended to be secured and were in fact secured by the 14th amendment (*Strauder* v. *West Virginia*, 100 U.S. 303 and *Ex Parte Virginia*, 100 U.S. 339).[27]

The argument that the amendment contains only prohibitions upon the States entirely overlooks the language of the first clause of the first section which declares:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Through this clearly affirmative provision, Congress, by virtue of section 5 of the 14th amendment, may pass legislation of a direct and primary nature to protect and enforce that status of citizenship and all its attendant rights.

[27] See also *Brewer* v. *Hazle School District No. 44*, 238 Fed. 2d 91. This stands for the proposition that the 14th amendment can be the basis of an action for an injunction against the actions of individuals when such individuals attempt to interfere with rights and duties prescribed by the 14th amendment.

Senator Howard, the author of the citizenship clause of the 14th amendment, saw its purposes to be large and magnificent. He described the crowning glory of the 14th amendment in these words:

"We desired to put this question of citizenship and the rights of citizens and freedmen * * * beyond the * * * power of gentlemen * * * who would pull the whole system up by the roots and destroy it, and expose the freedmen again to the oppressions of their old masters." [28]

SUBAPPENDIX

ENACTMENTS PURSUANT TO THE 14TH AMENDMENT BY CONGRESSES CONSTITUTED BY MANY OF THE FRAMERS OF THAT AMENDMENT

Within the historical context of the post-Civil War period, the 14th amendment might be viewed as a device to perfect and clarify the constitutional demands of the 13th amendment.

As I have previously pointed out, the 13th amendment was intended to have a much broader impact than the abolition of institutionalized slavery—the economic system. Not only was this purpose clearly stated in the language of the amendment itself, but legislation passed pursuant to the amendment was sweeping in scope.

On March 13, 1866, Congress passed a bill known as the Civil Rights or Enforcement Act. Entitled "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication," [29] it was aimed at outlawing the "black codes." All persons born in the United States were declared citizens thereof. The bill further sought to provide equality among the races as to their rights to make and enforce contracts, to sue, be parties, give evidence and inherit, purchase, lease, sell, hold and convey real and personal property and "to full and equal benefit of all laws and proceedings for the security of person and property." In several of its provisions, the bill was remarkably parallel to the 14th amendment, but it predated that amendment.

When the bill was presented to President Johnson for his signature, he returned it, vetoed. He objected to the bill on the several grounds that:

(1) The Negroes were too newly freed to possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States.

(2) The civil rights enumerated in the bill were already secured to all aliens, and it might be assumed that they were already secured to the Negro as well.

(3) If the principle of the bill were admitted, Congress could legislate against racial discrimination with regard to voting, office holding, jury service and the like.

(4) Former Federal-State power relationships would be unduly uprooted.

Congress completely rebuffed Johnson's objections. The Senate repassed the bill by a vote of 33 to 15; the House of Representatives repassed it by a vote of 122 to 44 and the bill became law on April 9, 1866.

However, Congress, to eliminate reasonable doubt as to the constitutional basis for this bill, undertook within 2 months to frame the 14th

[28] Congressional Globe, 1st sess., 39th Cong., p. 2896.
[29] 14 Stat. 39 (1866).

amendment.[30] The 14th amendment passed the Senate on June 8, 1866, the House of Representatives on June 13, 1866, and ratification was completed on July 9, 1868. Upon ratification the Civil Rights Act of 1866 was reenacted. The adoption of the 14th amendment and the reenactment of the Civil Rights Act of 1866 do not demonstrate the inadequacy of the 13th amendment for the purposes sought of it by Congress. Rather, these events demonstrate that the 13th and 14th amendments read together empower the Congress to carry out the many aims and purposes expressed during the formulation of these amendments.

Thus, the adoption of the 14th amendment did more than provide a constitutional basis for one civil rights act. It was adopted "to obviate objection to legislation *of a similar character*, extending the protection of the National Government over the common rights of all citizens of the United States. Accordingly, after its ratification Congress reenacted the act, under the belief that, whatever doubts may have previously existed of its validity, they were removed by the amendment." [31]

A brief survey of contemporaneous post-14th amendment civil rights acts will further indicate the congressionally intended scope of that amendment.

The second Civil Rights or Enforcement Act was passed by Congress on May 31, 1870. It was later amended by the act of February 28, 1871. Both acts were designed to implement the 14th and 15th amendments by providing Federal machinery to supervise elections in the States. Stiff penalties were provided for interference with the exercise of the franchise based on race or color.

An act of April 20, 1871, the Ku Klux Klan Act, penalized private action, under color of law, which deprived persons of their rights under the laws or Constitution of the United States. The bill levied penalties for conspiracy to overthrow the Government of the United States or to prevent the execution of its laws, and authorized the President to use military force to suppress unlawful action when States were unable or unwilling to prevent interferences with citizens rights or the obstruction of the Federal Government processes.

The Civil Rights Act of March 1, 1875, was designed to guarantee the Negroes equal accommodations with white citizens in all inns, public conveyances, theaters, and other places of amusement. Refusal by private persons to provide such accommodations was declared to be a misdemeanor, and injured parties were given the right to sue for damages.

Two other acts, the Slave Kidnaping Act of May 21, 1866, and the Peonage Abolition Act of March 2, 1867, made criminal kidnaping any person with the intention of placing him in slavery or otherwise reducing a person to a condition of involuntary servitude.

[30] Konvitz and Leskes, "A Century of Civil Rights," p. 51.
[31] Mr. Justice Fields, *Slaughter House* cases (16 Wall. 96, 97).

APPENDIX B

88TH CONGRESS
1ST SESSION

S. 2037

IN THE SENATE OF THE UNITED STATES

AUGUST 9, 1963

Mr. PROUTY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for the protection of certain rights of citizenship, the free exercise of certain privileges of citizenship, and the benefit of certain immunities of citizenship.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Citizenship Act of 1963".

DECLARATION

The slave is gone. The whip that scourged his flesh—the chain that gouged him hand and foot—one hundred years of suffering—all these are gone.

Yet the heirs of his body are not free.

The child of the slave and the child of his child are less than aliens in the country of their birth; they are of a land that is not theirs.

Leashed by law, corded by custom, pilloried by prejudice, they stand pinioned in a twilight zone between servitude and liberty.

The things that were this Nation's to protect we left unguarded as conscience did desert us all.

What of the covenants we made with them?

Privileges. Immunities. Citizenship—the bundle of all rights—the thing we prize the most. These are not the hollow words of hollow men.

Although they lie in sleek wood moss grown, we should uncoffin them in order that they may catch that sweet glimpse of promised sun where there is neither caste nor class—where men pass freely and lodge at will.

The child of the slave and child of his child, shall cast off the badge of bondage they still wear. America can be more than shadow host.

Republic, scarred thy face no longer be. Man will be what man was meant to be.

SECTION 1. (a) All citizens shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages,

and accommodations of public establishments free from discrimination or segregation on account of race, color, religion, or national origin, where such discrimination or segregation—

(i) is a vestige of historical outgrowth of the slavery sought to be abolished by the thirteenth amendment to the Constitution of the United States, or

(ii) serves to deny or impair the right of any citizen or group of citizens to travel freely from State to State or within a State, or to deny or impair any privilege incidental to such travel where such a practice would unduly burden the effective exercise of the right to travel, or

(iii) serves to deny or impair any right or incident of citizenship protected by the fourteenth amendment to the Constitution of the United States.

(b) As used in subsection (a) of this section the term "public establishments" shall include the following:

(i) any hotel, motel, or other public place engaged in furnishing lodging to transient guests, including guests from other States or traveling from State to State; or

(ii) any motion picture house, theater, sports arena, stadium, exhibition hall, or other public place of amusement or entertainment which customarily presents motion pictures, performing groups, athletic teams, exhibitions, or other sources of entertainment; or

(iii) any retail shop, department store, market, drugstore, gasoline station, or other public place which keeps goods for sale, any restaurant, lunchroom, lunch counter, soda fountain, or other public place engaged in selling food for consumption on the premises, and any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire.

(c) The provisions of this title shall not apply to an establishment not open to the public.

PROHIBITION AGAINST DENIAL OF OR INTERFERENCE WITH THE RIGHT TO NONDISCRIMINATION

SEC. 2. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any citizen of any right or privilege secured by section 1, or (b) interfere or attempt to interfere with any right or privilege secured by section 1, or (c) intimidate, threaten, or coerce any person with a purpose of interfering with any right or privilege secured by section 1, or (d) punish or attempt to punish any citizen for exercising or attempting to exercise any right or privilege secured by section 1, or (e) incite or aid or abet any person to do any of the foregoing.

CIVIL ACTION FOR PREVENTIVE RELIEF

SEC. 3. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted (1) by the citizen aggrieved, or (2) by the Attorney General for or in the name of the

United States if he certifies that he has received a written complaint from the citizen aggrieved and that in his judgment (i) the citizen aggrieved is unable to initiate and maintain appropriate legal proceedings and (ii) the purpose of this title will be materially furthered by the filing of an action.

(b) A citizen shall be deemed unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such citizen is unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or when there is reason to believe that the institution of such litigation by him would jeopardize the employment or economic standing of, or might result in injury or economic damage to, such citizen, his family, or his property.

(c) In case of any complaint received by the Attorney General alleging a violation of section 2 in any jurisdiction where State or local laws or regulations appear to him to forbid the act or practice involved, the Attorney General shall notify the appropriate State and local officials and, upon request, afford them a reasonable time to act under such State or local laws or regulations before he institutes an action. Compliance with the foregoing sentence shall not be required if the Attorney General shall file with the court a certificate that the delay consequent upon such compliance in the particular case would adversely affect the interests of the United States, or that, in the particular case, compliance would be fruitless.

(d) In any case of a complaint received by the Attorney General, including a case within the scope of subsection (c), the Attorney General shall, before instituting an action, utilize the services of any Federal agency or instrumentality which may be available to attempt to secure compliance with section 2 by voluntary procedures, if in his judgment such procedures are likely to be effective in the circumstances.

APPENDIX C

88th CONGRESS
1st SESSION

S. 1732

IN THE SENATE OF THE UNITED STATES

Referred to the Committee on ---------- and ordered to be printed.

AMENDMENTS

Intended to be proposed by Mr. PROUTY to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, viz:

On page 5, beginning with line 1, strike out all through line 3 on page 7, and insert the following in lieu thereof:

RIGHT TO NONDISCRIMINATION IN PUBLIC ESTABLISHMENTS

SEC. 3. (a)(1) All citizens shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any public establishment free from discrimination or segregation on account of race, color, religion, or national origin, where such discrimination or segregation—

(A) is a vestige or historical out-growth of the slavery sought to be abolished by the thirteenth amendment to the Constitution of the United States, or

(B) serves to deny or impair the right of any citizen or group of citizens to travel freely from State to State or within a State, or to deny or impair any privilege incidental to such travel where such a practice would unduly burden the effective exercise of the right to travel, or

(C) serves to deny or impair any right or incident of citizenship protected by the fourteenth amendment to the Constitution of the United States.

(2) All persons shall be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any public establishment which is engaged in interstate commerce.

(b) For purposes of subsection (a), the term "public establishment" means any establishment which holds itself out as offering goods, services, facilities, privileges, advantages, or accommodations for sale to, use of, or rent or hire by, the public, including but not limited to the following:

(1) any hotel, motel, or other public place engaged in furnishing lodging to transient guests;

(2) any motion picture house, theater, sports arena, stadium, exhibition hall, or other public place of amusement or entertainment; and

(3) any retail shop, department store, market, drugstore, gasoline station, or other public place which keeps goods for sale; any restaurant, lunchroom, lunch counter, soda fountain, or other public place engaged in selling food for consumption on the premises; and any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire.

(c) For purposes of subsection (a), a public establishment is engaged in interstate commerce if—

(1) in the case of a public establishment described in paragraph (1) of subsection (b), such establishment is engaged in furnishing lodging to transient guests which include guests from other States or guests traveling in interstate commerce;

(2) in the case of a public establishment described in paragraph (2) of subsection (b), such establishment customarily presents motion pictures, performing groups, athletic teams, exhibitions, or other sources of entertainment which move in interstate commerce; and

(3) in the case of a public establishment described in paragraph (3) of subsection (b), if—

(A) the goods, services, facilities, privileges, advantages, or accommodations offered by such establishment are provided to a substantial degree to interstate travelers,

(B) a substantial portion of any goods held out to the public by such establishment for sale, use, rent, or hire has moved in interstate commerce,

(C) the activities or operations of such establishment otherwise substantially affect interstate travel or the interstate movement of goods in commerce, or

(D) such establishment is an integral part of a public establishment which is engaged in interstate commerce.

For purposes of this subsection, the term "integral part" means physically located on the premises occupied by an establishment, or located contiguous to such premises and owned, operated, or controlled, directly or indirectly, by or for the benefit of, or leased from the persons or business entities which own, operate or control an establishment.

(d) For the purposes of this section, the term "State" includes the District of Columbia.

(e) The provisions of subsection (a) shall not apply to a bona fide private club or other establishment not open to the public, except to the extent that the facilities of such club or establishment are made available to customers or patrons of a public establishment to which the provisions of subsection (a) apply.

Amend the title so as to read: "A bill to prohibit discrimination against any person on account of race, color, religion, or national origin in public establishments, if such discrimination or segregation denies to any citizen certain rights, privileges, and immunities of citizenship, or if such public establishment is engaged in interstate commerce."

APPENDIX D(1)

TEXAS
LAW REVIEW

VOLUME 41 FEBRUARY 1963 NUMBER 3

The Twilight of State Action

JERRE S. WILLIAMS*

It was in 1883 that the United States Supreme Court undertook to delineate the scope and application of the critical first section of the fourteenth amendment. This was done in a group of five cases, decided at once, which have come to be known as the *Civil Rights Cases*.[1] The firm and clear majority opinion of Justice Bradley and the powerful and appealing opinion of Justice Harlan in dissent have become constitutional classics. Any consideration of the requirement that there be governmental action against an individual for that individual's constitutional rights to be asserted, at least as to most individual constitutional liberties,[2] stems from the Court's opinion in the *Civil Rights Cases*. Inquiry into the modern development of the doctrine of state action must begin with this leading case.

I. THE CIVIL RIGHTS CASES

The five cases which make up what we have come to know as the *Civil Rights Cases* involved the constitutional challenge of the Civil Rights Act of 1875[3]. This law of Congress prohibited racial discrimination on public conveyances, in inns, and in theaters and other places of public amusement. The statute carried with it civil and criminal penalties. Two of the five cases involved refusing Negroes accommodations in inns, two other

* Professor of Law, University of Texas.

[1] 109 U.S. 3 (1883).

[2] A few individual liberties are not dependent upon governmental action, as in the thirteenth amendment prohibition against involuntary servitude where it is well established that a private citizen can violate the constitutional prohibition. Bailey v. Alabama, 219 U.S. 219 (1911). Interference by private citizens with the rights of other citizens to vote in congressional elections is a violation of Article I, Section 4 of the Constitution. United States v. Classic, 313 U.S. 299, 315 (1941); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

[3] Act of March 1, 1875, 18 Stat. 335 (1875).

cases involved refusing Negroes admission to theaters, and the fifth case involved refusal of a railroad to supply transportation to Negroes.

The United States Supreme Court held the Civil Rights Act unconstitutional as it applied to compelling these privately owned and operated facilities to be made available without racial discrimination. In reaching this conclusion, Justice Bradley, for the Court, read the first section of the fourteenth amendment literally. Since the words in terms provide that "no State" will deprive any person of life, liberty or property without due process of law, a private deprivation of life, liberty, or property by an individual was not in violation of the constitutional provision. The key words of Justice Bradley's opinion, quoted so often as to be now quite familiar, are:

> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.[4]

If the first section of the fourteenth amendment was not limited to state action in derogation of individual rights, Justice Bradley reasoned, the effect of the fourteenth amendment would be to destroy the federal system. At two different places in his opinion, he stresses the assertion that if the amendment were designed to allow federal legal protection of individuals against other individuals, this would enable Congress to enact a detailed code of laws governing all conduct by persons whether they had any official status or not.[5] In the view of the Court, this would have meant that all criminal law would now have been subject to federal control, and it would follow that much of the civil law would also have been within the scope of the federal power to legislate.

Taken without limitations, and without consideration of the background of the amendment, this logic of the majority opinion would appear unanswerable. Yet, historical study of the origins of the fourteenth amendment in the reconstruction days indicates that the framers had something much broader in mind than a federal power simply to prohibit official state intrusion upon constitutional rights. It is likely that the

---

[4] 109 U.S. 3, 11 (1883).
[5] *Id.* at 13, 14.

framers of the amendment envisioned a power in Congress to insure that the care of the civil rights of the recently emancipated Negroes would be firmly in the hands of the federal government, regardless of the source of the threat to those rights.[6] It was the Court, through these *Civil Rights Cases* and other cases decided at about the same time,[7] that trimmed the scope of the fourteenth amendment down to its present dimensions. From some sources there is even today significant criticism of the broad sweep of the fourteenth amendment,[8] yet historians tell us that the amendment as it has been applied is far less sweeping in scope that the framers intended.[9]

Justice Harlan, in his dissent,[10] first made it clear that a literal reading of the first section of the fourteenth amendment does not demand that it be limited to those intrusions upon individual rights which are governmental. He made reference to the wording which establishes that all persons born and naturalized in the United States are United States citizens. Then he reasoned that freedom from racial discrimination in public accommodations was an attribute of United States citizenship. Such an attribute would be subject to the protection of the Congress under section five of the amendment, which enables federal legislation.

---

[6] FLECK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV 131 (1950).

[7] United States v. Harris, 106 U.S. 629 (1883); United States v. Reese, 92 U.S. 214 (1876); United States v. Cruikshank, 92 U.S. 542 (1875); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

[8] The more controversial of the recent Supreme Court cases which are criticized as unduly broad in protecting individual liberties under the fourteenth amendment are well known. In addition to cases discussed elsewhere in this article are Engel v. Vitale, 370 U.S. 421 (1962) (prescribed prayer in public schools); Mapp v. Ohio, 367 U.S. 643 (1961) (illegally obtained evidence inadmissible in state court, overruling a prior rule); Griffin v. Illinois, 351 U.S. 12 (1956) (requiring that transcript be furnished on appeal of criminal case); Brown v. Board of Educ., 344 U.S. 1 (1952) (school integration). There are many other cases involving statutes growing out of state opposition to school integration which fall into the same category.

[9] The best proof is found in the various civil rights acts passed contemporaneously with the fourteenth amendment which were held unconstitutional by the Supreme Court in the *Civil Rights Cases* cited in note 1 *supra*. See also FLECK, *op. cit. supra* note 6, *passim*; Frank & Munro, *supra* note 6, *passim*; CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 36 (1947); Watt & Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13 (1949). Justice Black thoroughly explored the historical origins of the fourteenth amendment in his dissenting opinion in Adamson v. California, 332 U.S. 46, 68 (1947); compare Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

[10] 109 U.S. 3, 26 (1883).

Through this analysis, Justice Harlan avoided the seemingly unanswerable argument of the majority that to treat the amendment more broadly than the majority was willing to do would empower the federal government to take over enactment of a criminal code applicable throughout the United States, together with broad powers to enact civil statutes on local subjects. In contrast, it appears from Justice Harlan's opinion that he would not view the fourteenth amendment as giving the federal government power to enact a law prohibiting theft by one private person from another. This kind of truly private wrong would not be an interference with the rights of United States citizenship.

Only when the interference with a person's right was based upon discrimination of the type involved in civil liberties issues would the amendment, to Justice Harlan, become applicable and Congress be enabled to legislate. At least Justice Harlan showed that there was a middle road that the majority of the Court did not in its opinion indicate it perceived. Almost certainly this was the application of the amendment intended by its framers. But it did not become the law, and it is not now the law.

In the alternative,[11] Justice Harlan then assumed that the first section of the fourteenth amendment required governmental action before it became applicable. But this was not seen by him as a stumbling block to finding violations of the Civil Rights Act by the railroads, hotels, and theaters involved in these cases, and to finding the act as applied unconstitutional. Concerning the railroads, he stressed the degree of governmental control, the franchise, and the role that the railroads played in fulfilling a state function by serving as a highway. He then treated the inn as analogous to the railroad under the common law obligations of innkeepers. Even with the more tenuous situation of the theater, Justice Harlan found governmental action in the licensing and control which the government exercises over such places of amusement. So to Justice Harlan, state action, if required, could be found in the actions taken by all three of these businesses.

It is this latter portion of Justice Harlan's dissenting opinion which lives on and has gradually become more and more vital with the passing of the years. Many cases, some of which will be discussed in more detail later, have now firmly established the proposition that private individuals can be so enfranchised or so regulated by the government that in pursuing their own activities they are fulfilling a governmental function. From this recognition it follows that the state can become involved in the

[11] *Id.* at 57–59.

actions of persons who are not actually employed by the state but are acting in a sanctioned capacity of one kind or another. Obviously, drawing this line is a difficult task in many instances. The necessity for drawing this line has occasioned much of the constitutional litigation involving state action, litigation which will be the subject of later discussion.

The *Civil Rights Cases*, then, are the leading cases which set the pattern of the application of the fourteenth amendment. More broadly, the impact of the requirement of state action as developed in the *Civil Rights Cases* and those preceding and following them is the key to the understanding of most of the individual liberties guaranteed in the Constitution, whether against inroads by state or federal government. The same requirement of governmental action is found in the first amendment concerning freedom of speech and religion, in the fifth amendment due process clause, and indeed throughout the Bill of Rights.

Almost all of those traditional American liberties which we espouse are liberties protected against the action of the government, state or federal, and not against the action of the individual. When one private person steals property from another, there is no violation of a constitutional right. The property of the person unquestionably has been taken without due process of law. But the government has not done the depriving, and the local criminal law is applicable. On the other side of the coin, the confiscation of the very same property by the government without just compensation is a clear violation of a constitutional right. If done by the federal government, it is a violation of the fifth amendment; if done by the state, it is a violation of the fourteenth. The theme of this article, then, is to explore the modern implications of the definition of our individual freedom in terms of constitutional prohibitions against intrusion by the government.

While the *Civil Rights Cases* are leading with respect to this issue, they certainly did not freeze the law into an unchangeable mold. It is now elementary that the concept of state action has been a developing and quite broadly growing one. There follows, first, a summary of the leading cases which represent this development of growth and broadening. After this, there will be an evaluation of the modern concept of state action as it applies in the situations which are of current concern in constitutional law.

II. The Development of the State Action Concept

The growth of the concept of state action following the *Civil Rights Cases* has taken place in four directions: (A) the individual acting "under

color of law," (B) the non-official individual or group acting so much under governmental authority as to be viewed as engaging in state action, (C) the concept of governmental refusal or failure to act as fulfilling the requirement of state action, (D) state action found in judicial enforcement of private agreements and the supervision of private relationships. Each of these four areas of development is discussed in turn below.

A. *Under Color of Law*

The matter of persons acting under color of state law has been disposed of in a way useful to the understanding of the interpretation and application of the Constitution. The problem is a simple one, although its solution has occasioned some difficulty. This is the case where a state official acting under his authority nevertheless departs from that authority given him. While still purporting to act under authority, he actually acts in violation of state law. The most common example of this kind of case is police brutality. The officer who beats a prisoner to extract a confession is obviously violating state law. The issue is whether the officer involved in such shocking and illegal conduct is actually engaged in governmental action for purposes of the requirements of the fourteenth amendment. This issue has been resolved in the affirmative, but not without recent dissent.

The Supreme Court early committed itself in the leading case of *Ex Parte Virginia*.[18] Involved was the prosecution of a state judge in Virginia for engaging in racial discrimination in the selection of jury panels. The judge had been indicted under an Act of Congress of 1875[19] which provided that any officer or other person charged with the duty of selection of jurors who engaged in racial discrimination would be guilty of a misdemeanor. The Court upheld the constitutionality of the statute in an opinion by Justice Strong. While recognizing that the judge in engaging in racial discrimination in the selection of the jury had violated the "spirit" of the state law, nevertheless, the Court found the judge to be acting in his official capacity in selecting the jury.

This was a practical and sensible result. Otherwise, it would become virtually impossible ever to find a violation of individual liberty. The governmental authority could always abjure the actions of the state officer as moving outside of his authority and as being in violation of state law.

There has been modern indirect attack upon this principle in spite of

[18] 100 U.S. 339 (1880).

[19] Act of March 1, 1875, ch. 114, § 4, 18 Stat. 336.

its pragmatic quality. But it did not occur until a leading modern case reaffirmed the doctrine of *Ex Parte Virginia*. This case is *United States v. Classic*[14] which involved prosecutions under federal civil rights legislation for both fraud and ballot-box stuffing by Democratic Party primary election officials in Louisiana. The action of the defendants in that case obviously was in violation of state law. Yet the Court found that they had acted "under color of state law" as required by what was then Section 20 of the Federal Criminal Code,[15] one of the Federal Civil Rights Acts passed in the latter half of the last century.[16] The Court's opinion, by Justice Stone, concerned itself very little with the logical dilemma in finding that a state official acting in violation of state law nevertheless was "acting under color of state law."

The attack upon the doctrine came in *Screws v. United States*[17] in 1945. Screws was a sheriff who arrested a prisoner and then beat him to death. He was prosecuted under the same provision involved in the *Classic* case. That the murder of the prisoner by Screws was in violation of state law was obvious. The majority of the Court, relying on *Ex Parte Virginia* and the *Classic* case, found that the sheriff had acted "under color of state law." Justices Roberts, Frankfurter, and Jackson dissented[18] on the ground that the statutes should not be interpreted as making a federal offense out of a situation where a state officer violates the explicit law of the state. They viewed the statute as providing for punishment only of those persons who violated federal rights under claim of state authority, and not those who were offending against state authority. Although both Justices Roberts and Frankfurter had joined with the majority of the Court in the *Classic* case, they now viewed the application of the statute under such circumstances as unduly broad. It should be noted that their objection was simply to the application of the statute, not to the constitutional power of Congress to apply a federal statute to such a case.

The issue came before the Court again in *Williams v. United States*[19] in 1951, when the defendant, a private detective, who had been issued a special police officer's badge to investigate some thefts from a local busi-

---

[14] 313 U.S. 299 (1941).

[15] Civil Rights Act, 18 U.S.C. § 242 (1958).

[16] The statutory provision in question had its origin in the Civil Rights Act of 1866, 14 Stat. 27. The history of this section is traced in the appendix to Justice Frankfurter's opinion in United States v. Williams, 341 U.S. 70, 83 (1951).

[17] 325 U.S. 91 (1945).

[18] *Id.* at 138.

[19] 341 U.S. 97 (1951).

ness, beat suspects to extort confessions from them. Prosecuted under the same statutory section, Williams was convicted. His conviction was affirmed by the Supreme Court. The majority of the Court again held that action "under color" of state law could be found by a court or jury even when the defendant was violating the state law against assault. Justices Frankfurter, Jackson and Minton dissented[19] in a brief opinion in which they simply reaffirmed the position of the dissent in the *Screws* case.

Finally, the same question came before the Court for more thorough consideration in *Monroe v. Pape*[21] in 1961. This case was a suit for damages against Chicago police officers who engaged in an illegal search of the plaintiff's home. The statutory provision involved was the civil counterpart[22] of the criminal statute applicable in the preceding cases. As in the provisions of the criminal statute, "under color of law" was required. Again the majority of the Court upheld the application of the statute to the police officers who engaged in the illegal search.

Justices Harlan and Stewart concurred.[23] This case was their first exposure to this problem. They expressed their serious doubts as to the proper interpretation of the statute in the preceding cases. However, they indicated that because this was a matter of statutory interpretation, the prior cases should be controlling. Justice Frankfurter dissented.[24] He covered the same ground that had been traveled in the dissent in the *Screws* case. Admitting that he had joined with the majority in the *Classic* case, he asserted that upon reconsideration he felt this statute could not be so broadly interpreted. In his opinion he stressed that he was limiting himself to the matter of the interpretation of the statutes, and not denying the right of Congress to cover such cases.

While *Ex Parte Virginia* has not been directly assailed, the attempt by dissenting justices to narrow down the scope of the statutes requiring "under color of law" certainly raised doubt about the authority of the Constitution to apply to a case where the state officer acts in explicit violation of state law. The many considerations stated by Justice Frankfurter in his long dissenting opinion in *Monroe v. Pape* would seem to be equally applicable to the constitutional issue.

Facile logic would seem to be on the side of the dissenters. It destroys the symmetry of the law to hold that a state employee who has so departed

---

[19] *Id.* at 104.
[21] 365 U.S. 167 (1961).
[22] Civil Rights Act, REV. STAT. § 1979 (1873–74), 42 U.S.C. § 1983 (1958).
[23] 365 U.S. 167, 192 (1961).
[24] *Id.* at 202.

from his authorized activity that he is in precise and obvious violation of state law nevertheless is still acting as a state officer for purposes of the fourteenth amendment. Yet, illogical or not, this conclusion must be sound. The matter of agency is one for private law, for relieving the state of responsibility for the private torts of its agents as they move out of the area of authorization. But this does not change the compelling need for the state to be held responsible when its officers interfere with constitutional rights, at least to the extent of holding it and its officers subject to legal process such as by way of injunction to stop similar actions in the future. As is mentioned above, if this were not so these constitutional rights would become unenforceable against the government.

It is established, then, with reasonable certainty that state action is present within the requirements of the Bill of Rights and the fourteenth amendment when a government official engages in conduct which infringes upon individual liberty, even though in doing so he is in direct violation of state or federal law. It is not likely that there will be a change in this doctrine which will significantly alter the application of the concept of state action in such instances. Further growth of the doctrine in this area is not likely because the doctrine has been extended to cover all instances of concern. Further extension actually would be in the direction of moving to the coverage of persons who do not purport to be governmental officials but are nevertheless fulfilling a function which is to some extent governmental. Insofar as the development moves in this area, it becomes a part of the second line of analysis, and the cases which have considered that kind of issue are the pertinent ones. They will now be discussed.

B. *Private Groups and Governmental Power*

The second area of the development of the concept of governmental action is that in which private groups are clothed with a measure of governmental power. Here it should be noted there is no ground to claim that the persons acting for the private groups are government employees. The assertion is that as private citizens they have been clothed with such governmental power that the state is acting when these persons take action under the authority given them by the state. The modern development of this facet of the concept of governmental action has taken place in three major areas. The first of these is concerned with the power of labor unions, the second with transportation, and the third with voting rights.

Since labor unions have become clothed by statute with significant pub-

lic responsibilities, the courts have ceased to treat them as purely private organizations and have found them to be acting as the government to a sufficient extent to call forth the application of the concept of state action. The leading case is *Steele v. Louisville & N. Ry.*,[25] decided in 1944. This case had to do with the failure of a railroad brotherhood properly to represent Negroes whom it was charged by law with the obligation to represent. The Court found that the federal statute did not authorize the union to engage in racial discrimination, so its actions were in violation of the statute. But the Court, speaking through Justice Stone, made it quite clear that if the statute did permit racial discrimination in these circumstances, then the requisite governmental action would be present. The Court said:

> If . . . the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.[26]

The Court went on to state that if the Railway Labor Act imposed upon the Negroes the legal duty to comply with the terms of the discriminatory contract, the Court would have to decide the constitutional questions. But finding that the statute did not authorize the discriminatory action by the labor union, the constitutional issue was not reached.[27]

The same analysis of the role of labor unions was used to uphold the Taft-Hartley requirement that union officers file non-Communist affidavits before their unions could avail themselves of the facilities of the National Labor Relations Board.[28] The case is *American Communications Ass'n v. Douds*.[29] Here the Court recognized the quasi-public nature of labor unions and the role they play under the powers given them by federal law. The Court metaphorically said:

> But power is never without responsibility. And when authority

---

[25] 323 U.S. 192 (1944).

[26] *Id.* at 198.

[27] Justice Murphy, concurring separately, did reach and decide the constitutional issue. Instead of leaving the issue unresolved as the majority did, Justice Murphy said that if the statute did authorize such discrimination, it would be unconstitutional. 323 U.S. 192, 209 (1944).

[28] National Labor Relations Act § 159(h), 61 Stat. 136, 146 (1947) (repealed by Pub. L. 86-257, Title II, § 201(d), Sept. 14, 1959).

[29] 339 U.S. 382 (1950).

> derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by the Government itself.[30]

In the labor field, the law has become well established that while a labor union is free to discriminate on a racial basis when it has no official stature under law, when it has become a bargaining agent representative of employees by virtue of legislation, this power becomes circumscribed.

The doctrine of racial segregation or "separate but equal" was established by the Supreme Court in a case involving public transportation facilities, *Plessy v. Ferguson*.[31] The role of the transportation cases in the modern reversal of that doctrine has been indirect. The reason is that insofar as interstate transportation is concerned, the Court has availed itself of the theory of burden upon commerce and of the Interstate Commerce Act[32] as bases for eliminating racial segregation. In a series of cases,[33] the Court has held that the Interstate Commerce Act forbids racial discrimination on transportation facilities covered by it. The most recent case in this line is also the most significant as far as the concept of state action is concerned. In *Boynton v. Virginia*,[34] 1960, the Court voided a trespass conviction for a Negro "sit-in" in a white restaurant in a bus terminal. The Negro was an interstate passenger. There was no showing in the record that either the terminal or cafe were owned or operated by the interstate transportation company. But the Court found that the terminal was an "integral part" of the bus company's transportation service for interstate passengers. On this basis, the Interstate Commerce Act was found to have been violated by the bus company in using this segregated terminal and restaurant.

The constitutional issue of governmental action concerning transportation facilities has been raised in the cases involving segregation on privately-owned municipal buses. After the Montgomery, Alabama, case,[35] which held unconstitutional the state statutes and city ordinance of Montgomery compelling racial segregation on the municipal buses, the city of Birmingham repealed its ordinance requiring segregation. Instead, an ordinance was passed authorizing the privately owned municipal bus

---

[30] *Id.* at 401.

[31] 163 U.S. 537 (1896).

[32] Interstate Commerce Act, 54 Stat. 902 (1940), 49 U.S.C. § 3(1) (1958).

[33] Henderson v. United States, 339 U.S. 816 (1950); Morgan v. Virginia, 328 U.S. 373 (1946); Mitchell v. United States, 313 U.S. 80 (1941).

[34] 364 U.S. 454 (1960).

[35] Browder v. Gayle, 142 F. Supp. 707 (N.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956).

company to make its own arrangements with respect to seating. Pursuant to this ordinance, the bus company did segregate its passengers on a racial basis.

A challenge to the legality of this segregation by the municipal bus company in Birmingham was dismissed in the lower federal court.[36] But the dismissal was reversed in *Boman v. Birmingham Transit Co.*,[37] in the Fifth Circuit, in 1960. The Court found that the city had delegated to the franchised bus company the power to regulate seating, a governmental function, so that the bus company should be viewed as an agent of the state in establishing this policy. Judge Cameron, in dissent,[38] took the position that the municipal bus company was purely a private business and its action was not the action of the government.

It is of the utmost importance to keep the distinction clear between those cases where the private company segregates because of a state law or municipal ordinance compelling it to do so, and those cases where the enfranchised company is not compelled to segregate but does so on its own initiative. The result in the former case is quite clear and beyond question. There is no doubt of state action in a case where the state by law has compelled segregation on facilities even private in nature. The requirement of state action is quite clearly met if the state compels segregation in theaters, restaurants, private golf courses, private clubs, and the like. This is clearly governmental action in violation of the Constitution. This is not the questionable case.

The live issue arises when the private group clothed with a measure of governmental power makes its own determination to engage in discriminatory activities which would violate the Constitution if the state took the same action. The *Boman* case stands for the proposition that the public utility can be so enfranchised that it is governmental action for the privately owned company to engage in conduct forbidden by section one of the fourteenth amendment.

The Supreme Court has already spoken on this issue in a transportation case not involving discrimination. In 1952, the Supreme Court faced the constitutional question involved in the broadcasting of a radio program on privately owned municipal transportation in the District of Columbia.[39] In finding that no constitutional rights of the passengers were violated by their being forced to listen to these radio programs, including commercial

[36] Boman v. Morgan, 4 Race Rel. L. Rep. 1027 (N.D. Ala. 1959).
[37] 280 F.2d 531 (5th Cir. 1960).
[38] 292 F.2d 4 (5th Cir. 1961).
[39] Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952).

announcements, the Court first had to determine whether the action of the privately owned transit company in instituting the broadcasting program constituted governmental action. If it did not, there would be no constitutional issue.

In reaching the conclusion that the requisite governmental action was present, the Court pointed to the fact that the Public Utilities Commission of the District of Columbia, having received complaints of the practice, had held a hearing and had dismissed its investigation on the ground that the public safety, comfort, and convenience were not impaired by the broadcasting. The Supreme Court stated flatly that it did not rely on the fact that the bus company was franchised, nor on the fact that it had a monopoly. Rather, the Court asserted that it relied upon the fact that the bus company was regulated by the Public Utilities Commission under the authority of Congress.

In effect, the finding of the Court seems to be that the Government approved the broadcasting by its unwillingness to stop it. This holding is to some extent related to the cases later discussed concerning state inaction constituting governmental action for purposes of making the constitutional provisions applicable. Another aspect of the holding is of more concern at this stage of analysis. The Court's reliance upon the fact that the business was regulated by the Public Utilities Commission under Congressional authority makes the holding, as far as governmental action is concerned, substantially broader than if it were limited to franchise or monopoly situations. In the light of the *Pollak* case, there would seem to be little doubt that the *Boman* case states the law today concerning franchised public utilities which engage in racial discrimination as part of their own policy, but are permitted to do so by the governmental regulatory agencies.

The empowering of private groups by the state to fulfill the public function has been the subject of a series of well-known cases in the matter of racial discrimination in voting rights. Although presaged by the Court's decision in the *Classic* case, a case not involving racial discrimination in primary voting, the leading case is *Smith v. Allwright.*[40] The issue was whether the Democratic party rule in Texas that Negroes could not vote in the Democratic primary was a violation of the Constitution. The issue was strictly one of whether there was governmental action or not. The Court, already having found governmental action in the Louisiana primary in the *Classic* case, found the requisite governmental involvement

[40] 321 U.S. 649 (1944).

in the Democratic primary in Texas. The opinion observed that the state had delegated to the party the power to fix the qualifications of primary electors. The Court took the position that this was a delegation of the state function and made the party's action the action of the state. Particular stress was laid upon the connection between the party primary and the general election under state law, and the extensive controls which the State of Texas exercised by statute over the organization and composition of political parties.

Smith v. Allwright has recently been criticized on the ground that it does not rest upon "neutral principles of constitutional law."[41] It is argued that the case means that the constitutional ban on racial discrimination actually has been extended beyond state action to the action of a party organization, "at least where the party had achieved political hegemony."[42] It is well to ask at this point whether such a conclusion embodies a plea for neutral principles of constitutional law or for abstract principles of constitutional law. Law that views as neutral the allowing of the kind of interference with the right to participate in the election of public officials which took place in *Smith v. Allright* is withdrawn from reality.[43] Not only is the state by its inaction permitting the private group to take over part of a public function and engage in discrimination, a principle which is discussed later in this article, but the history of the state itself engaging in the discrimination and withdrawing so that the private group could take its place in discriminating, realistically finds the state acting in enabling the discrimination. If neutral principles are those where the Court is required to close its eyes to what is actually the situation and what is actually going on, the Court never has followed such neutral principles, and it can be fervently hoped it never will.

Following the Court's decision in *Smith v. Allwright*, the state of South Carolina undertook to withdraw state participation in the party primary by repealing all of its laws having to do with primaries. The South Carolina Democratic party primary continued to be operated precisely as it had before, except that there were no state laws setting up these procedures. In *Rice v. Elmore*,[44] the Fourth Circuit found that there was

---

[41] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 28 (1959).

[42] *Id.* at 29.

[43] The whole Wechsler theory of "neutral" principles is effectively criticized in Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A.L. REV. 571 (1960).

[44] 165 F.2d 387 (4th Cir. 1947).

state action in the Democratic primary in South Carolina. The Supreme Court denied certiorari.[45] Judge Parker in his decision stressed the fact that a political party is not a private organization like a country club. Parties have become, in effect, state institutions. Primaries and party conventions are part of the election machinery. The Court also emphasized the fact that the state law gave effect to what was done in the primary and that this made the primary part of the election machinery.

Two other aspects of Judge Parker's decision need to be mentioned in connection with the later evaluation of the role state action plays today. The first is his raising the question whether a state by simply allowing a party to take over part of its election machinery could avoid the involvement which would bring about the application of the constitutional provisions. Here, again, is the concept of the state permitting the discrimination to take place as constituting the constitutional violation. The other noteworthy matter is Judge Parker's recognition that a law which may be fair on its face may become unconstitutional if applied unfairly. Here the Court is stressing the need for looking at the situation as it actually exists, not looking solely at the sterile words of a statute. This, as will be seen, is also a principle that plays a significant role in delineating the role of state action today.

This latter principle was relied upon again by Judge Parker in the following case of *Baskin v. Brown*,[46] which constituted South Carolina's next attempt to limit the voting in a Democratic primary to white persons only. After the decision in *Rice v. Elmore*, South Carolina stayed wholly out of the picture, and the Democratic party itself vested control of the primary elections in local "Democratic clubs." In holding that the Democratic primary still had to be open without racial discrimination, Judge Parker followed the *Rice* case, pointing out that the state had allowed the political party to take over and operate a vital part of the state's election machinery. The Court also insisted again that this kind of issue must not be viewed blindly. It concluded that it was quite clear the Negro actually was being barred from effective participation in elections in South Carolina.

The various justifications for the finding of governmental action which have been used in the voting cases came to what would appear to be close to the ultimate test in *Terry v. Adams*[47] in 1953. This case involved the

---

[45] 333 U.S. 875 (1948).
[46] 174 F.2d 391 (4th Cir. 1949).
[47] 345 U.S. 461 (1953).

constitutionality of barring Negroes from voting in the Texas Jaybird primary in Washington County, Texas. The Jaybird Democratic Association held its "primary" in advance of the regular Democratic primary in the county. Negroes were not allowed to vote in this pre-primary balloting run by the Jaybird Democratic Association. Traditionally the winner of the Jaybird primary had become the elected official. Only in rare cases was he ever opposed in the Democratic primary, and the Democratic primary victory was almost always tantamount to election.

The obvious challenge to the breadth of the concept of governmental action posed by these facts resulted, nevertheless, in an 8 to 1 holding by the Supreme Court that racial discrimination in the Jaybird primary was in violation of the fifteenth amendment. While there was no majority opinion, three justifications of the finding of state action can be extracted from the three prevailing opinions. The first of these was that, as a practical matter, the Jaybird primary was the election, relying upon *Rice v. Elmore*. The second was that the state had delegated its function to the Jaybird Association. Justice Clark said in this opinion that the state had delegated to political parties the right to choose public officials, and the Jaybird Association was a political party. The third line of analysis was that the state's permitting this private primary to take over the election process constituted the requisite state action. Here again is the concept of state inaction as constituting the requisite governmental action to bring the constitutional provisions into play.

Justice Minton alone dissented[48] on the ground that the Jaybird Democratic Association was a purely private association which simply happened to have a majority in the county, and that the Jaybird primary was in effect nothing more than a caucus of this particular private association.

Terry v. Adams, in finding governmental action in the Jaybird primary, broke new ground. The issue was a factual one as to whether the Jaybird Association met the test of a private group clothed with sufficient governmental authority to cause its activities to be governmental action for constitutional purposes. The Court reached its result by looking to how the pre-primary actually controlled the selection of officials, rather than by simply using abstract principles not related to the facts.[49] Nor

---

[48] *Id.* at 484.

[49] It is possibly an overstatement to say the court broke wholly new ground by relying on the actual control of the selection of public officials in the Jaybird pre-primary. In United States v. Classic, 313 U.S. 299, 313 (1941), the Court referred to the Demo-

did the opinions limit themselves to the theory that governmental action is present when the state sits back and allows the private group to fulfill a significant public function.

So it is that these voting cases reveal that the private group can be so clothed with governmental power that its actions become the requisite governmental action for purposes of bringing the constitutional provisions into play. Also, they show that the state may be acting by tolerating or allowing the assertion of the power by the private group. This is the concept of state inaction which becomes the next line of inquiry in tracing the development of the modern application of the doctrine.

C. *Governmental Inaction*

The principle that failure of the government to act can be a constitutional violation of individual liberty was established in the leading case of *Smith v. Illinois Bell Tel. Co.*[80] in 1926. The Telephone Company had filed a proposed schedule for a raise in telephone rates. The Illinois Commission was dilatory in acting on it and finally canceled the proposal. This action by the Commission was reversed by the Court on appeal. Then the Public Utilities Commission simply sat for two years without doing anything while the company operated at a loss. The company finally sued in the federal court to enjoin enforcement of the established rates by the Public Utilities Commission on the ground that they were confiscatory. The Supreme Court held the cause of action valid. The theme of the opinion was that the failure of the state to act in a confiscatory situation can be a violation of the due process clause. Justice Sutherland, speaking for the Court, said: "Property may be as effectively taken by a long continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them . . . ."[81]

This decision has been quoted and referred to in several other cases, probably the most noteworthy of which for purposes of evaluating the concept of state action today is *Catlette v. United States*,[82] a decision in the Fourth Circuit. Here the Court affirmed the conviction of a sheriff for failing to protect members of the Jehovah's Witnesses group in their constitutional rights of free speech and free exercise of religion. The

cratic Party's dominance in Louisiana resulting in the winner of the primary always being the elected official. But no substantial reliance was placed upon this.

[80] 270 U.S. 587 (1926).

[81] *Id.* at 591.

[82] 132 F.2d 902 (4th Cir. 1943).

sheriff was asked for police protection for a meeting, but he actively refused it and stood by while private citizens broke up the meeting. This case is a particularly significant complement to the principle of *Smith v. Illinois Bell Tel. Co.* because it falls in the pattern of what is today the likely kind of situation in which state action through inaction may well arise. For example, the theory of the constitutional justification for the proposed federal anti-lynching bill[65] is found in the punishment of state officials for failing to protect prisoners from being taken by a mob.

A recent case of great significance re-enforces the state inaction principle. In *Baker v. Carr*,[66] in 1962, the Supreme Court held that the perpetuation by a state of a serious malapportionment of legislative districts which developed because of population shifts denies equal protection of the laws under the fourteenth amendment. Implicit in this holding is a finding of governmental action in the failure of the state to re-district its legislature.

D. *Enforcement of Private Agreements*

Admittedly the sort of case of greatest tenuousness in applying the concept of state action is a suit between two private persons where state action is found solely through the judicial decision in that private suit. The leading case in this area is, of course, the restrictive covenants case, *Shelley v. Kraemer*.[67] This was a suit to enforce a restrictive covenant running with the land which prohibited sale of property to a Negro. Suit was brought by one covenantor against the seller, who was proposing to sell the property in violation of the restrictive covenant. The Court said that the covenant itself was lawful, but that the action of the state in enforcing it was governmental action. Since it was state action and since it involved racial discrimination, it was in violation of the fourteenth amendment.

The case cannot be criticized on the theory that court action should not be viewed as governmental action. This criticism is wholly untenable because there have been many other instances where court enforcement of state law is viewed as governmental action. The most obvious of these situations is the labor injunction,[68] although there are other instances as well.[69]

---

[65] S. 1733, 82d Cong., 1st Sess. (1951) refers in part to the "nonfeasance" of governmental officers or employees permitting or endorsing lynching.

[66] 369 U.S. 186 (1962).

[67] 334 U.S. 1 (1948).

[68] AFL v. Swing, 312 U.S. 321 (1941).

[69] Cantwell v. Connecticut, 310 U.S. 296 (1940).

If there is to be criticism, it should be on the ground that state enforcement of agreements between purely private persons is not discrimination by the state.[68] An evaluation of this criticism will be made later, but for the present let it be said that whether rightly or wrongly, the case did establish the proposition that the state was engaging in racial discrimination when it undertook to enforce the restrictive covenant between the private persons involved in *Shelley v. Kraemer*.

Enforcement by way of granting damages met the same fate in the case of *Barrows v. Jackson*[69] in 1953. The fact that enforcement by award of damages would have the same legal and constitutional significance as enforcement by injunction seems to follow from *Shelley v. Kraemer*. Actually, the more significant factual aspect of *Barrows v. Jackson* for purposes of delineating the role that state action may play in the future, is found in the circumstance that the covenant involved was not at issue as far as running with the land was concerned. The defendant, who was sued for breach of the agreement by allowing a Negro to occupy the property, was herself a covenantor. She had participated in the making of the promise. Thus, putting the Negro in possession constituted a violation of the personal promise made. Yet, the Court held that any enforcement of this agreement by way of granting damages would be in violation of the Constitution.

III. Analysis of the Development of the State Action Concept

This completes the summary of the leading cases in the four lines of development of the concept of state action. No fault need be found with any of the fundamental principles established.

(1) If violation of state law excuses a state officer from engaging in state action, most constitutional cases involving individual liberty would go by the board because such actions are or can be made violations of state law.

(2) It appears inescapable that a private group can be clothed with sufficient authority from the government to make it act as the government for purposes of constitutional liberty. For example, suppose that there is a public utility supplying all power under franchise for a particular community. Suppose this privately-owned public utility refused

[68] *But cf.* Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473, 496 (1962).

[69] 346 U.S. 249 (1953).

to serve Negroes. Because of the franchise and the monopoly, this would mean that no Negro would be able to get electrical power or gas in the community. Unquestionably, for the state to allow its enfranchised monopoly to engage in this kind of racial discrimination would be in violation of the fourteenth amendment.

(3) In the case of state inaction, it is a sound proposition that the state can tolerate inequity by private groups to the extent that constitutional violation has occurred. To state the extreme hypothetical situation again, suppose state officials simply refused ever to enforce the law of assault when a member of the white race assaulted a Negro. Without any doubt at all there would be constitutional violation. So also would there be an infringement of constitutional rights when police officials actively refrain from protecting certain racial or other groups, as in the *Catlette* case.

(4) Finally, in the matter of state enforcement of private agreements, the extreme hypothetical situation can again show that the principle itself is unassailable. A group of citizens in a particular community could sign agreements which provided that no houses in the community could be owned or occupied by persons who did not vote solely for Republican candidates. Enforcement of this kind of agreement by the state in a community where not all persons actually made the promise but simply bought property in the community subject to the restriction would constitute the requisite state action and a constitutional violation. This would particularly be seen if the area covered constituted an entire community.[60]

There has been no attempt here yet to evaluate the application of these general principles, which appear to be unassailable as they apply in particular situations. It can be argued with reasonableness that some of the cases already mentioned applying these principles are incorrectly decided. But it is important to understanding at this point to recognize the nature of the principles and their validity, at least as applied in some situations. Then the evaluation as to how these principles ought to be applied in each case can effectively be made.

It is the subject of particular emphasis here that recognizing the validity of the principles means that the limitations upon their application must be found within the scope of other and competing principles. Stating

[60] The plea for "neutral" principles would apparently argue that such considerations were irrelevant. Wechsler, *supra* note 41, at 29; Shanks, *"State Action" and the Girard Estate Case*, 105 U. PA. L. REV. 213 (1956).

this in another way, the application of these principles must be recognized as matters of degree. There are no absolutes here, just as it is exceedingly difficult to find any absolutes, or even near-absolutes, in the law.

Another conclusion which must be accepted from the lines of development set forth above is that as a means of determining whether individual constitutional liberties have been violated, the concept of state action has substantially lost its utility. A court decision resolving a private legal dispute is state action. Police action in the enforcement of a private interest is state action. State action is broadly found in many businesses or organizations which are substantially private in nature but have some public concern connected with them. Indeed, all rights of private property and of contract are based upon state law. So the enforcement of these laws is state action.[61]

The result is that it is difficult to conceive of situations where state action is not present. One private citizen steals money from another. It would be state action to refuse to enforce the law concerning theft. A private citizen bars someone from his home on a racial basis. This is the extreme situation which always is posed. He is entitled to claim it as his home only because of state common law or statutory enactment, which is state action. If he calls upon the police to evict the undesired person from his property, this is state action. While in the past it has been possible to use the finding of state action as the determining factor in deciding whether constitutional rights have been violated, we are now substantially at the end of this road.

Does this mean that the right of the private citizen to engage in discrimination on a racial or religious basis has been ended? It is at this point that a very careful distinction must be made in analysis. It is proper to conclude that the state action limitation, as a limitation, has substantially disappeared. But this is not enough. All that this conclusion does is lead to the further inquiry as to whether or not the state has violated constitutional rights. Under the terms of the Constitution, it must be the state which engages in the violation, not the private individual. This inquiry must open up a substantially different road down which we must proceed for the determination of the cases in the future. There would seem to be little doubt that we are moving into a new dimension where the cases will no longer turn upon the question whether there was state action or not. But this does not mean that the cases must

[61] Horowitz, *The Misleading Search for State Action Under the Fourteenth Amendment*, 30 So. Cal. L. Rev. 208, 209 (1957).

all uphold the claimed individual constitutional right. There still will be serious matters of concern before it can be decided an individual liberty has been interfered with. It is the nature of this new inquiry which is the subject of the remainder of this article.

IV. After State Action—What?

The point that is being made here can perhaps best be shown by taking two well known and relatively simple examples. The first of these is the kind of situation that was involved in one of the *Civil Rights Cases*. The conclusion today must be that that portion of the *Civil Rights Cases* having to do with racial discrimination by the railroad is no longer good law. Without precise holding, Justice Harlan's dissenting position has prevailed. While the cases involving interstate carriers have all relied upon the Interstate Commerce Act,[62] we have already seen reliance upon the Constitution in the cases involving local transportation.[63] It would be inconceivable today that the refusal of any franchised public carrier to carry a person in a non-discriminatory fashion would not be considered to be state action[64] and a violation of the Constitution. Private ownership and private policy-making could not prevail over the quasi-public nature of the function which is being fulfilled.

In contrast to this situation, consider again the extreme factual case raised above, where the private individual wishes to discriminate on a racial basis in his own home. There is state action. But in contrast to the past cases where this was enough to find a violation of constitutional right, this is not enough in this kind of case. This is where much of the analysis has gone astray. There is a competing interest here which the state has a right to protect. This is the freedom of the individual to engage in discrimination on a purely private basis without intrusion. This freedom may or may not have constitutional backing, as will be later shown. But there should be no doubt that the conclusion in this case is that while state action would be involved in having the police evict unwanted persons from the private home, there would be no constitutional violation. Here it is not the state which is engaging in the discrimination. The state is only aiding the individual in his own private freedom to discriminate if he wishes. The key to a sensible solution to this case is not whether there

[62] Interstate Commerce Act, 54 Stat. 902 (1940), 49 U.S.C. § 3(1) (1958).

[63] Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960).

[64] Public Util. Comm'n v. Pollak, *supra* note 63.

was state action or not but whether there was the violation of a constitutional right, conceding that state action was present.

Admittedly the problem is one of balance. It is proper to say, as some have said,[65] that there is no formula which will solve each particular case. Some have suggested that the distinction can be stated in terms of whether the government is affirmatively aiding in the discrimination, which would be unconstitutional, or simply is tolerating or permitting the discrimination, which would be constitutional.[66] This is not an accurate way of describing the distinction because in many instances, as in the case of the private home, the government is affirmatively aiding in a discrimination. Yet this would not make the discrimination unconstitutional.

V. Government Tolerance of or Aid in Private Discrimination

With these general observations in mind, a number of cases and factual situations can be considered and evaluated to establish the need for this new approach. It is well to mention here that after consideration of a number of these cases, a recent decision of the United States Supreme Court which lays the foundation for effectively moving down this new road will be stated and discussed.

Perhaps the best case with which to start an evaluation of guides for the decision of cases, since the concept of state action has become all-pervading, is *Rice v. Sioux City Memorial Park Cemetery Ass'n.* This case involved an attempt by a widow owning a burial plot in the Sioux City Cemetery to bury the body of her husband, a full-blooded Winnebago Indian. The contract which she had entered into provided that only Caucasians would be buried in the burial plot. The cemetery refused to allow the deceased husband to be buried in the cemetery, and the widow brought a suit for damages for mental suffering. The United States Supreme Court affirmed the Iowa Supreme Court on equally divided vote,[67] the Iowa Court having held that the contract was an adequate defense.[68] Upon rehearing, the United States Supreme Court dismissed

---

[65] Justice Clark speaking for the Court in Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961), quoted at p. 382 *infra*. See Henkin, *supra* note 58, at 481; Van Alstyne & Karst, *State Action*, 14 Stan. L. Rev. 3, 45, 58 (1961).

[66] Henkin, *supra* note 58, at 489; Pollak, *Racial Discrimination and Judicial Integrity*, 108 U. Pa. L. Rev. 1, 13 (1959); 57 Mich. L. Rev. 122, 124 (1958).

[67] 348 U.S. 880 (1954).

[68] 245 Iowa 147, 60 N.W.2d 110 (1953).

the writ of certiorari as being improvidently granted.[69] So the issue remains unsettled in the Supreme Court.

The Iowa Supreme Court followed the traditional state action analysis. This led it to very peculiar grounds for the justification of its decision. The Court indicated that the cemetery could not affirmatively enforce this "restrictive covenant," but that it could use it for an adequate defense. It was said that if Mrs. Rice had undertaken actually to go ahead and bury her husband's body in the grave which she had purchased, the Cemetery Association could not have stopped her because this would have involved state action in the discrimination.[70]

Here is an example of the kind of faulty analysis which results from the state action fetish. The resolution of the Sioux City problem cannot be on the basis of whether there was state action or not. Treating the contract provision as a defense unquestionably is also giving it legal significance, and therefore state action is present. The issue in the Sioux City case, rather, should be viewed as requiring the need to evaluate the extent to which the government of the state of Iowa became involved in the discrimination practiced by the cemetery. This involvement has to do with the extent to which the cemetery is like a public utility, is franchised, is controlled by law, or fulfills a quasi-public function.

The facts of the case show that the cemetery did not have a monopoly in the community. If it did have such a monopoly, it would be a certainty that the refusal to bury the body of Mrs. Rice's husband would be in violation of the Constitution. But the matter of monopoly is not where the line automatically should be drawn. It will be recalled that in the *Pollak* case, involving the piped music in the transit buses in the District of Columbia,[71] the Court disavowed relying upon the fact that the company had a monopoly. Often labor unions do not have monopolies, but they also have been treated as being quasi-public organizations whose actions are governmental actions. So their actions are the subject of concern in the balancing of the individual right against the governmental right.

The more effective analysis of the *Sioux City* case is started by admitting there was state action. The question should then be asked: was there a sufficient private interest in the cemetery company in the form of a right to discriminate to outweigh the public interest in the constitutional

---

[69] 349 U.S. 70 (1955). The Court's reasoning was that the state had passed a statute which eliminated the possibility of this issue ever arising again in Iowa.

[70] 246 Iowa 147, 157, 60 N.W.2d 110, 117 (1953).

[71] 343 U.S. 451, 462 (1952).

elimination of discrimination? Reasonable men could differ about the answer to this question. Yet if discriminatory action by the cemetery was held to violate the Constitution, this would not automatically mean that all businesses, therefore, became touched with the public interest and would be forbidden to engage in racial discrimination. Obviously, the cemetery business is more public in nature than are many small shops and manufacturing businesses of one kind or another. On the other side, since other cemeteries were available, it can be argued that there is not sufficient justification here for the intrusion upon the right of the business to engage in discrimination if it wishes, when the purchaser of the lot agreed to the discriminatory provision. But the critical aspect of the analysis of the *Sioux City* case should be that it does not turn upon whether there was state action or not.

The *Sioux City* case involved a contractual agreement between private individuals. Growing out of the restrictive covenant situation, two other kinds of cases have arisen where the state action analysis had resulted in a most peculiar and unrealistic approach to the legal problem. The first of these situations is found in *MacGregor v. Florida Real Estate Comm'n*,[12] a 1958 decision of the Supreme Court of Florida. This was a proceeding to discipline a real estate broker for his actions in the sale of property to a member of the Jewish faith. The property had been listed by his principal subject to the restriction at the behest of his principal that it be sold only to a Christian. The real estate broker misrepresented to the principal that the buyer was a Christian. In the disciplinary proceeding, the broker challenged the validity of the action undertaken against him on the ground that it was a violation of the Constitution. The Florida Supreme Court held that this was not an unconstitutional attempt to enforce the restriction contained in the listing contract, but that the broker was being punished for the violation of trust and for his deception of his principal. The Court stated that it had no doubt that the restriction contained in the contract could not be enforced by the courts, because this would constitute state action.

While the result of this case seems completely sound, the conclusion that the agreement could not be enforced because enforcement would constitute state action is clearly erroneous. Of course, state action would be involved in the enforcement of such a contract. But it was also present in the disciplinary proceeding. The reason why the state action analysis is misleading in this case can best be seen by recognizing that the princi-

[12] 99 So. 2d 709 (Fla. 1958).

pal himself could certainly sell the house in discriminatory fashion if he wished. It is his property, and he could sell it or not. There is not the slightest hint in any of these cases or any Supreme Court analysis that it would be a violation of the Constitution for a court to enforce the right of the owner of property to discriminate on a racial or religious basis in the sale of that property which he owns.[15] Since the principal himself could have sold the property on a discriminatory basis, then he can designate his agent to sell the property on a discriminatory basis. The issue is not whether there is state action at all. Rather, the issue is to be resolved by the balancing of the constitutional right against racial or religious discrimination on the one hand, with the freedom of the private citizen to engage in his personal discrimination as he wishes. The right of the individual to discriminate in the disposition of his own property certainly would prevail in this case, absent any policy in law forbidding such a private discrimination.[16] But the fact that the state could prohibit this private discrimination shows that the personal right to discriminate here is not a constitutional one. Yet this personal right to discriminate, when permitted by the state, should prevail over a constitutionally claimed right against discrimination in some situations. There are positive values of individuality in many personal discriminations, including some which have no constitutional protection.[17]

Another kind of case which has been the subject of most unfortunate analysis as a result of the state action idolatry is that involving marital separation agreements under which the parties agree that the children will be reared in a certain religious faith. The courts of Iowa[18] and Ohio[19] have refused to enforce such agreements on the ground that to do so would be state action, and the religious liberty provided in the first amendment would be infringed: Again, the analysis of these cases has been that any enforcement of a contract is state action and, since it is state action, enforcing these contracts is automatically unconstitutional. One cannot escape the feeling that the courts are using this device as a

[15] The restrictive covenants cases involve forcing the property owner to discriminate against his own desires. Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

[16] The state may by law prohibit discrimination by individuals in the way they handle their property. Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

[17] For the position that only constitutional rights to discriminate may be weighed against the constitutional prohibition of discrimination see Henkin, *supra* note 58, at 492; Van Alstyne & Karst, *supra* note 65, at 45.

[18] Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956).

[19] Hackett v. Hackett, 150 N.E.2d 431 (Ohio App. 1958).

convenient means of avoiding the difficult and delicate issue which really is posed.

The true issue in such a case must be resolved by balancing the individual interest in favor of the discrimination, against the public interest opposed to the discrimination. There is no desire here to quarrel with the results in the cases. But if those results were to be reached, it would be far better to reach them on the basis that the children are the wards of the court and that a contract provision attemping to secure a restricted religious exposure to only one faith is contrary to public policy and will not be enforced.

Under the analysis here presented, the question can properly now be raised as to whether the restrictive covenants cases, *Shelley v. Kraemer*[78] and *Barrows v. Jackson*,[79] are wrong. Admittedly state action is present. But the question still is whether in the balancing of interests the right of the individual to discriminate must overweigh the constitutional interest against discrimination. It is not difficult to draw the distinction between the restrictive covenants cases and other cases involving contracts between parties which call for discrimination, such as the *Sioux City Cemetery* case, the real estate agent case in Florida, and the cases involving the religious upbringing of children. In the restrictive covenants cases, the concern for the right of the individual to discriminate is not a personal matter. At best, it is a matter of economics. In those cases, the willing buyer and willing seller wish to take the action. This eliminates the element of a personal desire to discriminate. Some other person is involved in the contract, but this person is not involved with respect to his own desires and personality in the element of discrimination. This third person is attempting to force the discrimination upon those who do not wish to discriminate. The concern for individual freedom, for the freedom to be left alone with one's own beliefs and to be allowed to carry them out, is far less cogent in such a case.[80]

The holding in *Shelley v. Kraemer* has been criticized on the ground that the decision was not based upon "neutral principles" of constitutional law.[81] The same evaluation of this position made previously in connection with the election cases[82] can properly be made here. Only by closing one's eyes to the actual effect of a restrictive covenant and the

---

[78] 334 U.S. 1 (1948).
[79] 346 U.S. 249 (1953).
[80] See Henkin, *supra* note 58, at 496.
[81] Wechsler, *supra* note 41, at 29.
[82] See p. 360, *supra*.

legal foundation given by the state to such a covenant running with the land can one say that the Court played an unduly activist role in *Shelley v. Kraemer*. Any realistic appraisal of the role that the state plays in barring entire segments of cities to residence by certain groups through the enforcement of such broad restrictive covenants running with the land shows the inevitable involvement of the state in discrimination. The state here is not enforcing a purely private discrimination, but is lending the use of its own law to the establishment of ghettos. The call again appears to have been for abstract and unrealistic principles rather than merely neutral ones.

The matter of the private desire to discriminate often arises also in the case of devolution of property. Many of these possibilities have been considered in various places and from time to time, again with the result that analysis by the state action concept is most misleading. A person leaves property to his daughter on condition that she marry someone of her religious faith. She marries someone outside of her faith and sues to obtain the property anyhow, on the ground that the enforcement of the condition is unconstitutional state action. Proper analysis would compel the conclusion that the devolution of property involves state action. This is something that is carefully controlled by state law, done under supervision of the state probate court, and with precise and detailed approval throughout. But the compelling factor should be that it is an element of individual freedom for a person to be allowed to bequeath his property as he wishes even though he does desire to engage in racial, religious, or other discrimination in the way he disposes of it. Here is another instance where the personal freedom which is being supported by allowing the discriminatory devolution is not a constitutional freedom. It has been well established that there is no constitutional right to bequeath property,[83] although there could be constitutional rights in discriminations enforced by the state upon the person making his will.[84] But this is the reverse situation to that which is here being considered.

A recent North Carolina case provides a good example of the problems which arise from application of the state action analysis to the devolution of property. *Charlotte Park & Recreation Comm'n v. Barringer*[85] involved park land which was conveyed to the city on condition that it

[83] See Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942).

[84] Any invidious discrimination in the privilege to dispose of property by will, such as depriving any particular racial or religious group of this privilege, would be unconstitutional.

[85] 242 N.C. 311, 88 S.E.2d 114 (1955).

be limited to use by white people only. The conveyance was a determinable fee providing for its termination if the park was used by persons other than white, and if the heirs paid $3,500 to the city. Under suit for declaratory judgment, the court held that the park land would revert to the heirs, the conditions having been met. Certiorari was denied by the United States Supreme Court.[66]

The court's analysis was that there was no judicial enforcement of the reversion since it was automatic. This is not a justifiable distinction. While it was not necessary for the court under the principles controlling determinable fees to cause the reversion by a decision, it nevertheless was state law which made the property revert. State action is unavoidably involved in the operation of any determinable fee. The distinction drawn by the state court is a distinction without a logical or justifiable difference.

Instead, it needs to be accepted in a case such as this that state action is present. The issue should then be determined by deciding whether the individual right to discriminate should outweigh the constitutionally required public concern against discrimination. This analysis will not give an automatic answer to such a case. It can be argued that even though, in general, there is a value in allowing private persons to engage in racial and other discriminations in bequeathing their property, they should not be allowed to do so in the terms of a grant when they are leaving their property for the use of the general public. The intensely personal nature of the terms of the devolution is removed to a great extent when property is given so broadly. This is not to say that that ought to be the conclusion in this kind of case. It can also be effectively argued that this is the wish of the person granting the property, that if he desires to give it in this fashion then his wish is worthy of respect.

The United States Supreme Court seems to have approached this kind of case with the correct analysis, although clear explanation has not been given. The *Girard* cases involved the devolution of property to the city of Philadelphia, the city to serve as trustee for the setting up of Girard College, limited to male white orphans. The Board of Directors of the College was the Board of Trusts of the City of Philadelphia. The United States Supreme Court found that the city was engaged in racial discrimination by acting as the trustee of this College.[67]

On remand to the state, the state court found that the dominant pur-

---

[66] 350 U.S. 983 (1956).

[67] Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

pose of the grant had been to limit the school to white orphan boys, rather than to have the school administered by a public trustee. Following out this conclusion, the state court set up a private trustee, but the original grant limiting the College to white orphan boys was continued.[88] Upon return to the United States Supreme Court, the appeal was dismissed and certiorari was denied.[89] The continuance of the College, limited to white orphan boys, was permitted so long as the public agency did not serve as trustee.

There are elements of the traditional state action analysis in the holdings in these two cases. Yet the requirement of state action was surely met in the second case as well. The actual determination of the Pennsylvania court to remove the public trustee because it found that the dominant purpose of the gift was to set up a college restricted to white, male orphans was itself state action in every bit as strong a sense as court enforcement of restrictive covenants. Indeed this was quite analogous to the enforcement of a restrictive covenant by the court. Yet the Supreme Court declined to review the case either by appeal or certiorari although it had already had the case once before. This result is clearly acceptable on the basis of a balancing of an individual's right to designate how his property will be used as against the public concern with discrimination.[90]

In summary, the analysis here applied to the case just discussed, while not actually undertaking to formulate a "test," reveals this core question: is the state limiting its action to enabling the private individual to engage in his private discrimination? Insofar as the state moves beyond this, by letting someone else enforce the discrimination as in the restrictive covenant cases, or by aiding groups and organizations which are beyond the role of the private citizen with his own private interest in discrimination as in the transportation and labor union cases, the constitutional right against discrimination applies.

VI. Government Involvement in Group Discrimination

Evaluation of the situations which have to do with a degree of shift away from the private individual to the group or organization claiming the right of private discrimination is now in order.[91] Groups have a

---

[88] *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958).

[89] 357 U.S. 570 (1958).

[90] *But cf.* Henkin, *supra* note 58, at 500, doubting the right of a state to enforce an institutional bequest which discriminates on race although recognizing the right to make such a bequest which discriminates on a religious basis. *Quaere.*

[91] Rice v. Sioux City Memorial Park Cemetery, 348 U.S. 880 (1954), *vacated*, 349

greater vulnerability to the rights of the public generally because they have greater relationship to the public generally than do individuals. The process of a state policy clothing a group with public interest so that freedom to engage in private discrimination no longer exists has been developed earlier. Labor unions now clearly fall into this category, as do enfranchised public utilities and transportation facilities.

The similar issue has been raised in housing. In *Dorsey v. Stuyvesant Town*,[92] a decision of the New York Court of Appeals in which the Supreme Court denied certiorari,[93] the City of New York and an insurance company entered into a contract to clear a slum area and construct a housing project. The land was condemned by the city and certain tax concessions were given. After the housing project was completed, the private company refused to lease to Negroes. The New York Court of Appeals found that the aid by the government was not enough to be considered state action. The court said that the concept of state action is applicable to private organizations and individuals "only in cases where the State has consciously exerted its power in aid of discrimination or where private individuals have acted in a governmental capacity so recognized by the State."[94]

This statement made by the court in support of its conclusion cannot stand under searching analysis. There are instances where the state can properly consciously exert its power in aid of discrimination and yet there is no constitutional violation. These are the instances of private and personal discrimination by individuals. Also, certainly the requirement of state action is not limited to those cases where the state itself recognizes that it has delegated governmental power to private individuals. The state had not recognized such delegation in the white primary cases.

The *Stuyvesant Town* case should be accepted as involving state action. To say that the condemning of the land and the tax concessions do not constitute state action is a clear denial of the modern application of the

---

U.S. 70 (1955), discussed p. 369, *supra*, would appear at first glance to be more properly classified in this article as involving a quasi-public group rather than a private individual. The reason the case was considered with other cases involving private individuals is that the existence of a contract between the parties and the issue of court enforcement of that contract as state action is the more uniquely useful facet of the case for analysis here. If the case is viewed solely as being concerned with a quasi-public business, the cemetery, it simply becomes one of many raising a similar issue.

[92] 299 N.Y. 512, 87 N.E.2d 541 (1949).

[93] 339 U.S. 981 (1950).

[94] 299 N.Y. 512, 535, 87 N.E.2d 541, 551 (1949).

doctrine. But this should not be taken as establishing that the decision in the case is therefore determined. The issue of state action is not the real issue. The issue must be resolved by a balancing of the right of personal discrimination against the state's compulsory concern for the elimination of discrimination.

Perhaps this can most clearly be seen by considering the same problem in a church organization. Here tax concessions and other aids to churches are accepted beyond cavil, in spite of the specific mandate for separation of church and state contained in the first amendment. The reason that these concessions are of concern is because the church group engages in discrimination which would be unconstitutional if the government itself so acted. This relationship cannot be resolved on any state action basis. The state action obviously is present. Rather, in evaluating the government's relationship to various church groups, the balancing of the individual's right to discriminate, which in this instance is an aspect of freedom of religion, must be weighed against the state's concern for the elimination of discrimination. And fortunately it is well established that this right of the individual religious group to discriminate must predominate.

Note that in making this constitutional analysis of action by groups, the same type of evaluation is used as has been used in determining whether state action is present or not. What is important is recognizing that the analysis is not for the purpose of determining whether there is state action, since the cases establish that there is. The purpose of the analysis, rather, is to determine the extent of the state involvement with the private group. Stating this proposition in the reverse, the purpose of the analysis is to determine the extent to which the private group has moved toward a relationship to the public which gives the public the obligation to police on a constitutional basis the group's desire to discriminate. In the *Stuyvesant Town* case, the issue was whether the state gave a sufficient degree of aid, both in quantity and nature, to the Stuyvesant Town Corporation to bring about the conclusion that the private housing group has so departed from its private nature that the public must insist that it not discriminate on a racial basis. To repeat, this is not an issue of state action; it is an issue of a balancing of the private right to discriminate against the constitutional obligation upon the public acting through the government to eliminate discrimination. On this analysis, the *Stuyvesant Town* case is seen as a border-line case with the result subject to serious question. The intimate relationship between the city and slum clearance, the size of the housing project, and the fact that

the city had to exercise its powers of condemnation to obtain the property for the corporation show the quasi-public nature of the corporate action.

In contrast to this case is *Johnson v. Levitt & Son*,[95] a decision of the Federal Court for the Eastern District of Pennsylvania. This case involved racial discrimination in Levittown by the owners of the Levittown housing project. The only claim of state involvement was the fact that there was FHA and VA financing on the houses. The court held the government was not sufficiently involved for there to be a constitutional violation in this racial discrimination. This decision appears correct without serious question although, again, it would be difficult to hold that the governmental guarantee of the mortgages of these houses is not governmental action. Indeed, the government is so intimately concerned with the problem of racial discrimination in housing for which the government guarantees mortgage loans that the matter became an issue in the Presidential campaign of 1960, and President Kennedy has issued an Executive Order forbidding racial discrimination in the sale of such housing by the original entrepreneur.[96]

To explore the gamut between the personal discrimination and the public interest, one need only consider the vast area of private schools, private clubs, and, as mentioned above, churches. Perhaps the most useful kind of organization for evaluation is the private school. Here the nexus with the state is quite acute in many respects. Curriculum is prescribed to a large extent in the elementary grades. Free textbooks,[97] lunches,[98] bus fares[99] may be given, as may tax exemption.[100] Such private schools are publicly accredited in that they fulfill the state requirements of law concerning compulsory schooling.[101] In the private colleges, credits in many instances are acceptable by law, as in the case of medical degrees and degrees in law. The federal government has engaged in an extensive program of scholarship and financial aid for persons attending such private schools.[102]

---

[95] 131 F. Supp. 114 (E.D. Pa. 1955).

[96] Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962).

[97] Cochran v. Louisiana Bd. of Educ., 281 U.S. 370 (1930).

[98] National School Lunch Act, 60 Stat. 230, 234 (1946), 42 U.S.C. §§ 1753, 1760 (d)(3) (1958).

[99] Everson v. Board of Educ., 330 U.S. 1 (1947).

[100] Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROB. 144 (1949); Note, 49 COLUM. L. REV. 968 (1949).

[101] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[102] See National Science Foundation Act, 64 Stat. 149 (1950), 42 U.S.C. §§ 1862(4),

An issue for the future is whether such schools engaging in racial discrimination are doing so in violation of the Constitution. But it would be totally misleading to resolve this issue on a determination of whether there was state action or not with respect to these schools. It is quite obvious that the state action here meets all constitutional requirements. But if the issue is to turn on the presence of state action, we then move ourselves into the constitutional dilemma that these schools are not only prohibited from engaging in racial discrimination, but they are prohibited from engaging in religious discrimination as well. This, we immediately recognize, does not make sense under the Constitution. One of the very purposes of the private school is to engage in religious discrimination. Indeed, if these schools are to be found as involved in state action and this is considered to be enough to bring the constitutional provisions into play, sectarian religious training in private religious schools would be outlawed. Public schools, of course, clearly may not engage in religious discrimination or sectarian religious training.[103]

This is but another instance of the need shown for realizing that the concept of state action does not solve these cases. In all of them, state action is present. Rather, there must be the evaluation of the personal right to discriminate as against the public's concern for the elimination of discrimination. And in such an evaluation, the result may well be different when the issue is one of religious discrimination as opposed to racial discrimination. But these differing considerations are not even subject to use if the traditional state action analysis is taken as the "test."

The matter of the private club is subject to the same need for sophisticated inquiry. If there is not state action, there is at least state inaction in allowing the private club to engage in racial or religious discrimination. The issue is simply whether in our society there is a positive value in allowing private groups to engage in such racial and religious discrimination when these groups limit their relationship to the public as narrowly as possible. The constitutional answer to this issue should be predictably certain. It should not take the required freedom of religion of the first amendment, applicable only to religious groups, to authorize such discrimination by groups that truly can be viewed as private and

1869 (1958); National Defense Education Act of 1958, 72 Stat. 1590, 20 U.S.C. §§ 461–465; STAFF OF SENATE COMM. ON LABOR AND PUBLIC WELFARE, 81st CONG., 1ST SESS., REPORT ON FED. SCHOLARSHIP AND FELLOWSHIP PROGRAMS AND OTHER GOV'T AID TO STUDENTS (Comm. Print 1950).

[103] Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Board of Educ., 333 U.S. 203 (1948).

voluntary. The country club, the luncheon club, the lodge or social club, as long as they do not move out into the area of public concern, as have the labor unions, should be under no constitutional inhibition whatsoever against engaging in discrimination. This should be so whether the discrimination involves race, religion, politics, sex, diet, or any of the multitude of other facets of individuality. It has been suggested that the private club could turn away the Negro non-member but only because they could also turn away the white non-member.[104] This again is the trap of the state action analysis. It fails to recognize the valuable right of the person or truly private group to engage in all manner of discriminations, except as they may be specifically outlawed by affirmative state regulations.

Another kind of problem that arises in evaluating the extent of state involvement is seen in cases such as *Eaton v. Board of Managers of James Walker Memorial Hosp.*,[105] a Fourth Circuit decision in 1958. This case had to do with the denial to Negro doctors of the "courtesy staff" privileges of the hospital. The court held the hospital policy constitutional. The hospital had originally been public. But in 1901 it had been conveyed to a private corporation for the purpose of obtaining a donation. It had remained private ever since 1901, although from 1901 until 1951 it received some financial grants-in-aid from the city. The only governmental connection with the hospital in existence at the time of the suit was the fact that the county had a contract with the hospital to pay for the care of indigent patients.

The quasi-public nature of the hospital, with rigid control by law of its activities and of the activities of its staff, clearly involves state action. In view of this fact, the circumstance that the county pays for the care of some indigent patients at the hospital would be irrevelant to the issue of state action. Here actually the government is a customer of this private business organization. Admittedly, the matter of being a customer could become so broad that it would be proper to treat the private organization as actually public in nature. But the mere payment of the funds should not of itself make the distinction as to whether in this case the racial discrimination is constitutionally prohibited or not. The state is a customer of many private business groups of one kind or another. State employees on official business, being paid by state funds, stay at hotels

---

[104] Schwelb, *The Sit-In Demonstration: Criminal Trespass or Constitutional Right?*, 36 N.Y.U.L. Rev. 779, 799 (1961).

[105] 261 F.2d 521 (4th Cir. 1958), *cert. denied*, 359 U.S. 984 (1959).

and eat in restaurants. The issue as to whether hotels and restaurants may constitutionally engage in racial or other discrimination should not hang upon such a tenuous thread. The issue in this case also must be one of evaluating whether the private group has so moved into the area of public concern that the public's interest in eliminating the particular discrimination in question must outweigh the personal right to discriminate.

VII. The Supreme Court Lays a Foundation for Abandoning the State Action Analysis

In a significant decision in 1961, the United States Supreme Court for the first time opened the door to the abandoment of the state action concept as a means of deciding the constitutional issue on discrimination. The case is *Burton v. Wilmington Parking Authority*.[106] To those who are bound up in the state action syndrome, Justice Clark's opinion for the majority of the Court can be called vague and obscure.[107] But when it is realized that we have entered the time of the twilight of state action, the Court is revealed as perhaps beginning the construction of the new and sensible road of evaluating the constitutional issue concerning discrimination on the merits rather than letting the accident of state action make the determination.

The case involved a publicly owned and operated parking garage. Part of the building was leased out for stores and a restaurant, the Eagle. The land had originally been condemned for public use, and the leasing was an integral part of the income to the public from the entire property. The building upkeep was at public expense, and certain improvements by the restaurant were given tax exemption. The United States Supreme Court, in the opinion by Justice Clark, held that the racially discriminatory policy of the Eagle Restaurant was in violation of the Constitution. The Court stressed the fact that the profits from the racial discrimination would go to the financial success of the government agency. Justice Clark firmly asserted: "[R]eadily applicable formulae may not be fashioned"[108] for such cases. Then, in the opinion, he summarizes the approach of the majority of the Court to the issue before it in a way that opens the door to the new analysis:

> But no state may effectively abdicate its responsibilities by either

---

[106] 365 U.S. 715 (1961).

[107] St. Antoine, *Color Blindness But Not Myopia*, 59 Mich. L. Rev. 993, 1005-06 (1961).

[108] 365 U.S. at 725 (1961).

> ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.[109]

Of particular relevance is the reference to the government's "interdependence" with the restaurant, and the reference to "purely private" activity. While there are also words of state action, particularly state inaction, in Justice Clark's opinion at least the foundation has been laid for the Court to evaluate these cases on grounds other than simply determining whether state action is present or not. The denial of the possibility of a formula, the reference to questions of degree in interdependence and the privateness of activity clearly open the door to this kind of analysis.

Interestingly enough, the traditional state action approach by the concurring and dissenting Justices points up most effectively the inadequacies of such an analysis. Involved in the case was a state statute which authorized restaurants to choose their customers. Justice Stewart, in his concurring opinion,[110] said that the only proper interpretation of this state statute was that it authorized racial discrimination. As such, he found that the statute violated the fourteenth amendment. In his strictly state action approach, Justices Harlan, Whittaker and Frankfurter concurred in their dissents. All of them said that if the statute was properly interpreted as authorizing racial discrimination in restaurants, it would be in violation of the fourteenth amendment.[111] Indeed, a rather incredible distinction was made by Justices Whittaker, Harlan and Frankfurter in dissent. While stating that if the state statute provided that restaurants may engage in racial discrimination, the statute would be unconstitutional, the Justices went on to say that if the state law was merely the common law policy of allowing restaurants to choose its customers, then there would be no constitutional violation.

This attempted distinction between state statutory law and state common law would seem to have no constitutional justification. Certainly it has been well accepted and established for many years that state common

---

[109] *Ibid.*
[110] 365 U.S. at 727.
[111] 365 U.S. at 729.

law is just as much state action for purposes of the fourteenth amendment as is state statutory law.[118] And a distinction between a statute or a common law principle which states that restaurants may choose their customers to allow the racial discrimination as opposed to a statute or common law principle which says in terms that restaurants may engage in racial discrimination (but does not compel it) shows the exceedingly tenuous and useless nature of the state action concept.

Even the apparent conclusion reached by these Justices that any statute which in terms authorized racial discrimination would be in violation of the Constitution would seem to be specious. Suppose, for example, that a state passed a statute which provided that individuals shall have the legal right to engage in racial discrimination in their own homes. Under the claim of the dissenting Justices in the *Wilmington Parking Authority* case, this statute would be unconstitutional. The same, I suppose, would be true of a statute which in terms authorized churches to engage in religious discrimination. It is here asserted that the position taken by the specially concurring and dissenting Justices in this case reveals quite clearly the fallacy of falling back upon the concept of state action to determine these cases. The issue must be whether the private organization has moved into an area of sufficient public concern, whether there is such "interdependence" that the discrimination is no longer private and personal. And whether the state allows the restaurant to discriminate through a common law policy or through specific statutory authorization would seem to be irrelevant to the merits of that issue.

VIII. State Action and the "Sit-Ins"

The Supreme Court is in this term facing a series of cases which may cast further light upon the need to move beyond the state action analysis. These cases are, of course, the restaurant "sit-ins." The facts are well known. Groups of Negro and white citizens went into the restaurant portions of stores where Negroes were allowed to trade and occupied seats in the restaurant area. Under store policy denying Negroes the right to eat at the restaurant facilities, the Negroes were not served. The Negro and white persons continued to remain quietly in their seats until police were called. The persons engaging in the sit-ins were arrested and convicted under typical trespass statutes or more specific statutes providing that any person commits an offense who fails to leave store prop-

[118] See pp. 347, 361, 363, 364, *supra*.

erty when requested by store personnel to do so. These convictions,[113] challenged on constitutional grounds, have been argued[114] and are awaiting decision in the United States Supreme Court.

It is probable that these cases will not throw much additional insight upon the whole problem of state action. In four of the five cases, the cities involved had existing ordinances requiring segregation in public dining facilities.[115] While these ordinances were not used in the convictions, since the defendants were convicted of trespassing, the trespassing grows out of the violation of the city ordinances by those persons engaging in the sit-ins. Under these circumstances, the Solicitor General took the position in argument that it is not necessary to go beyond the point of holding that the state is affirmatively engaged in discrimination when such statutes exist, and then persons are convicted for conduct which also constitutes violation of those segregation statutes.[116] It would do no violence to the most fundamental concepts of state action and of past cases to find constitutional violations in the affirmative governmental conduct in these four cases.

The other sit-in case, the Louisiana case, does not involve any precise ordinance requiring segregation.[117] The Solicitor General took the position in his argument that the "pervasive state policy of segregation would create the same effect" as if there were such specific segregation ordinances or statutes.[118] That this case could also be disposed of on this narrower ground would appear to be obvious from past developments. Any practical approach to the actual effect of segregation, as we have seen the Court use in *Smith v. Allwright*,[119] *Terry v. Adams*,[120] and *Shelley v. Kraemer*,[121] shows that the pragmatic impact of what the state does or what the state allows to occur is a proper factor. Justice Bradley himself in his majority opinion in the *Civil Rights Cases*, specifically stated that state "custom" supporting individual action could be state

---

[113] Shuttlesworth v. City of Birmingham, 134 So. 2d 213, 214 (Ala. 1961); Grober v. City of Birmingham, 133 So. 2d 697 (Ala. 1961); State v. Goldfinch, 241 La. 958, 135 So. 2d 860 (1961); State v. Avent, 253 N.C. 580, 118 S.E.2d 47 (1961); City of Greenville v. Peterson, 239 S.C. 298, 122 S.E.2d 826 (1961).

[114] The argument is reported in 31 U.S.L. WEEK 3159 (U.S. Nov. 13, 1962).

[115] The *Greenville, Birmingham,* and *North Carolina* cases, see note 113, *supra.*

[116] 31 U.S.L. WEEK 3162 (U.S. Nov. 13, 1962).

[117] State v. Goldfinch, 241 La. 958, 135 So. 2d 860 (1961).

[118] 31 U.S.L. WEEK 3163 (U.S. Nov. 13, 1962).

[119] See p. 360, *supra.*

[120] See p. 362, *supra.*

[121] See p. 373, *supra.*

action.[123] So it would be nothing new for the Court to be able to dispose of the sit-in cases by reversing the convictions on the ground that there has been governmental violation of the fourteenth amendment, without going beyond the law which has already developed.

In view of the position taken by the United States government through the Solicitor General as amicus curiae, it is probably likely that the sit-in cases will be disposed of on this narrower basis and will not substantially advance the modern evaluation of state action. Yet, it is always possible that the Supreme Court may write more broadly. In any event, the sit-in demonstrations provide a useful means for making further application of the principles which have been the subject of this article.

Perhaps the beginning point of the application of the principles developed in this article to the sit-in situation can best be the reporting of a brief interchange between Justice Douglas from the bench and Solicitor General Cox. The question and answer in the interchange are precisely in accordance with the analysis which is here proposed. At one point in the argument, Justice Douglas asked Solicitor General Cox, "Isn't it always state action when a state sends people to jail for doing something like this?" Solicitor General Cox replied, "It's always state action, but not always discrimination."[124] Here is a clear indication from the Solicitor General that he recognizes the all-pervading nature of state action and further recognizes that state action of itself cannot be the controlling and deciding factor in these cases.

State action can be found in several sources in the restaurant sit-ins. The first source is in the public nature of the restaurants, the public control exercised over them. To find state action by this means would in effect be an adoption of Justice Harlan's dissent in the *Civil Rights Cases*[125] and an overruling of the majority opinion on the state action issue.[126] But this aspect of state action does not stand alone.

The second aspect of state action is the element of state inaction found in the toleration by the state of widespread discrimination by businesses of a significantly public orientation. If an occasional isolated business engaged in racial discrimination, there would be little justification for the state to concern itself on behalf of its citizens who are being discrimi-

---

[123] Civil Rights Cases, 109 U.S. 3, 17 (1883) ("State authority in the shape of laws, customs or judicial or executive proceedings.").

[124] 31 U.S.L. WEEK 3162 (U.S. Nov. 13, 1962).

[125] 109 U.S. 3, 26 (1883).

[126] Counsel representing the sit-in demonstrators in one of the cases argued that the *Civil Rights Cases* should be overruled. 31 U.S.L. WEEK 3160 (U.S. Nov. 13, 1962).

nated against. But when the discrimination is so widespread that it is difficult for the particular group of citizens to live effectively in the community, the state may not stand idly by and allow this kind of widespread sanction without discriminating through its inaction.

In the third instance, state action is clearly found in the arrest and removal by the police of the persons engaged in the demonstrations. Solicitor General Cox stated this in argument.[126] Indeed, it has been said that this alone is enough to establish the unconstitutionality of the response of the stores to the sit-ins.[127] Of course, this final conclusion is a return to the traditional state action analysis which treats the presence of state action as controlling the constitutional issue.

If this important constitutional issue were determined upon the fact of the use of police to remove demonstrators, by the same analysis the person who caused the police to remove someone not wanted from his own home would be enlisting state help and the Constitution would be violated. This is the great danger of considering the issue on the basis of state action rather than on the basis of its merits.

Evaluations of the legality of the sit-in demonstrations, if the narrower grounds mentioned above are not used, should be upon the same analysis which has been put forward here so many times in so many different factual situations. The issue should be resolved by a careful balancing of the right of personal discrimination by the private individual or group against the compulsory public concern against discrimination. The inquiry should be very much along the lines of the traditional state action inquiry, but not to the same result. If the inquiry is directed to finding whether there is state action or not, the merits of the issue will not be posed. The valid affirmative concern for the right of personal discrimination will not be considered.

In this evaluation, it should be obvious that the restaurant in the store is far more interdependent with the public interest than is a private club. On the other hand, it obviously is less interdependent with the public interest than is the monopolistic, franchised public utility.

The traditional property law concept cannot be controlling. In *Marsh v. Alabama*,[128] the United States Supreme Court held that the owner of

---

[126] See p. 386, *supra*.

[127] Schwelb, *supra* note 104, at 809, seems to conclude that the sit-in convictions must be reversed because police aid was used to evict them. He does not carry his analysis on to the use of police to evict a trespasser in a private home because the trespasser is a Negro.

[128] 326 U.S. 501 (1946).

a company-owned town could not bar members of the Jehovah's Witnesses sect from engaging in free speech activities on the streets. This case certainly is as closely relevant as any to the sit-in cases now before the Court. It was pointed out in *Marsh v. Alabama* that the company-owned town was actually a suburb of Memphis, and the streets were open to the general public. The court stressed the right of the people living in the city to be exposed to the same kind of opportunity for the hearing of expression of opinion as would persons in other communities. The Court very properly said that the traditional concept of property, a state-created concept in any case, should not be controlling in such a circumstance. It has been seen in the discussion of the many instances here of private groups or organizations fulfilling quasi-public functions that this conclusion is not a radical one, although it was subject to much criticism at the time.[129]

At the time it was decided, it was felt by many persons that the *Marsh* case meant that no one could bar people from his own home or from his own private club. These fears were occasioned by the same kind of an analysis, stopping short of the merits of the controversy, as has been the subject of criticism in this article. It has not been widely publicized, but the *Marsh* case has been significantly and properly limited by a later decision. The same issue of the right of the Jehovah's Witnesses colporteurs to move through the halls of a privately-owned apartment house in carrying their message was before the Supreme Court of Virginia in *Hall v. Virginia*.[130] The conviction for trespass for insisting upon entering the halls of the apartment house contrary to the orders of the owner, was upheld. The United States Supreme Court dismissed the appeal, with Justices Douglas and Murphy dissenting.[131] The practical difference between the company-owned Memphis suburb and the apartment building is obvious and raises a wholly justifiable distinction. In further confirmation of the narrowness of the *Marsh* case, it should be noted that the "sit-down" strikes of the middle 1930's, where the employees stayed in the plant and took over the premises but refused to work, were held to be unlawful at that time.[132]

---

[129] *E.g.*, 44 MICH. L. REV. 848 (1946); 25 ORE. L. REV. 132 (1946); 1 WYO. L.J. 142 (1947).

[130] 188 Va. 72, 49 S.E.2d 369 (1948). *But cf.* Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958) (Apartment house owners must beware of *Marsh v. Alabama*).

[131] 335 U.S. 876 (1948).

[132] NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

If the Court does go beyond the likely narrow grounds for the disposition of the "sit-in" cases, it will be faced with the need to balance the competing considerations developed in this article. And the resolution would be an exceedingly difficult and delicate matter. But it should be recognized that regardless of which way the Supreme Court were to determine this issue, it should not mean that immediately all other cases are swept into the same category. If the Court should find the sit-ins lawful and the state action unconstitutional, simply because there was "state action," then other cases would be swept into serious question when there should be no question.[188]

But if the Court did recognize that it is balancing the personal interest as against the state interest, as it did, to some extent at least, in the *Wilmington Parking Authority* case, then a holding that the sit-ins were lawful and the state action was unconstitutional on the broader basis here proposed would not automatically mean that a private club could not discriminate, or that the private school could not discriminate, or that the individual in his private home could not discriminate. It would not even establish that under other circumstances even restaurants, which were separate and not part of stores, could not discriminate or that businesses of other types could not discriminate. If, on the other hand, the Court should hold that there was no legal justification for the sit-ins and that the state acted constitutionally, this would not automatically mean that the public utility could engage in discrimination or that the Court was abandoning its position and the leased public facility was no longer subject to constitutional requirements.

IX. Conclusion

This article has attempted to make the following points:

First: The sun is setting on the concept of state action as a test for determining the constitutional protections of individuals. Through developments concerning "color of state law," state inaction, private groups and organizations becoming sufficiently oriented to public concern to justify public control, and judicial enforcement of private agreements, state action is so permeating that it is present in virtually all cases.

Second: A kind of analysis which resembles the state action analysis is still properly used in those cases which evaluate the extent to which a

[188] The cases of licensed clubs, private schools, churches, all businesses and even discrimination in private homes would then be doubtful because state action is present in all. See p. 367, *supra*.

private group or organization has become oriented to public concern. But the purpose of this analysis is not to determine whether there has been state action or not, but rather to determine whether the state's compulsory constitutional interest in the elimination of discrimination is overbalanced by the desirability of permitting a private right to engage in personal discrimination.

Three: Personal freedom to discriminate lessens as the personal role becomes lessened, either through lack of personal interest (restricted covenants cases) or the public's concern as the person moves into a relationship with the public generally (business and organization cases).

Fourth: There is no formula. Each case must turn upon its own facts, although stare decisis will give a measure of predictability to similar cases.

Fifth: The elimination of state action as a controlling concept does not eliminate the role of the courts. Rather, it broadens it. The issue must become one of the merits of accommodating the interests, not one in the nature of a formula which is irrelevant to the interests involved.

The vast amount of literature evaluating the concept of state action has almost universally omitted consideration of the desirable right of individuals and private groups to engage in a multitude of discriminations in our society.[184] Analysis of cases on the basis of finding whether there has been state action or not leads to ignoring this significant competing consideration. Only by moving beyond the cant of state action to the merits of the constitutional issue in cases involving individual constitutional rights against discrimination can there be an effective studied line of principles established which will enable the state to permit and encourage private discriminations but prohibit the state from making its own policy one of discrimination.

---

[184] *E.g.*, St. Antoine, *supra* note 107; Shanks, *"State Action" and the Girard Estate Case*, 105 U. PA. L. REV. 213 (1956); Schwelb, *supra* note 104, all *passim*. Even those who recognize the competing personal freedom to discriminate do so grudgingly and seem to try to confine it narrowly. Thus, Henkin, *Shelly v. Kramer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 437, 490 (1960): "a small area of liberty which the Constitution favors above the claim of equality." Of course, this area of private discrimination is quite broad: in the house, in the devolution of property, in buying and selling, in family relationships, in some business, in churches, private schools and as to race, sex, religion, politics, physical appearance, and all matter of personal attributes. And these areas of private discrimination are not limited to constitutionally protected rights to discriminate. Compare also Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, (1961); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960), both *passim*.

NOTRE DAME LAWYER
A Quarterly Law Review

VOLUME XXXIV MAY, 1959 No. 3

CIVIL RIGHTS AND STATE NON-ACTION

Roger Paul Peters[*]

Introduction

The failure of the states, taken as a whole, to insure and protect the civil rights[1] of everyone equally, from the earliest days to the present, is an accepted fact. Perhaps the pattern was established by the State of Virginia during the days of the Articles of Confederation. After enacting an elaborate Bill of Rights, this state proceeded to 1) suspend sitting of the courts, 2) twice appoint a dictator, 3) limit the right to vote otherwise than as provided, 4) enact ex post facto legislation, 5) attaint a man of high treason, and 6) declare a man's life forfeited without trial.[2]

More recently, governors of certain states, meeting the particular civil-rights problem of integration, have asserted that there is no higher law than that established by the "majority" (a numerical majority or a numerical minority with a majority of the power?). If the majority want to deny the civil rights of a minority, it is the duty of the governor, by their definition, to effectuate this desire, as if it were the supreme law of the land. Such an approach contradicts a basic principle of our form of government, that there exists a law slightly higher than the desires of the majority. This approach in the states is not new. Concerning the state governments under the Articles of Confederation, Madison concluded: "[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[3]

---

[*] Professor of Constitutional Law, Notre Dame Law School, LL.B. New York University. Member of the New York and United States Supreme Court Bars.

[1] It is not the purpose herein to define the civil rights of the individual. An interesting list is contained in the Convention of North Carolina, Declaration of Rights (1788), THE FEDERALIST 646 (Ford ed. 1898).

[2] THE FEDERALIST No. 10, at 55 (Ford ed. 1898) (Madison). Activities such as these led Madison to conclude that the operation of state governments under the Articles of Confederation was responsible "for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights. . . ." *Id.* at 55-56.

[3] *Id.* at 55.

In comparison with the federal government, the states, again taken as a whole, are more susceptible to corruption on all levels, more likely to heed the wishes of the majority in disregard of law, less able to enforce their laws, and less able to rise above self-interest. We have for a long time by-passed the state governments in favor of the federal government for reasons just such as these. The adoption of the Constitution was such a by-passing. Similarly, and more recently, we have the Mann Act,[4] the Lindbergh Kidnapping Act,[5] and the Interstate Transportation of Stolen Vehicles Act,[6] as examples of a turning to the federal government because of the state's failure to provide desired results. Furthermore, today the federal government rather than the state government is expected to control overlords of organized crime.

These by-passings of the states in favor of the federal government establish a pattern which is perhaps descriptive of what the relationship between the state and federal governments should be. If the end to be achieved by government is within the capabilities of the states, responsibility for achieving that end should remain with them. But when a state fails or refuses to fulfill this responsibility, it devolves upon the federal government either to force the state to fulfill its responsibility or to achieve the particular end itself.

That the securing of civil rights is an end to be achieved by government, was early recognized in the Declaration of Independence. It is within the capabilities of the states to achieve this end, but if a state fails or refuses to fulfill this responsiblity, it devolves upon the federal government to either force the state to secure the civil rights of the individual or to secure these rights itself. Only by such a system as this would the civil rights of an individual be completely secured as far as possible under our system of government.

Congressional civil rights legislation of some sort is a certainty. The continuous failure of the states to secure the civil rights of individuals will eventually result in a complete turning to the federal government for a solution. This immediately raises serious constitutional problems if Congress is to produce an effective solution. Do *Barron v. Baltimore*,[7] the *Slaughter-House Cases*,[8] and the *Civil Rights Cases*[9] correctly define the basic limitations of congressional action, or does our Constitution establish the type of system described previously? These are the questions to be explored in this article.

I. BARRON V. BALTIMORE

Legal protection — the maintenance of a certain degree of order in the community — was enjoyed by inhabitants of the thirteen colonies that became the original United States of America. Dissatisfaction with oppressive measures on the part of the legally constituted authorities, with King and

---

4 18 U.S.C. § 2421 (1952).
5 18 U.S.C. § 1201 (1952).
6 18 U.S.C. § 2312 (1952).
7 32 U.S. (7 Pet.) 153 (1833).
8 83 U.S. (16 Wall.) 36 (1872).
9 109 U.S. 3 (1883).

Parliament at the summit, led to the demand for independence, the successful Revolution, the establishment of the United States, and the more perfect union of 1787-89. Having won freedom from tyranny, the people of the new nation were determined not to suffer the new national government to develop into an instrument for curtailing dearly bought liberty. To that end, a Bill of Rights was adopted almost contemporaneously with the new Constitution. It seems to have been the general belief at the time of the adoption of the Bill of Rights that such safeguards were necessary primarily as a warning to, or a restraint on, Congress and the national government with little, if any, concern being felt about the necessity or desirability of having similar restraints expressed in the national Constitution with respect to the state governments. There appears to have been a pervading sentiment that the people of each state could readily see to it that the government of the states be kept in check. Such protection for the inhabitants of each state against their local government as was felt to be necessary had already been provided for in Article I, section 10 of the Constitution. These are the provisions prohibiting ex post facto laws, bills of attainder, laws impairing the obligation of contracts, and forbidding duties on imports and exports.

Such in brief is the orthodox view of the position of constitutional guarantees of fundamental human rights. This view received the approval of the Supreme Court in 1833 when *Barron v. Baltimore*[10] was decided. The Court held that action by a municipality was not governed by that provision of the fifth amendment which forbids the taking of property for public use without just compensation. The great Chief Justice, speaking for the Court, stated that the first eight amendments, the Bill of Rights we hear so much about, do not apply to the States or their instrumentalities. The Court has never departed from this view. No matter how often the Court has revised and even overruled previous doctrines and decisions this marvelous holding has ever remained a fixed star in the constitutional firmament. The soundness of the holding on the basis of reason and authority has been widely accepted. Reason in this connection embraces traditional political theories concerning the role of the states in the Union as well as construction of the language of the Constitution, particularly Article I, section 10, which expressly refers to the states, and the first eight amendments which do not. Authority embraces a history of the adoption of the amendments. Yet doubts about the soundness of *Barron v. Baltimore* persist.[11] Even at this late date the holding seems incredible to many until they are shown the report of the case. To the vast majority of Americans the holding is unknown. After having had the eulogies of the Bill of Rights dinned in their ears by orators, pundits, lawyers, bar association committees, and the like, they would be amazed to discover that this wonderful Bill of Rights does not apply to their state governments.

The people of Alaska have been lately celebrating their great good fortune in having been admitted as a state of the Union. Henceforth, the voter in Alaska or Hawaii (presumably soon to be admitted) can vote for

---

10 32 U.S. (7 Pet.) 153 (1833).
11 2 CROSSKEY, POLITICS AND THE CONSTITUTION 1056-82 (1953).

senators and representatives, he can vote for a governor and for the presidential electors. Politicians throughout the United States will now have to take Alaskans and Hawaiians into account in their calculations about measures in Congress as well as about presidential elections. Alaska and Hawaii will be guaranteed a republican form of government. Their legislatures will be restrained by Article I, section 10 of the Constitution. All sorts of benefits will accrue — but no longer will their legislatures be restrained by the Bill of Rights in the United States Constitution. If Alaskans and Hawaiians want a Bill of Rights, they will have to do what state citizens before them have done — see to it that there is a Bill of Rights in the state constitution and get it observed if they can.

Our American Bill of Rights was adopted long before the parliamentary reform of 1832 in England when rotten boroughs were abolished. The gerrymander, however, appeared early in our history and conditions in some of our states today approach the rotten borough system of abuses. Georgia is most notorious in this respect.[12] The up-state and down-state inequities in New York and Illinois are well known. The failure of Indiana to redistrict by its own legislature, in contemptuous disregard of the state constitution, has recently been brought to public notice.

Contrary to the expectations of the old Jeffersonians, representatives from rural areas have tended in recent times to show little regard for human rights. Whatever the causes may be, the fact remains that the individual human being — without regard to his station in life — has discovered again and again that he is more apt to receive decent equality of treatment from federal officers than from local functionaries.[13] Local tyrannies are exercised. Powerful men at the local level find their power ineffective on the broader national plane.

Barron v. Baltimore ruled that the rights specified in the first eight amendments are guaranteed only against federal action. The first amendment, of course, in terms forbids only action by Congress, but the other amendments are not in terms so limited. The teaching of *Barron v. Baltimore* is that since the words "no state shall" or similar words do not appear in the amendments, protection on the state level is not guaranteed by the amendments. This doctrine is a product of strict construction and not one in the interest of freedom of individual persons.[14] Every man, woman and child in every state with a

12 South v. Peters, 339 U.S. 276 (1950). See also Magraw v. Donavan, 163 F. Supp. 184 (D.C. Minn. 1958).

13 Mr. Justice Jackson apparently felt differently.

> Courts can protect the innocent against [illegal searches and seizures] only indirectly and through the medium of excluding evidence. . . . Federal courts have used this method of enforcement of the [Fourth] Amendment, . . . although many state courts do not. This inconsistency does not disturb me, *for local excesses or invasions of liberty are more amenable to political correction* . . . . [A]ny really dangerous threat to the general liberties of the people can only come from [the federal] government]. (Emphasis added.)

Brinegar v. United States, 338 U.S. 160, 181 (1949) (dissenting opinion).

14 Mr. Justice Frankfurter in speaking of the fifth amendment privilege against self-incrimination stated: "This constitutional protection must not be interpreted in a hostile of niggardly spirit." Ullmann v. United States, 350 U.S. 422, 426 (1955). Contrast the language in *Ullmann* typically used in referring to federal infringement of individual rights with the language of Mr. Justice Jackson in note 13, *supra*, where only state infringement was involved.

republican form of government is left at the mercy of the governing group in the state insofar as the Bill of Rights is concerned.

Professor Crosskey has pointed out, to the disgust of the orthodox, that the Bill of Rights by its terms specifies standards of governmental action and that the failure to observe them was believed to be a great evil.[15] It was so at the time of the adoption of the amendments, probably almost universally. It is so believed by many today with regard to most of the standards specified therein. If violations of the standards are grave evils and forbidden to the national government, why are not violations by local and state governments equally grave?[16] Crosskey points out that the language of the first amendment that "Congress shall make no law respecting an establishment or religion," means what it says and only what it says. Congress may not legislate on this matter at all, but the states may. The first amendment is clearly addressed to congressional powers only. The remaining language of the amendment, "or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances," also, Crosskey explains, clearly forbids Congress to prohibit the free exercise of religion, but does not forbid the states to do so. The same can be said about freedom of speech, that is, Congress may not abridge it, but the states may. And so forth. But, and here is the matter that is frequently overlooked, Congress is not forbidden to *protect* the free exercise of religion, the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the government for a redress of grievances. Indeed, Congress should be able to control the states in these matters without in any way violating the Bill of Rights. Congressional legislation could be held to be authorized by a combination of the Bill of Rights and the "necessary and proper" clause of Article I, section 8 of the Constitution.

It should be noted that *Barron v. Baltimore* came down in 1833, long after the adoption of the Bill of Rights, in an era when elements disruptive of the Union were increasing in virulence. In the succeeding generation those same elements brought on our bitter Civil War. Crosskey indicates several statements of judges and commentators on the Constitution which make clear that many believed (as the unlearned today no doubt still believe) that the Bill of Rights, except the first amendment, applied to the states.[17] It is also worthy of note that a provision guaranteeing trial by jury in criminal cases is contained in Article III of the Constitution, relating to the judicial powers of the United States. Why was this guarantee repeated in the Bill of Rights, Article VI? It can readily be seen that the repetition of this provision might well be interpreted as having a wider application in the Bill of Rights, namely, to the states as well as to the federal courts.

---

15 Madison referred to these rights as the "great rights of mankind to be secured under this constitution," not simply federal rights. SMITH AND MURPHY, LIBERTY AND JUSTICE 81(1958) (Madison's Speech to Congress, June 8, 1789).

16 2 CROSSKEY, *op. cit. supra* note 11, at 1056-82.

17 *Id.* at 1076.

Recently the futility of further investigation into the matters discussed in this article has been alluded to by a judicious writer on the right to counsel.[18] It is submitted, that even though little that is new or important is likely to be discovered by further investigation, it seems salutary to remind the bar and inform the public that the great pillars of constitutional law discussed herein are not althogether worthy of unstinted praise and approbation and may soon be ripe for being distinquished into the constitutional limbo of *Lochner v. New York*,[19] *Allgeyer v. Louisiana*,[20] the *Child Labor Tax Case*,[21] or even into the pit of oblivion of *Plessy v. Ferguson*,[22] *Dred Scott v. Sanford*,[23] the great income tax case[24] and the like.

II. The Slaughter-House Cases

A discussion of the *Slaughter-House Cases*[25] is undertaken here for the purpose of examining the concept of state action as a limitation on the power of Congress. In this case, decided in 1872, the Supreme Court was being called upon for the first time to give judicial construction to the fourteenth amendment which had been ratified in 1868. The issue before the Court was whether the legislature of Louisiana had the constitutional power to create an exclusive franchise in one corporation to maintain the slaughter house facilities for all butchering in the city of New Orleans. The plaintiffs objected to such action on the grounds that the sanitation reasons advanced in justification were a pretense for creating a state-favored monopoly which would violate the natural rights of butchers to pursue their profession. Such rights, it was contended, were privileges and immunities of federal citizenship, which could not now be abridged by state law because of the adoption of the fourteenth amendment. In a five-four decision, the Court rejected this argument by holding that privileges and immunities of federal citizenship was a separate category from privileges and immunities of state citizenship. Each class encompassed only those rights which were in fundamental relationship to the modifier "federal" or "state." Pursuit of a profession was within a citizen's state rights, not federal; therefore, any abridgement of this right by the state would not be an abridgement of the privileges and immunities of national citizenship. National citizenship protected things in the nature of freedom to travel among the states,[26] rights to petition the federal government, protection on the high seas, habeas corpus and other enumerated rights.

The dissents asserted[27] that the privileges and immunities of federal citizenship was a much broader category, including within it the funda-

18 Rackow, *The Right to Counsel — Time for Recognition under the Due Process Clause*, 10 W. Res. L. Rev. 216, n.2 (1959).
19 198 U.S. 45 (1905).
20 165 U.S. 578 (1897).
21 259 U.S. 20 (1922).
22 163 U.S. 537 (1896).
23 60 U.S. (19 How.) 393 (1857).
24 Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895).
25 83 U.S. (16 Wall.) 36 (1872).
26 Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867), had been decided prior to the fourteenth amendment and had struck down a state law attempting to charge travelers for the privilege of passing through the state because it would interfere with the rights of the federal government.
27 83 U.S. (16 Wall.) 36 at 83, 111, 124 (1872).

mental rights of state citizens in their relation to state governments. The right of a state citizen not to have the state abridge his fundamental rights against the state was of itself a privilege and immunity of federal citizenship. The right to follow one's profession freely without the state interference of favoritism to special groups was such a right and therefore could not be abridged by state law.

These, then, were the first views taken of the privileges and immunities of national citizenship by the Supreme Court. And though the majority view became firmly established as a fundamental canon from which the vast store of fourteenth-amendment jurisprudence flows, some persist to question the validity of the decision, notably Justice Black.[28] The case has become identified with the issue of whether the fourteenth amendment "incorporates" the first eight amendments, and an examination of the views of Professor Fairman against those of Professor Crosskey on this question[29] gives some idea of the conflicting theories of history that may be applied in an historical evaluation of the *Slaughter-House* decision.

Some of the salient issues with which this controversy is concerned reveal the tremendous scope and importance of the *Slaughter-House* decision in our constitutional history. The question of whether the Framers of the first eight amendments originally intended that the rights contained in these amendments should be protected against infringement by only the national government and not the states is the beginning of the controversy. To Fairman, the decision in *Barron v. Baltimore* enunciates the true constitutional will of the people. Consequently, the legislative history of the fourteenth amendment is to be interpreted in this light. Crosskey, on the other hand, concludes that the decision in *Barron v. Baltimore* was incorrect. He further concludes that the most obvious intent shown in the legislative history of the fourteenth amendment was an intent to do away with *Barron v. Baltimore*.

In light of these two interpretations of history, it is relatively simple, then, to see the two opposing definitions that could be given to the privileges and immunities clause. The words of the original draftsman speaking of the fourteenth amendment have this to say:

> [T]he proposed amendment does not impose upon any state of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the letter of the Constitution.[30]

Allowing Fairman to project his own psychological satisfaction with the prior constitutional history into this speaker, the resulting statement says the fourteenth amendment is a truism, as the court did indeed interpret it. Allowing Crosskey to interject his disatisfaction, the statement becomes an obvious attempt to overthrow *Barron v. Baltimore*.

---

[28] See dissent in Adamson v. California, 332 U.S. 46, 71 (1947), and more recently, citing that dissent, Bartkus v. Illinois, 359 U.S. 121, 150 (1959) (dissenting opinion).

[29] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); and Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954).

[30] CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1865-66).

The period subsequent to the adoption of the fourteenth amendment by Congress again provides the battleground for their opposing inferences. Fairman asserts that the failure of states to consider that many of their procedures were then in conflict with the first eight amendments, and the failure of lawyers to assert such arguments in court,[91] are clear indications that the clause was not intended to have such a broad effect, whereas Crosskey discounts these instances as oversights of negligible importance when balanced against the view expressed by the contemporary Congress in its passage of the civil rights legislation.

Fairman has on his side the tremendous weight of judicial history subsequent to the *Slaughter-House Cases*, which has always re-affirmed its holding, while Crosskey's position finds its strength in the inference that the privileges and immunities clause, if the heart of the fourteenth amendment, certainly was intended to have a greater effect than the cipher to which it was reduced. The controversy here outlined, however, takes place wholly within the area of what is protected against positive state action, since the clause is prefaced "No state shall make or enforce any law. . . ." Part of the question becomes moot since the subsequent enlargement of the due process clause to include "fundamental personal rights and liberties"[92] has resulted in the inclusion of much of what the dissenters in the *Slaughter-House Cases* would include as things "which of right belong to citizens of all free governments"[93] in the privileges and immunities clause.

As to the concept of state action, however, the *Slaughter-House Cases* remain relevant in two respects: 1) Insofar as it made the due process and equal protection clauses of the fourteenth amendment bear the burden of what was intended to be covered by the privileges and immunities clause, the decision destroyed any vitality the equal protection clause might have had by contrast with a "proper" interpretation of the privileges and immunities clause. 2) This decision implied some basic assumptions that were later to become dogmatic in the subsequent cases defining the limitations of congressional power over civil rights.

Relevant to the second point are the statements by Mr. Justice Miller in the *Slaughter-House Cases* implying that any other interpretation of the privileges and immunities than his interpretation, would grant Congress complete control over state legislation. Thus, he asks:

> [W]as it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?
>
> All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the

---

91 See note 95 *infra*.

92 "For present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." Gitlow v. New York, 268 U.S. 652, 666 (1925).

93 83 U.S. (16 Wall.) at 97.

> States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction . . . would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. . . . But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; . . . the argument [that such was not the intent] has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.[84]

It would seem that Mr. Justice Miller's argument, and that of Mr. Fairman, are founded in reasoning that because the privileges and immunities clause was poorly drafted to allow for two extremely divergent views as to its meaning, the Court should choose that interpretation most consistent with the existing state-federal structure. However, if we examine the results of subsequent judicial history under the fourteenth amendment and observe the great supervisory power of the Supreme Court that has subsequently developed over state legislatures through the medium of due process, and if we assume further that such was the intent of the framers of the fourteenth amendment, then the intent we discover in retrospect today is certainly at odds with much of what Mr. Justice Miller concluded could not be the intent without further clarity.

First, his assumption that if a broad meaning were given to the privileges and immunities clause, the Supreme Court would then have the "authority to nullify such [state legislation] as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment"[85] is spurious in its import that as a result, a natural law-laissez faire system of rights would be frozen into the Constitution under which state legislatures could make no new laws nor change old ones.[86] For in reflecting on the Supreme Court's ability to collapse generalities under the force of social pressures,[87] the privileges and immunities "in their nature, fundamental; which belong of right to citizens of all free governments"[88] could have been made to give way before the future surge of social legislation just as easily as "the fundamental rights and liberties protected by the due process clause."[89]

Secondly, Mr. Justice Miller's repugnance to the general idea of the Supreme Court as a "perpetual censor upon all legislation of the states" has not proved to be an inherited characteristic of his judicial descendants in

---

[84] *Id.* at 77-78.
[85] *Id.* at 78.
[86] See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890, at 180-81 (1939), setting forth opposing counsels' views on the affect of a broad interpretation of privileges and immunities.
[87] *E.g.*, Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), holding that a mortgage moratorium law did not impair the obligation of contracts.
[88] Corfield v. Coryell, 6 Fed. Cas. 546, 551 (No. 3,230) (C.C. E.D. Pa. 1823).
[89] Gitlow v. New York, 268 U.S. 652, 666 (1925)

terms of the power they have seen fit to wield over state legislation, except when judicial humility prompts them to refrain from scrutinizing too closely.

Thirdly, his concept of what is within the state legislative power "in their most ordinary and usual functions" as against the scope of the federal legislative power, has undergone a tremendous displacement of power through other clauses of the constitution, most notably taxation[40] and commerce,[41] bringing with it new concepts of concurrent state-federal legislative jurisdiction unknown in 1872.[42]

If we were allowed to give Mr. Justice Miller an insight retrospectively into what the dormant "intent" of the whole Constitution would come to mean as to the proper balance between state and federal power, would he be equally as willing today to say in affirming his argument for a narrow construction of privileges and immunities that:

> The argument we admit is not always the most conclusive which is drawn from consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; . . . when in fact [the effect] radically changes the whole theory of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.[43]

Such an analysis may be an argument for, or an argument against, or no argument at all that the *Slaughter-House Cases* were wrong in their inception since it is a dubious method of constitutional jurisprudence to reconstruct the framers' intent in history by imputing to them knowledge of what later courts would declare the whole intent of the Constitution to have been. But it is significant insofar as Mr. Justice Miller did not refer to the legislative history of the fourteenth amendment to find this intention but relied squarely upon his interpretation of what the federal-state structure was in making a choice between two definitions. For the resulting definition of privileges and immunities based upon the state-federal structure, should then be subject to as much change as the state-federal relationship has undergone. The anomaly remains, that in construing the Constitution as a living, organic whole, the privileges and immunities clause has been discarded as lifeless, when in reality, even without saying *Slaughter-House* was wrong, there should be principles of life remaining which are as yet undeveloped.[44]

---

40 *E.g.*, Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937) (sustaining the Social Security Act of 1935).

41 *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (sustaining the Agricutural Adjustment Act).

42 *E.g.*, *Compare* United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944), *with* Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), where after the Court held the business of insurance to be interstate commerce, Congress successfully ceded its power to the states.

43 83 U.S. (16 Wall.) at 78.

44 In this connection, it is interesting to note the comment of Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1346-47 (1952), concerning the possible application of § 241 of the Civil Rights Act (making it a crime to interfere with a citizen's exercise of his privileges and immunities) to interference with rights created under various pieces of federal legislation. See KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 44-45 (1947).

The fact that the state-federal structure has changed and grown in complexity is also directly relevant to the concept of state action that the *Slaughter-House Cases* engendered. First of all, the contentions in the case represented two polar extremes, with no indication being made that there was in fact a great middle ground of decision both as to the Supreme Court's power of review and the legislative power of Congress. For instance, none of the justices saw fit to hold that the right to pursue one's profession without unreasonable interference from the state was a privilege or immunity of national citizenship but that in this particular case, there was no abridgement because the legislation was not arbitrary or unreasonable. Yet today under substantive due process, the right is recognized even though the legislation is upheld.[48]

There was an assumption by the majority, implied by its projection of the consequences that must necessarily flow from a broad interpretation of privileges and immunities that future Supreme Courts would be unable to make evaluative distinctions as to what was and what was not fundamental between the citizen and his state government. This assumption, as we have seen before, has been proved inaccurate as to the power of the Court by the subsequent development of substantive due process and the greater protection of civil as opposed to economic liberties.

But there was also an assumption that as to the legislative power of Congress in the enforcement clause, the necessary result of broad privileges and immunities would be complete control of state legislatures in all respects. Again, the assumption failed to recognize that future Supreme Courts would have the ability and the duty to draw the line on Congress between what was fundamental to the spirit of the fourteenth amendment in the concept of civil rights as against the large area of legislative subject matter which could properly remain indifferent to that spirit and therefore be left a matter of local concern. Why should "privileges and immunities of national citizenship" be any less subject to progressive evaluative definition than "due process of law"? The conclusion of the majority that it should not be capable of such interpretation denied the ability of the Supreme Court to use its own common sense to avoid those same consequences which were thought to be so "serious, far-reaching and pervading" as to call for no other conclusion than that it had just made.

In this context, the attempts at civil rights legislation by Congress were to fight for their existence and find their annihilation. The assumptions had been laid. All that was necessary now was to follow them out. Privileges and immunities of national citizenship did not include any relationships of the individual to his state government because this would allow complete congressional power over all things ordinarily subject to state legislative power. Acts of individuals against other individuals are ordinarily subject to state legislation and, therefore, they could not be subject matter of federal legislation. Without recognizing that Congress had itself made the evaluative distinction as to the actual constitutional limits of its power in state legislative

---

[48] *Compare* Lochner v. New York, 198 U.S. 45 (1905), *with* Nebbia v. New York, 291 U.S. 502 (1934).

areas, the Supreme Court blindly followed the assumptions of the *Slaughter-House* decision into the abyss of the *Civil Rights Cases.*

III. The Civil Rights Cases

In a series of cases[46] culminating with the *Civil Rights Cases,*[47] the Supreme Court of the United States frustrated in large measure the intention of the framers of the fourteenth amendment to provide the federal government with legislative power extending to private interference with civil rights.[48] This was accomplished by the concept "state action," or more precisely, "positive state action."[49] Simply stated, state action includes state legislation and the acts of state officials and quasi-officials done under color of state law.[50]

State action proved from the beginning to be a difficult concept to apply, and the courts have been continually called upon to define its limits. Their efforts, particularly of late, have resulted in charges that they are disintegrating the strict and conventional interpretation of the fourteenth amendment.[51]

At the present time state action stands as a barrier to effective judicial interpretation and effective legislative implementation of the fourteenth amendment because it prevents both Congress and the federal courts from reaching individual action when, in their judgment, the situation might otherwise warrant such extension of the federal power. Such a situation exists when private individuals interfere with civil rights and the states choose to "sit on their hands" and permit such interference.

The present situation in one limited area of civil rights — school desegregation — illustrates the effect of the concept of state action on the United States Congress. Five years have elapsed since the Supreme Court declared school segregation on the basis of race unconstitutional,[52] and as

---

46 United States v. Cruikshank, 92 U.S. (2 Otto) 542 (1875); Virginia v. Rives, 100 U.S. (10 Otto) 313 (1879); *Ex parte* Virginia, 100 U.S. (10 Otto) 339 (1879); United States v. Harris, 106 U.S. (16 Otto) 629 (1882).

47 109 U.S. 3 (1883).

48 Greesman, *The Unhappy History of Civil Rights Legislation,* 50 Mich. L. Rev. 1323, 1339-40 (1952). That this was the intent of the framers, see Flack, The Adoption of the Fourteenth Amendment 262-63, 277 (1908); Cohen, *The Screws Case: Federal Protection of Negro Rights,* 46 Colum. L. Rev. 94, 105 (1946); Barnett, *What is "State" Action under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?* 24 Ore. L. Rev. 227-28 232 (1945); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131, 163-64 (1950). The vast majority of the witnesses before the congressional committee which framed the fourteenth amendment complained of private and not state action. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction 267-68 (1914).

49 Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment,* 43 Cornell L. Q. 375-76 (1958).

50 *Id.* at 375. See generally *State Action,* 1 Race Rel. L. Rep. 613 (1956).

51 Morse, *Policy and the Fourteenth Amendment: A New Semantics,* 27 Fordham L. Rev. 187 (1958). See also Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 So. Cal. L. Rev. 208 (1957); Note, *The Disintegration of a Concept—State Action Under the 14th and 15th Amendments,* 96 U. Pa. L. Rev. 402 (1948). The courts, however, have a defender. Manning, *State Responsibility Under the Fourteenth Amendment; An Adherence to Tradition,* 27 Fordham L. Rev. 201 (1958).

52 Brown v. Board of Educ., 347 U. S. 483 (1954).

yet Congress has enacted no legislation which would assist the courts in enforcing this decree. However,

> We sense, indeed, a crying need for the flexibility of the political process as distinguished from the relative rigidity of the judicial process, and we can deplore the fact that Supreme Court in the Civil Rights Cases of 1883 relieved the congressional conscience by freeing it of major responsibility. Perhaps more relevant to the public need at the time of the Brown decision would have been the overruling of the Civil Rights decision rather than of *Plessy v. Ferguson* with its "separate but equal" doctrine. But the Supreme Court of today has no means of overruling the Civil Rights decision unless Congress goes in the face of that decision and enacts a statute in violation of it. This, we currently see, Congress is most reluctant to do.[88]

Thus as the federal judiciary continues to go it alone in the area of school desegregation it is paying for the "sin" of their predecessors over fifty years ago — the *Civil Rights Cases*.

The Civil Rights label itself raises a major problem of definition — what are civil rights? Which rights should be protected by government? Yet rather than being concerned with this problem, the United States is still preoccupied with the lesser problem of devising a system commensurate with federalism which will *effectively* protect that which is predetermined a civil right of an individual. If such a system were established by the fourteenth amendment, and the Supreme Court had been willing to recognize it, the United States could have proceeded to the definitional problem involved in civil rights. But by not recognizing the system established in the fourteenth amendment for federal protection of civil rights, our dual sovereignty form of government, which should provide a double guarantee of civil rights to the individual, has been permitted to become itself an instrument for the denial of civil rights.

Effective protection of civil rights occurs when a forum exists in which interference with a civil right either by the state or an individual is rectified. This may be illustrated as follows. Assuming freedom of speech to be a civil right, if John Doe rents a hall and announces that he is going to give a speech on the evils of smoking, and another individual who happens to be a cigarette salesman informs him that if he gives this speech he will suffer certain economic and physical injuries, there has been an interference with John Doe's freedom of speech. (There may also be an interference with his right to be free from threats of violence, but this is a right distinct from his right of freedom of speech and his remedy for one is not necessarily the remedy for the other.) John Doe's right of freedom of speech is effectively protected if the state 1) provides laws which make it a crime and/or a tort for one person to interfere with another's freedom of speech and 2) *actually* administers, enforces, and construes these laws so that the individual who interfered with John Doe's civil right is convicted of a crime and/or assessed with damages, subject of course to the vicissitudes of the judicial process. The failure of a state to provide an effective remedy to rectify an interference with the civil

---

[88] SWISHER, THE SUPREME COURT IN MODERN ROLE 160 (1958).

rights of an individual is termed, in the context of this article, *state non-action*.[84]

By reason of the *Civil Rights Cases* Congress is powerless under the fourteenth amendment in the face of state non-action. Congress cannot order the state legislature to enact laws which provide remedies for interference with civil rights. Thus, when a state has provided no effective remedy, Congress must deal directly with offenders and offenses, but this the *Civil Right Cases* taught us Congress may not do. In the context of our illustration above, if the state has not provided John Doe with a remedy against the individual who interferes with his right of freedom of speech, Congress is precluded from declaring such interference a crime or a tort and providing for adjudication in a federal court.

Because the *Civil Rights Cases* prevent Congress from overcoming the effects of state non-action, this decision will be put to close scrutiny in an effort to determine the soundness of the Court's reasoning and assumptions. Then, the theory of state non-action will be more fully developed in an effort to determine what congressional legislation today would be "appropriate legislation" under the fourteenth amendment.

The Supreme Court of the United States must of necessity take into consideration things other than what are normally termed judicial precedents. As precedents, decisions founded in policy are frequently the most unsound precedents of the Court because they remain in existence long after the considerations of policy upon which they were based are proved invalid or cease to exist. The *Civil Rights Cases* was a policy decision, as a reading of the decision will demonstrate. At the end of the rather long and repetitious opinion, Justice Bradley wrote:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or man, are to be protected in the ordinary modes by which other men's rights are protected.[85]

This strange platitude indicates that the decision was merely a "judicial ratification of the conviction widely held among white people that enough time had been spent in getting protection for the former slaves and that they must find some way of getting along without special attention."[86]

Time has proven the invalidity of the Court's policy determination that the Negroes as a race were ready to fend for themselves. However, the fiction of this determination even at the time it was made can be readily seen by contrasting Justice Bradley's statement above with one made by Justice Strong

---

[84] A distinction will be made here between state non-action and state inaction. State inaction is the failure of officials of the executive and judicial branches of the state government to act in a particular situation for the protection of the rights of an individual when under a duty to act under existing state laws. State non-action will refer to the failure of the state legislatures to enact legislation to provide effective remedies against individuals' interference with civil rights.

[85] Civil Rights Cases, 109 U.S. 3, 25 (1883).

[86] SWISHER, *op. cit. supra* note 53, at 152.

less than three years earlier. In *Strauder v. West Virginia*[87] Justice Strong wrote:

> At the time when [the Thirteenth, Fourteenth, and Fifteenth Amendments] were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that, in some States, laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves.[88]

Thus in the fifteen years which had elasped since the ratification of the fourteenth amendment, and the less than three years since Justice Strong wrote his opinion in *Strauder*, the "abject and ignorant" colored race whose "training had left them mere children" had closed the gap between themselves and the "superior intelligence" of the white race despite the fact that continued efforts had been made during this period "to perpetuate the distinction that had before existed." Therefore, "the protection which a wise government extends to those who are unable to protect themselves" was no longer needed.

By "repealing" most of the existing civil rights legislation, a short time before its probable repeal by Democratic majorities in Congress, the Court returned the protection of the civil rights of the Negro race and all future minority groups to the "ordinary modes by which other men's rights are protected."[89] The Court, speaking through Justice Bradley, had something to say about these "ordinary modes" of protection also.

> In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, *and may presumably be vindicated by resort to the laws of the State for redress.* An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right. He will only render himself amen-

---

87 100 U.S. (10 Otto) 303 (1880).

88 *Id.* at 306.

89 Civil Rights Cases, 109 U.S. 3, 25 (1883).

> able to satisfaction or punishment; *and amenable therefore to the laws of the State where the wrongful acts are committed.*
>
> . . . .
>
> Innkeepers and public carriers, *by the laws of all the States as far as we are aware,* are bound to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.[60] (Emphasis added.)

The above quotation illustrates a fictional presumption the Court is too often wont to make — the sufficiency of state processes.[61] This is a determination that is properly made by Congress after long and careful investigation of not only whether laws exist, but also whether they are enforced. Justice Bradley presumed that any interference by one individual with the civil rights of another in any state in the union may "be vindicated by resort to the laws of the State for redress." He further presumed that a person who interferes with the civil rights of another, no matter in which state such interference occurs, is simply "amenable to satisfaction or punishment . . . [under] . . . the laws of the State where the wrongful acts are committed." No indication is made to show that every state had civil rights legislation (which they did not),[62] to say nothing of the question of enforcing ordinary criminal and tort actions. Justice Bradley assumed that the objective of the congressional enactment being struck down — equal facilities in inns and public conveyances for people of all races — was being accomplished "by the laws of all the States as far as [members of the Court] are aware." Again, there was no indication of the extent of the "awareness" of the Court.

It is unnecessary to demonstrate the invalidity both in 1883 and today of these presumptions indulged in by Justice Bradley. Congress undoubtedly determined in 1875 that individuals were being denied equal facilities in restaurants, inns, and public conveyances, and that such denials were not being rectified by state processes. Presuming as correct all the Court's assumptions as to the sufficiency of state processes in 1883 to accomplish the objective of the law in question, they would only be grounds for congressional repeal of the law, rather than for the Court's determination that Congress did not have the power of enactment.

Thus far we have seen two presumptive fictions used by the Court in the *Civil Rights Cases* — the readiness of the Negro race to fend for itself and the sufficiency of state processes to protect civil rights. But these two assumptions are most likely only excuses for the Court's narrow construction of the fourteenth amendment, rather than the basis for that construction. Narrow construction of the Constitution when the power of Congress is concerned and broad construction when the power of the Court is concerned is

---

60 *Id.* at 17, 25.

61 *E.g.*, Betts v. Brady, 316 U.S. 455 (1942); Wolf v. Colorado, 338 U.S. 25 (1949); Screws v. United States, 325 U.S. 91 (1945) (dissenting opinion of Justice Roberts).

62 Between 1865 and 1883 there was comparatively little legislation in the Northern, Eastern and Western states as to civil rights. Massachusetts, Delaware, Kansas, Montana, and New York were the only states outside of the South having any civil rights legislation in 1883. Such legislation could be found in the South at this time only in Louisiana, Arkansas, Tennessee, Florida and North Carolina. Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 547, 555-63 (1909). See SWISHER, *op. cit. supra* note 53, at 148-62.

an almost traditional aspect of our jurisprudence.[63] This, coupled with the general feeling of dissatisfaction with the congressional role in the Reconstruction, is probably the real basis for the decision of the majority. In view of congressional excesses during Reconstruction, the Court's interest in curtailing rather than extending the power of Congress is understandable. But by belatedly locking the barn in 1883, the Court denied the power to all succeeding Congresses and effectively removed civil rights from the political process. Thus, the changing sentiment of the people in regard to civil rights has found only limited expression through the courts. Correctly used, the power the framers of the fourteenth amendment intended to confer upon Congress would have allowed for full expression of these sentiments as well as have provided the flexibility needed to meet changing situations.[64] The error of the Court's action in denying a power to Congress because of a past abuse of power might be readily conceded by the present Court when it reflects that the same sort of reasoning is being used by those who urge curbing the Court because of more recently alleged abuses.

But returning from the area of policy, the incorrectness of the considerations underlying the Court's decision in the *Civil Rights Cases* means nothing if the Court nevertheless correctly construed the language of the fourteenth amendment. The Court dismissed the first sentence of the amendment as merely "declaring who shall be citizens of the United States." Justice Harlan objected to this eclectic reading of the amendment and found that the first sentence was positive, granting and creating both state and federal citizenship, and entitling Congress to insure to everyone all the rights of citizenship.[65] The invalidity of the majority's interpretation of the amendment can be shown, however, without attempting to settle the dispute with Mr. Justice Harlan in dissent. Speaking for the majority in the *Civil Rights Cases*, Justice Bradley wrote:

> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and a broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the law.[66]

It is necessary for the reader at this point to have before him an exact text of the portion of section one of the fourteenth amendment under discussion and of section five.

> Article XIV
>
> Sec. 1. . . . No State shall *make* or *enforce* any law which shall abridge the privileges or immunities of citizens of the United States;

---

[63] *Compare* Kansas v. Colorado, 206 U.S. 46 (1906), *with In re* Debs, 158 U.S. 564 (1895). A notable exception is Congress's power under the commerce clause. After the traditionally narrow construction, United States v. E.C. Knight, 156 U.S. 1 (1895), the Court ultimately went to the other extreme, Wickard v. Filburn, 317 U.S. 111 (1942).

[64] See Swisher, *op. cit. supra* note 53, at 148-60.

[65] Civil Rights Cases, 109 U.S. 3, 43-52 (1883) (dissenting opinion of Justice Harlan).

[66] *Id.* at 11.

> nor shall any State *deprive* any person of life, liberty, or property without due process of law; nor *deny* to any person within its jurisdiction the equal *protection* of the laws.
>
> . . . .
>
> Sec. 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article. (Emphasis added.)

Justice Bradley, by the statements just quoted, rewrote section one so that it now reads in effect:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State [make or enforce any law so as to] deprive any person of life, liberty, or property without due process of law; nor [make or enforce any law so as to] deny to any person within its jurisdiction the equal protection of the laws.

If it is doubted that Justice Bradley read the first section in this manner, re-examine the excerpt of the opinion quoted above where he said:

> It nullifies and makes void all state legislation, and state action of every kind which impairs . . . privileges and immunities, injures . . . without due process of law, or which denies . . . equal protection. . . .[67]

If this is what the framers meant they would have anticipated Justice Bradley and written:

> No state shall make or enforce any law which shall abridge . . ., deprive . . ., or deny . . . .

But this they did not do. What they did do was (1) prohibit the states from abridging the privileges and immunities of citizens of the United States, designating with positive language (". . . make or enforce . . .") the method by which abridgment must occur in order to fall within the prohibition; (2) prohibit the state from depriving any person of life, liberty, and property without due process of law, saying nothing about the method by which deprivation must occur in order to come within the prohibtion; (3) prohibit the states from denying any person the equal protection of the laws, again without designating how the prohibited denial must come about.[68]

The obvious question at this point is: May a state deprive a person of due process of law and deny him the equal protection of the laws other than by making or enforcing a law? The equally obvious answer is: Yes, by not making or enforcing a law when under a duty to do so.

IV. State Non-Action

It is helpful to review briefly the development up to this point. The validity of the decision which made necessary a fourteenth amendment, *Barron v. Baltimore*, was questioned in Section I. In Section II, the *Slaughter-*

---

67 *Ibid.*

68 The complete separation of the second and third clauses from the first clause is obvious to the casual reader. The last two clauses are set off from the first clause by a semi-colon. The subject of the first clause ("no State") is repeated but changed ("any State"). The recipient of the protection in the first clause ("citizens") is changed and the number of recipients is increased ("any person"). Lastly, while the first clause is limited to those laws which involve privileges and immunities of citizens of the United States, the last two clauses extend to all laws no matter what their subject matter. The second and third clauses express distinct concepts of their own, borrowing nothing from the first clause, particularly not the words "make and enforce."

House Cases, the Court's first pronouncement on the fourteenth amendment, was considered primarily to show that the *a priori* rejection of broad congressional power in its reasoning set the stage for the decision in the *Civil Rights Cases*. This last-mentioned decision was considered in Section III in order to demonstrate the fragile assumptions of the majority and the considerations of policy which dictated such an extreme denial of congressional power. As a secondary point, the effect of this decision on the protection of civil rights in our dual-sovereignty form of government was briefly examined. In the present section, state non-action, the key to a correct determination of the extent of congressional power under the fourteenth amendment, will be first traced in the legislative history of the civil rights laws enacted between 1868-1875. Secondly, state non-action will be examined in light of judicial developments since the decision in the *Civil Rights Cases* as well as in the judicial history prior to this decision. Ultimately, it is hoped that the question raised by section five of the fourteenth amendment, namely, just what is "appropriate legislation," will be answered.

A. *Legislative History of State Non-Action*

The first real efforts to enact laws for the enforcement of the provisions of the fourteenth and fifteenth amendments occurred during the Second Session of the Forty-First Congress and resulted in the Act of May 31, 1870.[69] A bill was introduced in the Senate by Senator Edmunds for the enforcement of the fifteenth amendment, but was amended by Senator Seward for the purpose of enforcing the third section of the fourteenth amendment and for securing to all persons the equal protection of the laws. During the debates on this bill, Senator Pool of North Carolina surveyed the problem of state non-action and asserted that Congress had the power to overcome the non-action of a state by legislating directly against individual action. Senator Pool defined the word "deny" as used in both the fourteenth and fifteenth amendments as including both acts of omission and commission by the states. According to him, a state was capable of denying civil rights by omission, that is, by a failure to prevent its own citizens from depriving any of their fellow citizens of the rights secured by the amendments, but the States were now prohibited from such denial. The possibility of denial by omission gave Congress the power to reach individual action because Congress had no power to legislate against the states.[70]

On the 23rd of March, 1871, after the House of Representatives had determined to adjourn without having passed any bills for the enforcement of the amendments, a message was received from President Grant recommending that such legislation be enacted. Congressman Shellabarger, who had been in Congress when the fourteenth amendment was proposed, reported a bill in the House five days later to the special session which had re-

---

[69] 16 Stat. 140. This statute re-enacted the Civil Rights Act of 1866, Act of April 9, 1866, 14 Stat. 27, which raised the constitutional questions leading to the proposal of the fourteenth and fifteenth amendments. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 19-40, 94-95 (1908).

[70] CONG. GLOBE, 41st Cong., 2d Sess. 3611-13 (1870) (Senator Pool, N.C.).

sulted from President Grant's message.[11] Section three of the proposed bill is of particular interest for our purposes because it was aimed directly at state non-action. This section provided:

> That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to to which they are entitled under the Constitution of the United States. . . .[12]

This bill, including the third section, was passed by the House, after nine days of debate. Of the one hundred eighteen voting for the bill, fifteen had been members of Congress when the fourteenth amendment was proposed. Two others who also had been members at that time were absent, but they were probably in favor of the bill.[13]

Even more important than the adoption of the bill with a section aimed directly at state non-action, are the remarks made during the debates which preceded its adoption. (It must be remembered that this was the first effort by Congress to enforce primarily the provisions of the first section of the fourteenth amendment.)

Congressman Hoar of Massachusetts pointed out that it had sometimes been suggested that the fourteenth amendment was aimed at only unlawful acts by state authorities. He urged, however, that the equal protection clause was evidence that this was not the case since it would have been unnecessary if that were all that had been intended. He then indicated that the refusal on the part of the state officials to extend the protection provided for by the first section, for example, if juries as a rule refused to do justice where the rights of a particular class of citizens were concerned *and the state afforded no remedy*, was as much a denial of equal protection of the laws as if the state had enacted a statute that no verdict should be rendered in favor of that class of citizens.[14]

Representative Garfield, also a member of Congress when the fourteenth amendment was proposed, maintained that the equal protection of laws clause was the most valuable clause in section one. He stated that if state laws were just and equal on their face, but were not enforced either by reason of the neglect or refusal of state authorities, Congress was empowered by the equal protection clause to provide for the doing of justice to those who were thus denied equal protection of the laws.[15]

Congressmen Colburn and Wilson of Indiana held similar views on the power of Congress to rectify the effects of state non-action. Mr. Colburn,

---

11 FLACK, *op. cit. supra* note 69, at 226-28.
12 Act of April 20, 1871, 17 Stat. 13.
13 FLACK, *op. cit. supra* note 69, at 244-45.
14 CONG. GLOBE, 42d Cong., 1st Sess. 334 (1871).
15 *Id.* at app. 149-54.

in answer to those who were maintaining that Congress had no power until a state had actually abridged the privileges of citizens, stated that affirmative action or legislation on the part of the state was not necessary to authorize congressional action, since the failure of the state to see to it that every one was protected in his rights was just as flagrant as a positive denial of protection.[16] Representative Wilson felt that the equal protection clause should be read as saying in effect that "no State shall fail or refuse to provide for the equal protection of the laws to all persons within its jurisdiction." According to him, both the failure of a state to enact proper laws as well as the failure of a state to enforce existing laws constituted a denial of equal protection. When such was the case Congress possessed the power to enact laws to secure equal protection.[17]

Congressman Bingham, the man who drafted the second sentence of section one of the fourteenth amendment, including the equal protection clause, made a long and significant address during the debate on the bill.[18] At one point in his remarks, Representative Bingham stated that under the Constitution as recently amended, Congress had the power to provide against the denial of rights by the states whether the states accomplished this denial by acts of omission or of commission. He said that citizens were being deprived of property without compensation, denied trial by jury, restricted in the freedom of speech and of the press, and that no remedies existed by which such interference with the rights of citizens could be rectified.[19]

While these remarks on the power of Congress to overcome the effects of the state non-action were being made in the House, a similar approach developed in the Senate. On April 4, 1871, Senator Morton of Indiana declared that the last clause of section one made a failure to secure the equal protection of the laws the same as a denial of equal protection. It was unimportant whether this failure was willful or merely the result of inability. Senator Morton felt that the last clause read in effect that every person in the United States shall be entitled to the equal protection of the laws. Because Congress could enact legislation applicable only to individuals and not the states directly, this was the only method available to secure equal protection where it was being denied by a failure of the state to act.[20]

---

16 CONG. GLOBE, 42d Cong., 1st Sess. 459 (1871).

17 *Id.* at 481-83.

18 In this speech Representative Bingham carefully explained the meaning of sections one and five of the fourteenth amendment as understood by himself and the other framers of the amendment at the time of its proposal. In his conservative statement on the intent of the framers of the fourteenth amendment, Mr. Fairman intimates that Congressman Bingham's speech of 1871 is no evidence of the intent of the framers; and implies that perhaps in 1871, he was attempting to perpetrate a fraud on the country. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 137 (1949). It is difficult to understand why the statements of the man who drafted all except the first sentence of section one, expressed in Congress during the first real effort to enact legislation for the enforcement of that section, are not evidence of the meaning the framers intended the amendment to have while Mr. Fairman's opinions formulated over ninety years later are evidence of that intent. See also Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 89-91 (1954).

19 CONG. GLOBE, 42d Cong., 1st Sess., app. 83-85 (1871). Congressman Bingham expressed similar views when the first section of the fourteenth amendment was before the House. FLACK, *op. cit. supra* note 69, at 79.

20 CONG. GLOBE, 42d Cong., 1st Sess., app. 251 (1871).

The end result of the debates in Congress during the special session of the spring of 1871 was the Act of April 20, 1871.[81] Portions of this act were held unconstitutional in *United States v. Harris*,[82] which was one of the decisions leading up to the *Civil Rights Cases*.

During the debates preceding the enactment of the Act of March 1, 1875,[83] the first two sections of which were held unconstitutional in the *Civil Rights Cases*, the power of Congress to reach individual action when faced with state non-action was again recognized. Mr. Lawrence of Ohio, a member of Congress when the fourteenth amendment was proposed, made an important address. After quoting the first section of the fourteenth amendment, he continued: "The object of this provision is to make all men equal before the law. If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of the laws. What the State permits by its sanction, having the power to prohibit, it does in effect itself."[84] Mr. Lawrence asserted that the word "deny" included omission as well as commission. To him the state which failed to enforce or secure equal rights was just as reprehensible as the state which actively denied those rights, for the failure to secure protection was in itself a denial. He further declared that the bills, the debates of which we have just considered, proceeded upon that idea that if a state omitted or neglected to secure the enforecment of equal rights, it denied the equal protection of the laws.[85]

It is not asserted that the laws enacted in 1870, 1871 and 1875 to overcome the effects of state non-action were necessarily appropriate to accomplish that end. It is asserted, however, that it was intention of the framers of the fourteenth amendment that Congress have the power to provide remedies for interference with civil rights when no remedies exist under state law. This is readily discernible from the remarks of men who were in Congress when the fourteenth amendment was proposed, who were instrumental in its becoming a part of the Constitution, and who even wrote the very words which conferred this power.

In the *Civil Rights Cases*, the majority refused to adopt this interpretation of the framers of the equal protection clause, but Justice Bradley in writing the opinion could not help but adopt some of the phraseology of this interpretation.

> The wrongful act of an individual, *unsupported by any authority*, is simply a private wrong . . .; an invasion of the rights of the injured party, it is true . . .; but *if not sanctioned in some way by the state*, or not done under state authority, his rights remain in force.[86] (Emphasis added.)

The interpretation the Supreme Court did adopt in the *Civil Rights Cases* was that of the minority which opposed the fourteenth amendment and op-

---

81 17 Stat. 13.
82 106 (16 Otto) U.S. 629 (1882).
83 18 Stat. 335.
84 2 Cong. Rec. 412 (1874).
85 *Ibid.*
86 The Civil Rights Cases, 109 U.S. 3, 17 (1883).

posed the legislation enacted to enforce its provisions. It is a fairly safe assumption that whatever the amendment was intended to mean, it certainly was not intended to mean that which its opponents said it meant.

B. Judicial History of State Non-Action

Oddly enough the judicial history of state non-action begins with two Justices of the Supreme Court of the United States who both wrote the opinion for the majority in decisions which led up to the *Civil Rights Cases* — Justice Woods and Justice Strong.[87] Justice Woods also has the dubious honor of having voted with the majority in this last-mentioned decision.

Justice Strong was appointed to the Supreme Court in 1870 and resigned in 1880.[88] Assigned to the Third Circuit, in 1873 he wrote in *United States v. Given*:[89]

> [The thirteenth, fourteenth and fifteenth] Amendments have *left nothing to the comity of the states* affecting the subject of their provisions. They manifestly intended to secure the right guaranteed by them against any infringement from any quarter. Not only were the rights given — the right of liberty, the right of citizenship, and the right to participate with others in voting . . . but power was expressly conferred upon congress to enforce the articles conferring the rights.[90] (Emphasis added.)

Given involved a refusal by a state official to collect poll taxes from Negroes. No sanction existed under state law for this refusal. In upholding the indictment of the state official for infringing rights under the fifteenth amendment, Justice Strong said:

> It is, I think, an exploded heresy that the national government cannot reach all individuals in the states. . . . But when state laws have imposed duties upon persons, whether officers or not, the performance or non-performance of which affects rights under the federal government, . . . I have no doubt that Congress may make the non-performance of those duties an offense against the United States, and may punish it accordingly. . . . Undoubtedly, an act or an omission to act may be an offense both against the state law and the laws of the United States. *Any other doctrine would place the national government entirely within the power of the states and would leave constitutional rights guarded only by the protection which each state might choose to extend to them.*[91] (Emphasis added.)

---

[87] Justice Woods wrote the opinion in United States v. Harris, 106 U.S. (16 Otto) 629 (1882). Justice Strong wrote the opinions in *Ex parte* Virginia, 100 U.S. (10 Otto) 339 (1879); Virginia v. Rives, 100 U.S. (10 Otto) 313 (1879).

[88] Biographical Notes, 30 Fed. Cas. 1396 (1897). Upon Justice Strong's resignation in 1880, popular opinion demanded that the "proper South" be represented on the Court. Accordingly, Justice Woods—"an ardent Republican," native of Ohio and former Union general who participated in Sherman's march to the sea — was appointed. 20 MALONE, DICTIONARY OF AMERICAN BIOGRAPHY 305-06 (1936).

[89] 25 Fed. Cas. 1324 (No. 15,210)(C.C.D. Del. 1873).

[90] 25 Fed. Cas. 1324, 1326 (No. 15,210)(C.C.D. Del. 1873).

[91] *Id.* at 1328. See also opinion of Bradford, J. in the same case, 25 Fed. Cas. 1328, 1329 (No. 15,211)(C.C.D. Del. 1873):

> If by indifference, refusal to pass such laws as harmonize with and aid in making available and secure to all citizens the right to vote, and by neglecting to punish the officers of its own state for a violation of their duty in affording to the citizens the prerequisites to voting, a practical denial and abridgement of that right are effected, congress, in my judgement, has full power under the fifteenth amendment to remove this evil, and to select such means as it may deem appropriate legislation.

Seven years later in *Ex parte Virginia*,[92] Justice Strong wrote:

> We have said the prohibitions of the 14th Amendment are addressed to the States. They are: "No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the the State, or of the officers or agents by whom its powers are exerted deny to any person within its jurisdiction the equal protection of the law.[93]

Justice Strong, by his dictum in *Ex parte Virginia*, indicating that the prohibitions of the fourteenth amendment are limited to the positive acts of state officials, is ready to close the concept of the rights protected by that amendment, and to leave to the comity of the states the corrections of private injustices of one group of citizens to another. Despite his opinion in *Given* as to the meaning of the amendments, the states are to be allowed to choose whether or not they will act in any given area to secure individual rights, and until they do, there are no constitutional rights in its citizens. Thus, Congress is denied the power to overcome state non-action, a power it apparently had when *United States v. Given* was decided.

Justice Woods was appointed to the Supreme Court in 1880 after having served as a judge in the Fifth Circuit for eleven years.[94] While a circuit judge in 1871 he wrote in *United States v. Hall*,[95] to the effect that the fourteenth amendment prohibited state non-action as well as state action. The defendants, private individuals, had been indicted for violating Section Six of the Civil Rights Act of 1870[96] by conspiring and banding together with intent to hinder the complainants in their exercise of their right of freedom of speech and peaceful assemblage. After holding that these rights were privileges and immunities of citizens of the United States,[97] Judge Woods wrote:

> We find that congress is forbidden to impair [freedom of speech and assemblage] by the first amendment, and the states are forbidden to im-

---

92 100 U.S. (10 Otto) 339 (1879).

93 *Id.* at 346-47.

94 Biographical Notes, 30 Fed. Cas. 1403 (1897).

95 26 Fed. Cas. 79 (No. 15,282)(C.C.S.D. Ala. 1871). In this decision Judge Woods held that "the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the Constitution of the United States, are the privileges and immunities of citizens of the United States. . . ." *Id.* at 82. Mr. Fairman, in finding that amendments I-VIII are not the privileges and immunities of citizens of the United States, makes no mention of this decision, but maintains that "if the theory that the new privileges and immunities caluse incorporated amendments I-VIII found no recognition in the . . . courts, it is not surprising that the contemporary Supreme Court knew nothing of it either." Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 132 (1949). Mr. Justice Frankfurter recently said: "The relevant historical materials have been canvassed by this Court and by legal scholars. [Citing Fairman]. These materials demonstrate conclusively that Congress and the [state legislatures] did not contemplate that the Fourteenth Amendment was not a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions on the State." Bartkus v. Illinois, 359 U.S. 121, 134 (1959).

96 Act of May 31, 1870, 16 Stat. 140. This section was the forerunner of 18 U.S.C. § 242 (1952).

97 Though such a view was rejected by the holding in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), these rights later became fundamental liberties of *persons* protected by substantive due process. *Cf.* Gitlow v. New York, 268 U.S. 652 (1925).

> pair them by the fourteenth amendment. Can they not, then, be said to be completely secured? They are expressly recognized, and both congress and the states are forbidden to abridge them. Before the fourteenth amendment, congress could not impair them, but the states might. Since the fourteenth amendment, the bulwarks about these rights have been strengthened, and now the states are positively inhibited from impairing or abridging them, and so far as the provisions of the organic law can secure them they are completely and absolutely secured. The next clause of the fourteenth amendment reads: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws." Then follows an express grant of power to the federal government. . . . *From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly and insufficient state legislation,*[98] *for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws.* Therefore, to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state *inaction*, or *incompetency*, the amendment gives congress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures. The extent to which congress shall exercise this power must depend on its discretion in view of the circumstance of each case.[99] (Emphasis added.)

Eleven years later and then an Associate Justice of the United States Supreme Court, Justice Woods in *United States v. Harris*[100] wrote:

> The purpose and effect of . . . the Fourteenth Amendment . . . were clearly defined by Mr. Justice Bradley in the case of *United States States v. Cruikshank* . . . as follows: "It is a guaranty of protection the acts of the State government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the State, not a guaranty against the commission of individual offenses; and the power of Congress, whether express or implied, to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of crime within the states."[101]

---

98 Thus, Congress could enact such laws as would prohibit all interference with the freedoms of speech and assemblage whether by state or individuals. This is in accord with Crosskey's explanation that the restriction on Congress to make no law abridging the freedoms of speech and assemblage does not mean that Congress can make no law protecting those freedoms, such as a law prohibiting the states or individuals from interfering with them. 2 CROSSKEY, POLITICS AND THE CONSTITUTION 1057 (1953). See text at footnotes 16-17 *supra*.

99 United States v. Hall, 26 Fed. Cas. 79, 81-82 (No. 15,282)(C.C.S.D. Ala. 1871).

100 106 U.S. (16 Otto) 629 (1882).

101 *Id.* at 638.

It has been asserted that Justice Woods' decision in *United States v. Harris* cannot be reconciled with his decision in *United States v. Hall*.[102] However, the inconsistency is less apparent when Justice Woods in *Harris* ceased quoting Justice Bradley and spoke in his own words:

> When the State has been guilty of no violation of [the fourteenth amendment's] provisions; when it has not made or enforced any law abridging . . . privileges or immunities . . .; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person . . . equal protection of the law; *when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.*[103] (Emphasis added.)

But what if on the contrary the laws of the state do not protect the rights of all persons because the state refuses to enact laws which provide for a remedy for interference with a particular right because it knows that only a minority group which the majority wishes to discriminate against will avail themselves of this remedy?

The portion of Justice Woods opinion in *United States v. Hall* quoted previously[104] serves as an adequate statement of the argument in favor of congressional power under the fourteenth amendment capable of overcoming state non-action. The real thrust of this argument is that "the citizen of the United States is entitled to the enactment of the laws for protection of his fundamental rights, as well as the enforcement of such laws."[105]

The intention of the framers of the fourteenth amendment as set out above and reflected in the lower court decisions of Justices Strong and Woods, is that when a state fails to protect civil rights the federal government may extend that protection. The logical assertion to be made against this position is that the fourteenth amendment places no affirmative duty on the states to act for the protection of civil rights. It is unnecessary for the fourteenth amendment to place such a duty upon the states because it exists notwithstanding the fourteenth amendment. The Supreme Court has rec-

---

102 Powe v. United States, 109 F.2d 147, 150 (5th Cir. 1940). In addition to the fact that the *Slaughter-House Cases* were decided in the interim, two feasible explanations of this inconsistency are available. First, that Justice Woods "better" grasped the intent of the framers of the fourteenth amendment at the time of the decision in *Harris*. However, this is unlikely, in that having lived through the period of ratification his conclusions on this point in *Hall* better express his own as distinguished from the Court's opinion. Furthermore, in deciding *Hall* he was not faced with the policy considerations which influenced the decision of the Supreme Court, particularly that of the *Civil Rights Cases* where he voted with the majority. The second explanation is that in adopting the interpretation of the fourteenth amendment that the Democratic minority had been continuously urging on Congress (See FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 210-77(1908)), Justice Woods was giving vent to his partisan political leanings which had been repressed during the Civil War and the period of his lower court judgeship. Although Democratic speaker of the House of the General Assembly of Ohio in 1857, minority leader of the Democrats two years later and "bitterly opposed to President Lincoln," Justice Woods became an "ardent Republican" after the war, actively participating in the reconstruction government. Republican presidents appointed him first to the circuit court of appeals and then to the Supreme Court. 20 MALONE, DICTIONARY OF AMERICAN BIOGRAPHY 305-06 (1936).

103 United States v. Harris, 106 U.S. (16 Otto) 629, 639 (1882).

104 Text at notes 95-97 *supra*.

105 United States v. Hall, 26 Fed. Cas. 79, 81(No. 15,282)(C.C.S.D. Ala. 1871).

ognized that "the equality of rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there."[106] What the fourteenth amendment was intended to do was to make this affirmative duty of the states to protect civil rights an enforceable one. The last clause of section one provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause is equivalent to the principle of republicanism just stated — every republican government is in duty bound to protect all its citizens in the enjoyment of equality of rights if it is within its power to do so.[107] The last clause of section one does not read "nor deny to any person within its jurisdiction the equal *operation* of the laws." The word "protection" is used instead of the word "operation." Equal protection includes, but is not limited to, equal operation. However, it seems that all that present constitutional doctrine requires is equal operation of the laws. But the word "protection" implies a positive duty to act and it is by reason of this word as well as the principle of republicanism that the states are under an enforceable duty to affirmatively secure civil rights.

Stated briefly, the argument interpreting the fourteenth amendment as granting Congress the power to overcome state non-action is as follows: The states are under a duty to make and enforce laws which provide an individual with an effective remedial process for interference with his civil rights. The states violate this duty when, through non-action, they fail to provide such a remedy. This failure is a denial of equal protection of the laws.

In the *Civil Rights Cases* the Court, by holding that a state could only violate the fourteenth amendment by positive action, precluded any argument based on the failure of a state to act when under a duty to do so. The illogic of holding that the states could only violate the fourteenth amendment by positive action became readily apparent, however, as soon as the Court found a particular duty upon the states. The development of the "separate but equal" doctrine furnishes an illustration. A state is under no duty to provide a law school, but when it does provide a law school solely for white students and refuses a Negro admittance, it comes under a duty to provide equal facilities for the Negro. Failure to provide him with equal facilities, while at the same time refusing him admittance to the white school, became a violation of the fourteenth amendment.[108]

The next step for the courts was to find that whenever a state official was under a particular duty to act for the protection of a right, and he failed

---

106 United States v. Cruikshank, 92 U.S. (2 Otto) 542, 555 (1875).

107 Under international law, a foreign nation is injured "when a state, through its officers or duly authorized agents, acts directly against the subject of a foreign state, in violation of international law [or] when a state acts indirectly, by failing to secure adequate remedies to strangers injured by individuals within their jurisdiction." DAVIS, ELEMENTS OF INTERNATIONAL LAW 95 (1900). Thus while the duty to act affirmatively for the protection of rights is recognized in international law it is not now recognized in our constitutional law.

108 Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); *cf.* McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914).

to act, this also would constitute a violation of the fourteenth amendment. Three circuit court decisions illustrate this development of the law.

In *Catlette v. United States*,[109] a police officer was under a duty to protect people from mob violence. He abandoned his duty and walked away, allowing a mob to assault a group of Jehovah's Witnesses. In upholding his conviction of a violation of 18 U.S.C. § 52[110] and ultimately the fourteenth amendment, the court said:

> It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official state inaction may also constitute a denial of equal protection.[111]

In *Picking v. Pennsylvania R.R.*,[112] a justice of the peace was under a duty to grant a hearing before a person was extradited from the state. He refused to grant a hearing to the plaintiff. In deciding that the plaintiff had a cause of action under the Federal Civil Rights Act[113] against the justice of the peace, Judge Biggs wrote:

> If these allegations be proved it may be concluded that the refusal of the justice to act as required by law may have deprived the plaintiffs of their liberty without due process of the law in violation of the Fourteenth Amendment. . . . The refusal of a state officer to perform a duty imposed on him by the law of his state because he has conspired with others in a conscious design to deprive a person of civil rights in legal effect may be the equivalent of action taken "under the color" of the law of the state.[114]

In *Lynch v. United States*,[115] police officers were under a duty to protect prisoners from mob violence. After arresting some Negroes, the police officers made no effort to protect them from a Ku Klux Klan mob. In upholding their conviction under 18 U.S.C. § 242 (1952), the court held:

> There was a time when the denial of equal protection of the laws was confined to affirmative acts, but the law now is that culpable official inaction may also constitute a denial of equal protection.[116]

In light of the judicial development since the *Civil Rights Cases*, the following general principle may be stated. When a state is under a duty to act to protect the rights of an individual, but fails to do so, the individual has been denied equal protection of the laws.

The duty of the states to act positively to protect the fundamental rights of all individuals has already been recognized.[117] The failure of the states by non-action to protect these rights is a violation of this duty, and in accord with the principle just stated, should be a denial of equal protection of the laws. By reason of section five of the fourteenth amendment, Congress

---

109 132 F.2d 909 (4th Cir. 1951).
110 The former version of 18 U.S.C. § 242 (1952).
111 Catlette v. United States, 132 F.2d 902, 907 (4th Cir. 1943).
112 151 F.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947).
113 Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 42 U.S.C. § 1983 (1952). See the debates in Congress when this law was enacted, Text at notes 72-78, *supra*, which supports the reasoning of Judge Biggs.
114 Picking v. Pennsylvania R.R., 151 F.2d 240, 250 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947).
115 189 F.2d 476 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951).
116 *Id.* at 479.
117 Text at note 106, *supra*.

is empowered to enact whatever legislation is appropriate to enforce the prohibition on the states not to deny anyone the equal protection of the laws.

Justice Bradley in the *Civil Rights Cases* was correct in characterizing the laws Congress may enact pursuant to section five as corrective legislation.[118] He was incorrect, however, in asserting that in no situation could such corrective legislation operate directly on individual action. Congress should be able to provide an individual with a remedy against another individual for interfering with his civil rights when such legislation is also corrective legislation.

Against state action, and by this is meant positive state acts, once Congress implements the constitutional power of the federal judiciary with general jurisdiction over constitutional questions, the prohibitions of section one of the fourteenth amendment become self-executing on the federal level. By providing such jurisdiction Congress has just about exhausted its power to enact appropriate legislation to enforce the amendment against state action. However, this may not provide an effective remedy in all cases where an individual is deprived of his civil rights by reason of the acts of a state official. For example, if a person is convicted of a crime through a confession obtained by third-degree methods, the general jurisdiction of the federal judiciary over constitutional questions provides him with an effective remedy because he can obtain reversal of the conviction upon appeal. But, if a person's civil rights are simply interfered with by the act of a state official and no conviction of a crime results, the general jurisdiction of the federal judiciary provides him no relief. To insure the person in this situation an effective remedy, Congress may appropriately provide that such acts of the state official constitute a crime and/or a tort, and also provide for preventive relief upon the instigation of either the aggrieved person or the Attorney General of the United States. The remedy of criminal prosecution and tort liability should be discreetly granted according to requirements of wilfulness and direct infringement. Thus it would be inappropriate for Congress to provide such relief against legislators enacting laws in violation of the civil rights of an individual, whereas it would be appropriate to provide such relief against local police officers violating the civil rights of an individual.

State inaction is the failure of a state official of the executive or judicial branches of government to act in a particular situation for the protection of the rights of the individual when under a duty to do so under existing state law. State inaction is the equivalent of state action, as was developed in *Collette, Picking and Lynch*. All legislation by Congress which would be appropriate to enforce the fourteenth amendment against state action is also appropriate against state inaction. But in some instances of state inaction where the individual is harmed by other individuals, the only fully effective remedy is not to grant a remedy against the state official alone, but also to substitute a federal remedy against the individual, equivalent to the remedy he has been denied by the inaction of the state official. For example, it might be provided that where a state prosecutor has willfully failed to prosecute a

[118] Civil Rights Cases, 109 U.S. 3, 11-14 (1883).

criminal action, the complainant be allowed to instigate a suit in the federal court similar to the one he has been denied in the state. Such appropriate legislation would here be operating against individuals, but only through the element of state inaction.

State non-action is the failure of the state legislature to provide effective remedies against individuals who interfere with the civil rights of other individuals. Congress cannot compel state legislatures to enact laws. Thus, in the face of state non-action, Congress is left no other course but to provide legislation which operates directly on offenders and offenses and provides remedies the state legislature should have provided. Consequently, Congress may provide that the interference of one individual with the rights of another individual constitutes a crime and/or a tort and further provide for preventive relief upon the instigation of the federal government or the injured person. Thus it is seen that the only appropriate congressional legislation corrective of state non-action is that which was expressly prohibited by the *Civil Rights Cases* — legislation operating on private individuals.

It must be remembered that Congress deals with fifty states and not necessarily all will be guilty of non-action in regard to the particular right Congress deems it necessary to protect by federal legislation. On this point a complaint Justice Bradley voiced in the *Civil Rights Cases* against the legislation therein involved is pertinent:

> It applies equally in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as those which arise in States that may have violated the prohibitions of the amendment.[110]

Appropriate congressional legislation against state non-action, therefore, would be inapplicable in states not guilty of non-action. How this may be accomplished is left to the skill of the draftsman, but some suggestions are offered here. Presuming that freedom of speech is a civil right of an individual, and Congress deems it necessary to enact legislation to overcome state non-action in regard to this right, legislation could be enacted by Congress making it a crime for one individual to interfere with another individual's freedom of speech, conferring jurisdiction of the crime on the courts of any state not having an adequate remedy of its own for such interference. The state courts would make the initial determination as to whether an adequate remedy existed under state law, and this determination would be made subject to review by the Supreme Court. Failure through refusal of the executive and judicial officials of the state government to enforce the federal law or their own remedy would be state inaction. Congress could provide that such action or inaction is a crime and/or a tort and provide for adjudication in a federal court pursuant to their admitted power to legislate against state action and inaction as developed above.

A more feasible suggestion would be legislation making it a crime for an individual to interfere with another individual's freedom of speech, conferring jurisdiction of the crime on the federal courts when no adequate

---

110 *Id.* at 14.

remedy for such interference exists under state law. Here a federal court would determine the question of the adequacy of the state remedy, including its effectiveness. If an effective remedy exists, the federal courts would have no jurisdiction and the complainant would have to pursue his state remedy. The refusal of the state prosecutor to initiate state proceedings would constitute state inaction and Congress could provide a federal remedy against the prosecutor in such a situation.

At the present time the power in Congress to enact all the legislation deemed appropriate against state action, and to some degree against inaction, exists. Congressional power to enact effective legislation against inaction and individual interference with civil rights remains to be recognized. It is maintained that Congress has this power to overcome state non-action by reason of the equal protection clause of the fourteenth amendment. This is seen from the meaning of this clause as understood by the framers when they enacted enforcement legislation, from circuit court decisions prior to the *Civil Rights Cases*, from judicial developments subsequent to the *Civil Rights Cases*, and from the plain meaning of the words "deny" and "protection" as used in the amendment.

The legislation which would be appropriate for Congress to enact against state non-action is commensurate with the principles of federalism. Any state may retain its sovereignty over any civil right and completely exclude the federal remedy for interference with that right by simply providing an adequate and effective remedy of its own.[120]

Such an interpretation of the fourteenth amendment would result in an effective system commensurate with our dual sovereignty form of government for the protection of any right predetermined a civil right. This then leaves us with the definitional problem, which was avoided at the beginning of this article and to which we can only allude at this point. Civil rights of the individual could be characterized as the "unalienable rights" of the Declaration of Independence, the "inalienable rights of the people" of the North Carolina Convention of 1788,[121] and the "great rights of mankind" developed in Madison's Speech to Congress in 1789.[122] More particularly, the civil rights of an individual are at least those minimum protections mentioned in Amendments I-VIII of the Constitution.

Conclusion

That the individual is endowed with fundamental rights was generally recognized at the beginning of our history as an independent nation. That governments are instituted among men to secure these rights was proclaimed to mankind. The federal and state governments were instituted for this purpose. These governments, whether before or after the forming of a more perfect Union were not considered as creating these fundamental rights or dis-

---

[120] For an example of a state providing at least some remedy for interference with a civil right, see Lebel v. Swincicki, 93 N.W.2d 281 (Mich. 1958).

[121] Convention of North Carolina, Declaration of Rights (1788), THE FEDERALIST 646 (Ford ed. 1898).

[122] SMITH AND MURPHY, LIBERTY AND JUSTICE 181 (1958).

tributing them as a majority of the people might see fit. Until *Barron v. Baltimore* was decided, it was still possible to hope that the fundamental rights of mankind were secure by process of law from oppression throughout the length and breadth of the the United States. *Barron v. Baltimore* made the protection of fundamental rights solely a matter of process of law in each state unless the federal government itself was oppressive. Oppressive laws of certain states led to the adoption of the fourteenth amendment, which by its terms re-instated the securing of fundamental human rights thoughout the United States and authorized congressional legislation to carry out its great purposes. As has been shown, the Supreme Court in the *Slaughter-House Cases* nullified the significance of the priviliges and immunities clause of the amendment and in the *Civil Rights Cases* further restricted the scope of Congressional action. The scrutiny of these cases previously made in this article has, it is submitted, indicated that the limitations on the national protection of fundamental rights need not in the future prevail when Congress has under consideration what has come to be known as civil rights legislation. This consideration is fortified by the demands now made in many quarters that the fundamental rights of the individual must receive protection not only at the national level but even in international law.

EXPANSION OF THE STATE ACTION CONCEPT UNDER THE FOURTEENTH AMENDMENT

Glenn Abernathy†

Aside from two specific instances, the United States Constitution does not, through its own force, set limitations upon private action. With the exception of the thirteenth and twenty-first amendments, it deals wholly with the structure and organization of the national government, limitations upon the state and national governments, and the distribution of powers—first, among the three branches of the national government and, second, between the national government and the states and the people. With the notable exception of the two amendments mentioned above, only positive governmental action by the executive or legislative departments, supported if necessary by judicial decision, can set limitations upon private action.

If there is any doubt as to other sections of the Constitution, there should be none about the general applicability of the fourteenth amendment to states rather than to private persons. The second sentence contains the phrases "No *State* shall make or enforce any law . . . " and "nor shall any *State* deprive any person . . . ; nor deny to any person . . . ." As the court is wont to say, "If language is to carry any meaning at all it must be clear" that this amendment was designed to impose limitations upon actions of the states and not upon those of private persons. That there is some evidence leading to a contrary conclusion as to the intention of Congress appears both in Congressional speeches at the time of passage and in later studies on the subject.[1] The practical answer to the intended application of the fourteenth amendment, however, was given by the Court in *Brown v. Board of Education:* "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted . . . ."[2] The decision rendered in the *Civil Rights Cases*[3] was unequivocally that the amendment covers state action and not individual action. Justice Bradley, speaking for the majority in those cases, stated:

> The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the

† See Contributors' Section, Masthead, p. 449, for biographical data.

[1] See Cohen, "The Screws Case: Federal Protection of Negro Rights," 46 Colum. L. Rev. 105 n. 61 (1946) for Congressional statements. See also Flack, Adoption of the Fourteenth Amendment 262-63 (1908); Barnett, "What is 'State' Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?" 24 Ore. L. Rev. 227, 228, 232 (1945); Frank and Munro, "The Original Understanding of 'Equal Protection of the Laws'," 50 Colum. L. Rev. 131, 163-64 (1950).

[2] 347 U.S. 483, 492 (1954).

[3] 109 U.S. 3 (1883).

> several States, is prohibitory in its character, and prohibitory upon the States . . . .
>
> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.[4]

These statements made by Justice Bradley in 1883 are concrete and specific, and indicate clearly that it is certain types of positive action by state officers or agencies which the amendment prohibits. But later in the opinion, he made remarks which leave the way open for considerable question as to the application of the amendment to state *inaction* when private persons deny rights of other private persons:

> [I]t is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, *customs*, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but *if not sanctioned in some way by the State*, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. . . .[5] (Emphasis added.)

The rule stated in the first selection from Justice Bradley's opinion has remained the law down to the present. A general principle, however, is capable of a great deal of molding, shaping and expansion as it passes via the decisional process through successive generations of judges. The majority opinion in the *Civil Rights Cases* raised at least as many questions as it answered, and later decisions have been rendered which point the way, partially at least, to answers to the secondary questions.

The dissent by Justice Harlan in the *Civil Rights Cases* represents a monumental intellectual and legal effort to justify the constitutionality of congressional legislation imposing civil liability for racial discrimination effected not by the normal officers of the state, e.g., by hotels, inns, railroads and places of amusement. (Since this study is directed to the definition of state action, Justice Harlan's arguments as to the validity of the legislation under the thirteenth amendment are omitted.) Particularly ingenious is the manner in which the Justice perceived state action in the rules and practices of hotels, inns, taverns, railroads and places of amusement. Citing numerous authorities, he concluded that innkeepers were exercising a quasi-public employment. "The law gives him special privileges and he is charged with certain duties and responsibilities to the public." He felt that the public nature of the innkeeper's

[4] Id. at 10-11.
[5] Id. at 17.

employment forbade him from discriminating against any person seeking admission on account of that person's race or color.

As to public conveyances, the Justice read the law of common carriers to require the performance of public duties, and that no matter who is the agent or what is the agency, the function performed *"is that of the State."* In addition, the investiture of the railroad with the state's right of eminent domain and the right of municipalities to spend tax money to aid in the construction of railroads made these corporations' functions public functions.

Implicit in both the majority opinion by Justice Bradley and in Justice Harlan's dissent are a number of legal paths which might be taken in the expansion of the concept of state action. Justice Bradley said that not only the legislature's acts were included, but "the action of state officers executive or judicial." He further stated that the wrongful act of an individual is not state action "if not sanctioned in some way by the state, or not done under state authority." This latter comment is the embryonic statement of the theory that state inaction to remedy private wrongs constitutes state action under the fourteenth amendment. Justice Harlan added other theoretical bases for expansion, albeit a more restricted development strangely enough, of the concept of state action. In effect he argued: (1) if a person or corporation is granted the tool of eminent domain, that person or corporation may be considered an agent of the state, and its acts considered the acts of the state; (2) if the operation being considered is subject to special regulation or supervision by the state and is granted special privileges by the state, then it may be concluded that its acts constitute state action; and (3) if the purpose served by a particular person or corporation is properly classified as a "public purpose," the operators may be described as agents of the state.

There are presented, then, in these opinions, several legal theories which the judiciary of later days could use as rationale for justifying an expanded interpretation of the acts included in the concept of state action. The peculiar feature of the expansion which has taken place since those cases, however, is that the judicial pegs on which this growth has been hung are those of the majority opinion rather than those of the dissenter. If the majority opinion be considered as restrictive in its delineation of state action, it would appear that development of a broader scope of coverage would almost of necessity move in the direction indicated by the dissenting Justice Harlan. Not only is this not the case, but the majority opinion contains implicitly a theory which would extend the concept of state action far beyond the reach of any of the three suggested tests of Justice Harlan—this is the theory that state inaction

may be state action violative of the fourteenth amendment. The answer seems to be that while the *decision* of the majority was more restrictive, the theory stated by that majority admits of very broad applications.

Prior to discussing the state inaction theory, an examination will be made of the various developments in the concept of what constitutes state action.[6]

The Court rather early began the extension of the term state action to cover not only legislative action (indicated by the use of "law" in the privileges and immunities clause) but action of the judicial and executive branches as well. And there was a vertical extension to include all governmental units subordinate to the state. The Court has found violations of the amendment by the state courts,[7] legislatures,[8] executives,[9] tax boards,[10] boards of education,[11] counties,[12] and cities,[13] among others. In cases where there is a clear official mandate to persons performing state functions in any of these categories, and the execution of such mandate results in a violation of rights protected either by the due process clause or the equal protection clause, then the fourteenth amendment is violated. Assuming the official position and the legal mandate to act, there is no further problem of determining state action. The only problem remaining is to determine whether a fourteenth amendment right has been violated, and this discussion does not contemplate the problem of the rights protected.

More complex questions concerning state action have arisen with respect to either operations not strictly classified as government operations, or acts of state agents which are not a part of their statutory duties. These will be taken up under various categories.

Official Acts Unauthorized or Prohibited by State Law

A question was raised very soon after the adoption of the fourteenth amendment, and even before the decision in the *Civil Rights Cases*, concerning the applicability of the amendment to the act of a state judge in discriminating racially in the process of selecting jurors. Such discrimi-

[6] For discussion of the subject see, Hale, Freedom Through Law cc. VIII-XI (1952); Barnett, supra note 1; Frank and Munro, supra note 1, at 162-64; Nicholson, "The Legal Standing of the South's School Resistance Proposals," 7 S.C.L.Q. 1, 23-31 (1954); Hale, "Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals," 6 Law. Guild Rev. 627 (1946); Watt and Orlikoff, "The Coming Vindication of Mr. Justice Harlan," 44 Ill. L. Rev. 13 (1949); Notes, 47 Colum. L. Rev. 76 (1947); 35 Cornell L.Q. 399 (1950); 96 U. Pa. L. Rev. 402 (1948).

[7] Ex parte Virginia, 100 U.S. 339 (1880).

[8] Strauder v. West Virginia, 100 U.S. 303 (1879).

[9] Sterling v. Constantin, 287 U.S. 378 (1932).

[10] Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907).

[11] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

[12] Ward v. Love County, 253 U.S. 17 (1920).

[13] Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913).

nation was not authorized nor required by state law, but Judge Cole, of Virginia, on his own initiative excluded Negroes from jury service. The judge was indicted under section 4 of the Act of Congress of March 1, 1875, for the intentional discrimination. While in custody, he petitioned the United States Supreme Court for habeas corpus, alleging that the Act could not constitutionally be applied to him. The question raised, then, was whether the federal criminal law passed under authority of the equal protection clause of the fourteenth amendment could constitutionally be applied to official acts of a state judge who acted in his own discretion and not under statutory direction. In *Ex parte Virginia*[14] the Supreme Court held that such acts were within the purview of the prohibitions of the fourteenth amendment and the enforcement acts passed under it. Justice Strong, speaking for the majority, stated:

> Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.[15]

While the action of Judge Cole of Virginia was not authorized by state law, neither was it expressly prohibited nor made punishable under Virginia law. The question logically arises whether an act specifically prohibited by state law can be brought within the purview of the fourteenth amendment when performed by a state official while supposedly acting in his official capacity. To phrase the question differently, can illegal acts of a state official be classified as "state action" when the defendant is purportedly acting in an official capacity? In early cases dealing with attempts to obtain civil remedies against this type of official action the Supreme Court vacillated, first saying "no," and then saying "sometimes."[16] The attempt to apply federal criminal penalties under the civil rights acts further complicated the answer in that the criminal provision punishes acts done "under color of law." It was not until 1945 that the United States Supreme Court squarely faced and answered the question with respect to federal criminal penalties. The case was *Screws v. United States*,[17] a classic example of police brutality.

---

[14] 100 U.S. 339 (1880).

[15] Id. at 347.

[16] The first case was Barney v. City of New York, 193 U.S. 430 (1904). In Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907), the Court held the unequal assessment basis of a state board violative of the fourteenth amendment even though such action of the board violated the state constitution. In Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913), the Court held that the fact that a city ordinance might violate the state constitution did not foreclose a finding of "state action."

[17] 325 U.S. 91 (1945). In United States v. Classic, 313 U.S. 299 (1941), the primary

Screws, sheriff of Baker County, Georgia, aided by a local police officer and a deputy sheriff, arrested Hall, a Negro citizen of the United States, on a warrant charging theft of a tire. Hall was handcuffed and driven to the court house. There he was dragged from the car and, while still handcuffed, beaten by all three men with their fists and with a two-pound solid-bar blackjack. The beating continued for fifteen to thirty minutes. Hall was then dragged feet first through the courthouse yard into the jail and thrown upon the floor, dying. An ambulance was called, but Hall died shortly afterward without regaining consciousness.

An indictment was returned against the three men charging, on one count, violation of the Criminal Code, 18 U.S.C. section 242. This section provides:

> Whoever, under color of any law, . . . willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The key phrase which concerns us here is "under color of any law." It is, of course, a statutory provision passed under the authority of the fourteenth amendment, and does not necessarily indicate the full reach of the amendment. But, certainly, if the phrase be interpreted as contemplating illegal acts of state officials in their official capacity, then the amendment must justify such inclusion for it to be constitutional.

The members of the Court divided on the interpretation of this phrase, with six members holding that the statute covered such illegal acts of state officials and three contending vigorously that such an interpretation was never intended by the Congress.

Justice Douglas announced the judgment of the Court and delivered an opinion in which the Chief Justice and Justices Black and Reed concurred. Justice Douglas' opinion is not notable for clarity of reasoning. The Justice knew where he wanted to go but seemed uncertain how to get there. He stated that the "color of law" phrase was before the Court in *United States v. Classic*,[18] and that the decision there was a rule of law controlling the *Screws* case. As to where the line is drawn between acts

election officials were held to have acted in violation of the federal act in miscounting ballots intentionally, even though the acts complained of were likewise condemned by Louisiana law. But the issue was not presented in the same way as in the Screws case. In the words of Mr. Justice Roberts, "the truth of the matter is that the focus of attention in the Classic case was not our present problem, but was the relation of primaries to the protection of the electoral process under the United States Constitution. The views in the Classic case thus reached ought not to stand in the way of a decision on the merits of a question which has now for the first time been fully explored and its implications for the workings of our federal system have been adequately revealed . . . ." 325 U.S. at 147.

[18] 313 U.S. 299 (1941).

performed under color of law and those not so included, Justice Douglas stated:

> It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express that idea. . . .[19]

Mr. Justice Rutledge was in full accord with the view that the statute extended to acts of state officials in their official capacity even though such acts were made criminal under state law, and Justice Murphy held that "section 20 unmistakably outlaws such actions by state officers."

Justice Roberts dissented, and was joined by two of his brethren—Justices Frankfurter and Jackson. To these men the question was purely one of congressional intent, and they concluded that Congress did not intend to make criminal the act of a state officer who flouts state law and is subject to punishment by the state for his disobedience. As to whether the fourteenth amendment authorized such a coverage as the majority attributed to section 20, Justice Roberts did not categorically answer. The indications are, however, that he might have gone along with the majority on the point of constitutional power, even though he differed on the congressional intent.[20]

It is clear, then, that the rule of construction laid down in the *Screws* case by a majority of at least six, and possibly seven, extends the coverage of the fourteenth amendment to acts of state officers performed in their official capacity, even though state laws prohibit such acts.[21]

Official or Private Action

The next question to be answered is when does a state official act in his official capacity? Justice Douglas, in his opinion in the *Screws* case, stated that acts of officers "in the ambit of their personal pursuits are plainly excluded" from the coverage of the statute or, presumably, the amendment. While such a statement does not necessarily preclude a broader interpretation of the full reach of the fourteenth amendment, it would seem to be an eminently reasonable delineation of the extent of coverage.

---

[19] 325 U.S. at 111.

[20] Id. at 148.

[21] The conviction of Screws was reversed, however, by the vote of the Justices that the trial judge's charge to the jury was defective in that he did not require the jury to find that the defendant was not merely guilty of the act of taking a life without justification, but intended to deprive the prisoner of a constitutional right, i.e., the right to be tried by a court rather than by ordeal. At the second trial Screws was acquitted. A similar case of police brutality reached the United States Supreme Court in 1951—Williams v. United States, 341 U.S. 97 (1951). Williams' conviction under § 20 was upheld.

To hold differently and consider every act of a state officer or employee to be "state action" subject to the fourteenth amendment would appear to place an intolerable burden upon both the individual employee and the state.

Few cases are available to illustrate the judicial view of what constitutes "private" as opposed to "official" acts of state officials. The extremes of the two categories are, of course, apparent. But when a quarrelsome police officer off duty gets into a brawl with a private citizen who knows the occupation of his opponent, and who might fear the consequences of a victory over a policeman, is the officer's action "state action"? Liability of this officer under federal civil provisions of the fourteenth amendment enforcement acts would be a somewhat more difficult question to answer.

Where an officer's acts are performed while on duty or in response to a citizen's request for some official performance of duty, it would appear that the officer's acts certainly constitute "state action." In *Catlette v. United States*[22] this situation was presented in a peculiarly distasteful fashion. Two Jehovah's Witnesses went to Richwood, West Virginia, to distribute religious literature, seek converts and get a petition signed. After having been warned by Deputy Sheriff Catlette and others to get out of town, the two men and two companions went to the city hall to request the mayor to furnish them police protection while carrying on their religious activities in the city. The mayor was absent, and their request was made to Chief of Police Stewart. Thereupon Catlette and Stewart took the men into the mayor's office. Catlette then said that what "is done from here on will not be done in the name of the law," and removed his badge. They forced three of the men to drink eight ounces of castor oil each, and the fourth, because of his protests, was forced to drink sixteen ounces. These and other members of the sect were then tied in file, marched to their cars, and given their personal property, which had been covered with castor oil and uncomplimentary inscriptions, and advised never to return.

Catlette was prosecuted under section 20 of the United States Criminal Code for deprivations of constitutional rights (including one's right not to have his stomach purged while engaged in purging souls) while acting under color of law. He defended on the ground that in view of his statement and the removal of his badge, the acts were committed in his private and not his official capacity, and that therefore such acts were not "under color of any law." The trial court was not impressed with this

[22] 132 F.2d 902 (4th Cir. 1943).

argument, and he was convicted. On appeal Judge Dobie, speaking for the court of appeals, stated on this point:

> We must condemn this insidious suggestion that an officer may thus lightly shuffle off his official role. To accept such a legalistic dualism would gut the constitutional safeguards and render law enforcement a shameful mockery. . . .[23]

In a later case involving essentially the same question, the court of appeals of another circuit held in similar fashion. In this case, *Crews v. United States*,[24] the Government obtained the conviction of Tom Crews, a Florida county constable, on the charge of violating section 20. Crews "arrested" a Negro farmhand on the grounds of drunkenness, proceeded to beat him with a bull whip, and ultimately forced him to jump into the Suwanee River where he was drowned. Crews appealed his conviction, claiming that his act was purely one of personal vengeance and was devoid of official character and authority, in that he was off duty and out of uniform. The three judges of the court of appeals unanimously rejected this argument, stating, through Judge Waller:

> An officer of the law should not be permitted to divest himself of his official authority in actions taken by him wherein he acts, or purports, or pretends, to act pursuant to his authority, and where one, known by another to be an officer, takes the other into custody in a manner which appears on its face to be in the exercise of authority of law, without making to the other any disclosure to the contrary, such officer thereby justifies the conclusion that he was acting under color of law in making such an arrest.[25]

Thus, as Professor Robert Carr so ably states the rule, "When an officer uses his official position as a means of gaining physical control over his victim, further evidence that his actions were in good part unofficial cannot interfere with the conclusion that he acted under color of law."[26]

Suppose, however, that an officer takes an off duty job as watchman or guard over private property. Would his acts in such related police capacity constitute "state action"? The answer is less easily determined than in the *Screws* and *Crews* cases, and seems to hinge on the specific facts in each case. The most notable case in this area which reached the United States Supreme Court is *Williams v. United States*, decided in 1951.[27]

Williams, the head of a private detective agency, was employed by a

---

[23] Id. at 906.
[24] 160 F.2d 746 (5th Cir. 1947).
[25] Id. at 750.
[26] Carr, Federal Protection of Civil Rights 175 (1947).
[27] 341 U.S. 97 (1951).

Florida corporation to investigate thefts of its property. He held a special police officer's card issued by the City of Miami. Along with two employees of the company and a Miami police officer, he took several suspects one by one into a shack on the corporation's property and there subjected them to brutal third-degree methods. The Miami policeman was sent along by his superiors to lend authority to the proceedings. And Williams, who committed the assaults, went about flashing his badge.

The indictment under section 242 (formerly section 20) charged that Williams, acting under color of law, obtained confessions by force and that the victims were denied the right to be tried by due process of law. Justice Douglas spoke for the majority in holding that such action was "state action" or action under color of law:

> . . . [the] petitioner was no mere interloper but had a semblance of policeman's power from Florida. There was, therefore, evidence that he acted under authority of Florida law; and the manner of his conduct of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person. . . .[28]

Various other cases presenting the question of when an offcer acts in his private capacity have been decided in the lower federal courts. One of these is *Flemming v. South Carolina Electric and Gas Company*.[29] The case was an action brought by a Negro woman under the federal civil rights acts for damages suffered as a result of a bus driver's requiring her to move to the rear of the bus, such move required by the segregation law of the state. Under South Carolina law the bus driver is made a police officer of the state for the purpose of enforcement of laws dealing with bus operation. Thus his act was claimed to have been under color of law and an act depriving the plaintiff of a constitutional right. The district court dismissed, but the court of appeals reversed. On the question of state action the court said, in a per curiam opinion:

> It is argued that, since the driver is made a police officer of the state by . . . the South Carolina Code, his action is not attributable to the defendant; but we think it clear that he was acting for the defendant in enforcing a statute which defendant itself was required by law to enforce. . . . He was thus not only acting for defendant, but also acting under color of state law. . . .[30]

In any given controversy the question of whether state officers were acting in their official or in a private capacity must hinge on the individual facts surrounding the incident.[31] Such circumstances may be considered

---

[28] Id. at 100.
[29] 224 F.2d 752 (4th Cir. 1955), appeal dismissed, 351 U.S. 901 (1956).
[30] Id. at 753.
[31] See, e.g., Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949); Watkins v. Oaklawn Jockey Club, 86 F. Supp. 1006 (W.D. Ark. 1949), aff'd, 183 F.2d 440 (8th Cir. 1950).

as whether the officer (if a peace officer) was wearing a uniform or badge, whether he was known to the injured party as an official of the state, whether he acted "under pretense" of his official position, whether he would have acted in the same manner if he had not held a state office, and any other circumstances relevant to determining the fact question. Certainly it can be concluded that the courts generally will look to the substance of his action and not merely the form. Momentary abdications of official title, even if accompanied by sonorous warnings to such effect, will not suffice to reduce conduct from the level of official acts to private acts if the initial focus of conflict occurred during the exercise of official authority.

An unusual aspect of the problem of differentiating between official and private action under the fourteenth amendment appears in the case *In re Estate of Stephen Girard.*[32] In 1831 Stephen Girard created a testamentary trust for the education of "poor white male orphans." By the terms of the trust, it is administered by the City of Philadelphia. This is accomplished through the Board of Directors of City Trusts of the City of Philadelphia. The board consists of the mayor and the president of the city council, both ex-officio, and twelve other members appointed by the judges of the courts of common pleas for the county. The members of the board serve, without compensation, for life or during good behavior. The board's operations are conducted completely independently of control or connection with any city or state agency other than the Philadelphia Orphans Court. These operations are financed solely from the proceeds of trust property.

Having been denied admission to the school operated under Girard's trust, two otherwise qualified Negro children petitioned the Philadelphia Orphans Court to direct the board to show cause why they should not be admitted to the school. They contended that the board's action was state action because the board's authority was derived from a statute, which provided that most of the board's membership was to be selected by elected public officials, while two of the board's members and its treasurer serve as such by virtue of their status as city officials. The court held that the action of the board of directors in administering Girard's racially discriminatory private testamentary trust was not state action under the terms of the fourteenth amendment, since the interest of the board was limited to that of a bare legal title holder and administrative agent. In a re-examination of the question *en banc* the Orphans Court affirmed the first decision, pointing out that the position of the

[32] 24 U.S.L. Week 2068 (Phila. County, Pa., Orphans Ct., July 29, 1955). See Note, 104 U. Pa. L. Rev. 547 (1956).

City of Philadelphia was functional—to act for the decedent and carry out his intent.[83]

The court added that even if the board were constitutionally barred from racial discrimination in administration of a private trust, the court would have to appoint a private trustee to carry out the terms of the will to restrict the school to "poor white male orphans."

Here there is no question as to the public positions occupied by the members of the board. The question, as the court saw it, was whether the officers were acting as state agents or as private agents in administering the trust, and the decision was that they were performing in essentially a private capacity.

In an opinion more noteworthy for the prolixity of its author than for clarity, the Pennsylvania Supreme Court upheld the decision, one justice dissenting.[84] The United States Supreme Court reversed this decision on the authority of *Brown v. Board of Education* and with no reference to the distinction between governmental and fiduciary functions.[85] Thus it may be assumed that when state agents act and act by virtue of their public position, then the requirement of state action is met even though the function performed is that of administering a private testamentary trust, or other normally private functions. The obvious next question is whether it would be unconstitutional for the Orphans Court to appoint, as it suggested, a private trustee for the estate and demand of that trustee that the terms of the will be met. There would appear to be no important constitutional distinction between enforcement of the terms by a city board and similar enforcement by a court.

Private Operations Assisted by Government Appropriations

Another facet of the problem of delineating state action appears in the classification of the privately owned and managed operation which receives direct financial aid from the state. Is the act of such an agency an act of the state or is it a private act for purposes of the fourteenth amendment? Obviously, a categorical yes or no answer to the question is impossible. It would seem patently ridiculous to characterize as state agents all persons or institutions which receive direct financial aid from the state. Persons on relief, unemployed persons benefiting under state compensation plans, persons on state retirement pensions, veterans organizations in some states, or even persons who financially benefit through ordinary contracts with the state could then be classified as state agents and their acts as state acts. Thus would the public purpose doctrine con-

[83] 24 U.S.L. Week 2311 (Phila. County, Pa., Orphans Ct., Jan. 6, 1956).
[84] In re Girard's Estate, 386 Pa. 548, 127 A.2d 287 (1956).
[85] Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

cerning the validity of state expenditures under the due process clause be equated with state action: any operation or purpose of value to the public may be encouraged by the appropriation of public money and the resulting publicly supported operation is a state operation for purposes of the fourteenth amendment. Justice Harlan virtually stated such a rule in his dissent in the *Civil Rights Cases*. Such a rule would seem to go to an extreme, and, in addition, would open up another well of uncertainty—that of discovering how direct the state assistance must be in order to characterize the recipient's acts as state acts. It would seem that a more useful approach would be that of determining the degree of control which follows the dollar, or of determining whether the purpose behind the state appropriation represents a systematic and intentional exclusion of persons, to borrow a phrase from the jury panel cases, from benefits or services to which they would normally be entitled if the purposes effectuated were accomplished directly by the state. There seems to be no formula which would provide the correct division of cases of this type into neat categories of state action and private action, but the absence of precise formulae for judicial decision is old hat in the field of constitutional law. Some clues, however, to the considerations which might impel the court in one direction or the other may be obtained from an examination of the cases in this area. These are lower court decisions, since the United States Supreme Court has not as yet decided a case squarely presenting the issue of whether receipt of state financial aid alone makes the recipient an agent of the state.

In 1945 a question was raised concerning the status of the Enoch Pratt Free Library of Baltimore. Kerr, a Negro, sued for damages and an injunction on complaint that she was refused admission to a library training class conducted by the library to prepare persons for staff positions in the central library and its branches. She charged that the library was performing a governmental function and that she was rejected solely because of race, and that such rejection constituted state action prohibited by the fourteenth amendment. Her father joined in the suit as a taxpayer and asked that if the library were found to be a private body not barred from discriminating, the City of Baltimore be enjoined from making further contributions on the ground that it would then be exacting taxes from him in violation of the due process clause. The library defended on the ground that it was a private corporation.

The library was established by Pratt in 1882. He erected a building and established a fund and gave them to the city on condition that the city would create a perpetual annuity of $50,000 to be paid to the board of trustees for the maintenance of the library and the erection of four

branches. In giving legal effect to the terms of the gift, the Maryland legislature passed a statute and the city passed three ordinances. The state law named the persons who were to constitute the board of trustees. The real and personal property vested in the city by virtue of the act, as well as later acquisitions, were exempted from state and city taxes. In addition to the $50,000 annually appropriated, much greater sums were required to meet demands for increased services. In 1943 the total amounted to $511,575 and in 1944 to $650,086. In addition the city paid large sums for bond interest, bond retirement, and the retirement funds for the library's employees. Salary checks were issued by the city's payroll officer and charged against the library's appropriation. The library budget was included in the regular city budget, and library employees were included within the municipal employees' retirement system.

The Court of Appeals for the Fourth Circuit held that the library's action was state action within the meaning of the fourteenth amendment.[86] The two criteria stressed by the court of appeals in holding the library's action to be state action were control by the state over the library's activities and, apparently, the volume of importance of financial assistance afforded by the state. The opinion indicated no line of demarcation to aid in determining how far along the spectrum from zero to complete control or complete financial support the state must go before the activity becomes that of the state. Nor is it easy to see where such a line can be drawn. It would seem that the only solution is the case-to-case approach, examining each question on its own peculiar set of public-private relationships. Certainly, however, the two criteria stated would necessarily be a part of the consideration of the question. The major problem is to determine whether other criteria should be added to these two.

In a subsequent Maryland case, *Norris v. Mayor and City Council of Baltimore*,[87] decided three years later, a very similar question to that decided in the *Kerr* case was presented. Maryland Institute was incorporated in 1826 as a private corporation for the purpose of teaching art courses. Norris, a Negro, applied for admission in 1946 and was refused on the ground that no Negro students were admitted. He sued for a declaratory judgment that he was entitled to enter and for an injunction barring further exclusion on ground of color.

The city made one appropriation of $20,000 and the state made an annual grant of $3,000 to the president of the institute. In 1907 the city leased a building constructed with public funds to the institute for $500

[86] Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945).
[87] 78 F. Supp. 451 (D. Md. 1948).

annual rent. The estimated commercial rental value of the institute's lease was $12,000 annually.

After 1881 the city maintained a contract relationship with the institute for the education of pupils in the schools of the institute. Pupils under such contracts secured appointments from members of the city council. City payments to the institute under these contracts amounted to about $25,000 annually. The state made annual contributions to the institute varying in amount—in 1948 about $16,500. For this contribution each of the twenty-nine members of the Maryland Senate had the right to appoint one student free of tuition charge. No control over the management of the affairs of the institute was exercised by either the city or the state except that courses were examined from time to time to guarantee that contract requirements were being fulfilled.

The question presented in the federal district court was whether the institute's activities became acts of the state in view of the financial support rendered by city and state and the contract relationships between those governments and the institute. The court held that there was no such control exercised by the state as to require a holding that the institute was an instrumentality of the state.

This lack of direct control was the essential point of differentiation between the *Norris* and the *Kerr* cases, according to Judge Chesnut, who compared the fact situations in the two cases at great length, even presenting a tabular statistical summary of financial aid in each case. He pointed out that the state made no designation of the particular individuals as managers, reserved no special visitorial powers with respect to management of the institute, and also noted the institute owned its property in its own right. In further support of the holding he cited earlier decisions of Maryland's courts holding the institute and other schools to be private corporations.

In spite of the absence of direct control, the court still had to answer the charge that the substantial financial support rendered by city and state converted the operation into a state institution. In answer the court stated:

> [Counsel for the plaintiff contends] . . . that whenever the State or Baltimore City as a municipal agency of the State, advances moneys to a private corporation of an educational nature in an appreciably substantial amount which thereby becomes mingled with other general funds of the institution, that action of the institution or City thereby becomes State action within the scope of the 14th Amendment. No authority is cited for this proposition and I know of none. In my opinion it is untenable. . . .[88]

[88] Id. at 460.

The court stated further that at each session of the Maryland Legislature there was passed an omnibus appropriations bill giving state aid to many private institutions for educational and charitable purposes, and even though many of the institutions practiced racial discrimination, the Maryland courts expressly approved the policy and action.

It may very well be true that state financial aid alone does not render the institution receiving such aid a state agency. The principle would certainly seem to be a sound one to follow. But financial aid plus some additional factor might lead to a different conclusion. Of course, a mere finding of state control is not determinative, since the state has a considerable measure of control under its police power over all types of business operations. However, a finding of state financial support plus an *unusual* degree of control over management and policies might properly lead to characterization of a business or agency as a state operation. The problem, of course, is to determine just how much control constitutes an "unusual degree of control." There appears to be no facile answer to the problem, although it seems that one practical approach might be to compare the degree of control over the operation in question with the control exercised over other similar types of businesses or agencies.

There are other factors also which when added to the factor of state financial aid might result in a finding of state action. It seems a fair guess that the United States Supreme Court would examine closely a state expenditure or appropriation to private institutions where there is any suggestion that such appropriation is in reality for the purpose of accomplishing an end which would be held unconstitutional if attempted directly. To put the case squarely, if a state favoring racial segregation should withdraw from the field of active education of its citizens and substitute therefor a contract device for furnishing tuition and fees to any private schools selected by the citizens, it is inconceivable that the Court would ignore the possibility that the whole purpose of the device might be to defeat the decision barring state enforced racial segregation in public schools. Thus financial aid plus motive to accomplish an unconstitutional purpose would present a second type of fact situation which might result in a conclusion of unconstitutional state action. However, there is a very important difference between this situation and the first one. In the first situation the Court can quite properly categorize the acts of the "private" institution as state acts. In the second this conclusion would not follow at all. The state appropriation to effect an unconstitutional purpose is simply unconstitutional under the due process clause. It represents a taking of property for an unconstitutional purpose and therefore for a purpose not "public" within the requirement of

the due process clause. The institution would remain private unless unusual control by the state be a condition of the receipt of state money.

Another factor which might be considered is whether the operation is an important public function. Would the combination of state aid and the furnishing of an important public service result in a conclusion that the operation should be classified as a state agency? If so, it would seem that logically the conclusion would have to rest on the theory that the performance of a public function is a state act. If a given function is of such public importance *and* so closely related to state governmental functions as to be classified as a governmental agency, then the presence or absence of state financial aid should be irrelevant in making a finding of state action. If the function does not fall within such a description, then the mere addition of state money should not influence the conclusion.

Thus the conclusion here is that the fact that a state appropriates money to a private person or institution has nothing to do with the determination of whether the acts of the person or institution constitute state action. While to recount a list of various appropriated sums of money may sound impressive, the fallacy of this consideration is exposed when one looks at the various persons or operations which receive government money. To take the extreme case, assume that a given operation is completely dependent upon the money it receives from the state, as for example a private garbage collection agency. The mere fact that the city provides the agency with its entire means of existence does not change the denomination of that agency as a private one. Nor does a person entirely dependent upon state welfare relief become thereby a state agent. Neither the total amount of the appropriation nor the ratio of state aid to total cost of maintenance of the private operation would seem to have any bearing on a determination of the presence or absence of state action on the part of the recipient. The determining factor must be something other than mere financial aid furnished by the state.

Private Operations Assisted by Governmental Acts Other Than Appropriation of Money

The state may aid a private operation in various ways other than by direct financial assistance. It may give the organization the power of eminent domain, it may grant tax exemptions, or it may give it a monopolistic status for certain purposes. Does the receipt of such assistance convert the organization into a state agency? According to Justice Harlan, in the *Civil Rights Cases*, it would, especially if the state acquired special control powers in return.

The most thoroughly argued case on the point is the case of *Dorsey v.*

Stuyvesant Town Corporation,[39] decided in the New York Court of Appeals in 1949. Stuyvesant Town was built as an apartment housing development pursuant to a contract between the City of New York, Metropolitan Insurance Company and its wholly owned subsidiary Stuyvesant. Stuyvesant was organized under the state's Redevelopment Companies Law of 1942, as amended. The purpose of the law was to encourage private companies to enter the housing field. Under that law, the City of New York, by eminent domain, brought under one good title an area of eighteen blocks in the city, the area having been declared one of substandard housing. Stuyvesant acquired the property, including certain streets which the city had agreed to close, by paying to the city the cost of acquiring land and buildings. The agreement provided that Stuyvesant would demolish the old buildings and construct new ones without expense to the city, and the city granted the corporation a twenty-five year tax exemption to the extent of the enhanced value to be created by the project. (Certain writers estimate the total tax exemption to reach approximately $50,000,000.)[40] The project represented an investment of about $90,000,000 of private funds by Metropolitan Insurance Company. No state law barred the owner or operator of this project from discriminating, racially or otherwise, in his choice of tenants. While repeated attempts had been made in the state legislature to amend the redevelopment law to bar racial discrimination, all had failed. Although the question was discussed in the city council, the agreement reached contained no bar to practice of racial discrimination by the landlord. When finally completed, the project housed approximately twenty-five thousand persons. The contract gave the city the right to regulate rents, and certain auditing privileges, and prohibited the mortgage or sale of the property.

Dorsey, a Negro, was refused tenancy because of race and sued to enjoin Stuyvesant from denying accommodations because of race, on the grounds of alleged violation of the fourteenth amendment. The issue presented, of course, was whether the city's assistance in the form of eminent domain and tax exemptions and the reserved control over the housing operation made the housing project a state instrumentality within the meaning of the fourteenth amendment. The lower court held that Stuyvesant town was not a state instrumentality. Justice Benvenga, in the New York Supreme Court, stated:

---

[39] 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950). Among the many notes on the case see 35 Cornell L.Q. 399 (1950); 34 Minn. L. Rev. 334 (1950); 35 Va. L. Rev. 917 (1949); 1950 Wash. U.L.Q. 139.

[40] Blum and Bursler, "Tax Subsidies for Rental Housing," 15 U. Chi. L. Rev. 255, 269 n. 22 (1948).

> The fundamental fallacy in plaintiff's argument is that it confuses "public use" and "public purpose" with "public project," and assumes that, because the work of redevelopment and rehabilitation is a public purpose, the project involved is necessarily a public project. But the public use and purpose involved terminates when the work of redevelopment is completed. . . . In a word, though the purpose involved is a public purpose, the project itself is not now and never was a public project. . . .[41]

By the narrow margin of four to three the New York Court of Appeals affirmed the decision in favor of Stuyvesant, and the United States Supreme Court denied certiorari.[42] Judge Bromley, speaking for the majority in the Court of Appeals, stated:

> To say that the aid accorded respondents is nevertheless subject to . . . [the fourteenth amendment requirements], on the ground that helpful cooperation between the State and the respondents transforms the activities of the latter into State action, comes perilously close to asserting that any State assistance to an organization which discriminates necessarily violates the Fourteenth Amendment. Tax exemption and power of eminent domain are freely given to many organizations which necessarily limit their benefit to a restricted group. It has not yet been held that the recipients are subject to the restraints of the Fourteenth Amendment.[43]

Judge Fuld spoke for the three dissenters in a vigorous rebuttal to the majority view. He stated that the housing operation was assuredly not a purely private agency because governmental assistance at a number of points was vital to the establishment of the project. Since it was not a private operation, it must be a state agency. The majority certainly did not overlook the presence of governmental assistance. The difference lay in the treatment accorded the project as a result of this aid. The majority seemingly considered the solution to the question of state action to rest in a process of determining how far along a continuous spectrum from purely private to purely governmental a specific problem situation might be located—at least in a case not involving "matters of high public interest" or performance of functions of a governmental character. Presumably, then, the majority would consider an act private if it were *mostly* private and governmental if it were *mostly* governmental. The dissenters, on the other hand, seemed to take the position that a particular operation is either *purely* private or else it is governmental.

Whether or not the principle of deciding questions of state action laid down by the dissenters will ultimately be the ruling law, it is certain that the United States Supreme Court has not yet expanded the state action concept this far. As the New York Supreme Court indicated, the

---

[41] 190 Misc. 187, 193, 74 N.Y.S.2d 220, 226 (Sup. Ct. N.Y. County 1947).
[42] See note 39 supra.
[43] 299 N.Y. at 535, 87 N.E.2d at 551.

minority view does in fact equate public purpose and state action, at least in cases where private persons receive state aid. As stated earlier, such a view would lead to ridiculous conclusions if pursued to its logical end.

The public purpose argument or doctrine must be left where it rightfully belongs—as a limitation of the power of the government to spend money or to exercise eminent domain—[44]and not dragged into the proper delineation of state action and private action. If the citizen is denied the equal benefits of a service performed by private persons with governmental financial aid or the "loan" of eminent domain, then he should litigate his rights in the matter under the public purpose doctrine of the due process clause.[45] Then if the services afforded by the private persons are unduly restricted, or if the classification of customers and non-customers is unreasonable, the courts can stay further expenditure of public money. This would accomplish the end of discouraging public expenditures to accomplish unreasonable discriminations without the encumbering legal snarls coincident with a finding of governmental instrumentality.

Private Activities Conducted on Government Property

In a number of cases a question has been raised concerning the status of an operation conducted by private persons under lease or permit on government property. The variety of fact situations which might be visualized in this connection is, of course, infinite. For purposes of attacking the problem of the application of the fourteenth amendment, therefore, the possible variations are grouped into four general types of situations for analysis: (1) private operation of a facility open to the public where the operator leases land from a governmental unit but where the governmental unit in fact directs and controls the management and the policies under which the facility is operated; (2) private operation of a facility open to the public where the operator leases land from a governmental unit and where there is a bona fide arm's length lease with no improper collusion or control over operating policy exercised by the governmental unit; (3) the same situation described in (2) except that the private operator makes capital improvements on the government land, but not open to the public, and (4) a private operation conducted under lease on government land.

---

[44] See Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); Note, "Recent Constitutional Developments on Eminent Domain," 4 Vand. L. Rev. 673 (1951).

[45] For example, in Connecticut College for Women v. Calvert, 87 Conn. 421, 88 Atl. 633 (1913), the Connecticut Supreme Court of Errors held invalid a state law granting to the college the right of eminent domain. The court held that the granting of this right could only be made where there was a common and equal right of the public to the benefit of the service rendered, free from unreasonable discrimination, and there was no guarantee of equal right of the public to use the college.

There has been no general division of cases by the courts into any such categories as those suggested here, but it seems that much of the confusion engendered by the opinions could be avoided by such a differentiation. It is necessary here also to add to the analysis a discussion of the rights protected by the fourteenth amendment, in a limited fashion, as well as the concept of state action.

It is clear that if state property is opened up to the use of the public, then restrictions upon that use imposed directly by the state must meet the test of the fourteenth amendment. The state cannot, for example, discriminate on the basis of religion,[46] or political belief,[47] or race[48] in the grant to the public of the use of its facilities. The state may withdraw public property from general public use or it can make such property available to the use of the public under various restrictions, but such restrictions must fall within statutory authorization and must not violate state or federal constitutional guarantees. To this extent, certainly, governmental power to determine conditions attaching to the use of public property is less than that of private persons over private property. The right of access to government property under reasonable restrictions appears to be a right clearly possessed by the citizen. However, the question arises as to the source of the right and the proper remedies for its abridgment.

The fourteenth amendment establishes the right as against unreasonable interference *by the state.* The fourteenth amendment establishes no such federal rights as against interference by private persons. Since the decision in the *Slaughter-House Cases* in 1873,[49] more recently reiterated in *Collins v. Hardyman,*[50] a distinction has been made, albeit not a crystal clear one, between federal rights and state rights, and only the former are covered by the fourteenth amendment. The right to gain access to state property, under reasonable restrictions, free from private interference is a state right not now protected by the Federal Constitution. Thus in the latter situation remedies against private interference must be sought in ordinary actions brought in state courts. Only where the state unreasonably interferes with the exercise of the right does the fourteenth amendment come into play. With this distinction as to the nature of the rights involved, it is less difficult to approach the cases concerning private activities on government land.

(1) *Private operation of a facility open to the public where the oper-*

[46] Niemotko v. Maryland, 340 U.S. 268 (1951).
[47] Hague v. C.I.O., 307 U.S. 496 (1939).
[48] Brown v. Board of Education, 347 U.S. 483 (1954).
[49] 83 U.S. (16 Wall.) 36 (1873).
[50] 341 U.S. 651 (1951) dealing with private interference with the assembling of citizens to discuss federal governmental policy.

ator leases land from a governmental unit but where the governmental unit in fact directs and controls the management and the policies under which the facility is operated. In cases falling in this category, there should be no question but that state action is present in the operation of the facility and in the execution of policies affecting access of the public to the facility. An illustration of this sort of lease is found in the case of *Lawrence v. Hancock*.[81] The City of Montgomery, West Virginia, built a municipal swimming pool. Vacillation on the question of admission of Negroes to the pool delayed the opening of the pool when completed in 1945, and in 1946 the city council leased the property for one dollar to the Montgomery Park Association, a private corporation formed for the purpose of operating the pool. All revenue, according to the lease, was to be used for redevelopment and improvement of the property. The association opened the pool to the public, but denied its use to negroes. Lawrence brought suit for a declaratory judgment and an injunction to restrain defendants, members of the city council, from discriminating against plaintiff because of race. (The action was dismissed as to defendant Montgomery Park Association.)

In finding a denial by the state of access to the pool, District Judge Moore stated:

> Justice would be blind indeed if she failed to detect the real purpose in this effort of the City of Montgomery to clothe a public function with the mantle of private responsibility. "The voice is Jacob's voice," even though "the hands are the hands of Esau." It is clearly but another in the long series of stratagems which governing bodies of many white communities have employed in attempting to deprive the Negro of his constitutional birthright; the equal protection of the laws.[82]

Thus even though improper interference be accomplished by indirection, if the state is found to be an active party to the interference, the denial constitutes state action.

Of course a broad statement based upon equal protection would go too far if it covered all leases of public land to private individuals. While all persons must have opportunity to bid on a lease, it would seem perfectly proper to lease public land to private oil companies for extraction of oil without at the same time guaranteeing to all citizens equal shares of the oil extracted, or equal access to the property for the purpose of sinking wells once the lessee has been selected. The better rule would appear to be that the citizen has a right of access to state property without unreasonable discrimination if that property is to be opened up to any substantial part of the public.

---

[81] 76 F. Supp. 1004 (S.D. W.Va. 1948).
[82] Id. at 1006.

(2) *Private operation of a facility open to the public, where the operator leases land from a governmental unit and where there is a bona fide arm's length lease with no improper collusion or control over operating policy exercised by the governmental unit.* The case which best illustrates this category is *Kern v. City Commissioners of Newton.*[53] The question presented was the right of Negroes to admission, on the same basis as others, to a municipally owned swimming pool which was operated by a private person under a lease with the city. The pool had been constucted by the City of Newton, Kansas, with funds procured from the sale of municipal bonds. Hunt, the private lessee, operated the pool for his profit and denied access to all members of the Negro race. Kern, a Negro, sued for mandamus, directed to both the city commissioners and the lessee, and requiring them to admit him to the pool.

Since mandamus generally lies only against public officials, or if against private persons only where there is express statutory duty imposed,[54] it would seem that the better approach would have been to seek a declaratory judgment and injunction. This would have put the issue squarely as to the right of access, without the overtones of state action surrounding the collateral attack by defendant on the propriety of a suit for mandamus.

Whatever the actual circumstances might have been, the record shows a lease entered into in good faith at arm's length with no subterfuge attempted by the city. Upon this record the denial of access was not accomplished by the city, and the remedy afforded should have been a private one. The Kansas Supreme Court held mandamus to lie, however, and had a difficult time in doing so. Since the action was brought in a state court, it is clear that a remedy could and should have been offered. The objection is that the wrong one was sought and considerable confusion attended the court's justification for giving it. The court held that the lessee Hunt was an official of the city to the extent that mandamus properly lay against him. It held that Hunt was not an official of the state to the extent that his operation was clothed with governmental immunity from wrongful death claims arising out of the furnishing of this municipal function. The opinion stated that Hunt merely managed the pool for the city. This simply was not true in view of the fact that the profits redounded not to the city but to Hunt.

Either Hunt's position as manager of the swimming pool leased from the city made him an agent of the government or it did not. If his acts in such capacity constituted state action, then he was clothed with

[53] 151 Kan. 565, 100 P.2d 709, 129 A.L.R. 1156 (1940).
[54] See 55 C.J.S., Mandamus § 55 (1948). See also Note, "Mandamus: Common Law and Statutory Development," 20 Iowa L. Rev. 667 (1935).

both the responsibilities and the immunities of such status. If not, then actions brought against him ought to have followed the normal remedies available against other private persons. Assuredly it is not reasonable or proper to classify all private operators of concession stands on government property as governmental agents. Here again, a firm distinction must be made between federal rights and state rights—between state deprivation of liberties included in the coverage of the fourteenth amendment and private deprivation of liberties included in the fourteenth amendment. There are ample remedies either at law or in equity to cover the situation of private abridgment of rights without resorting to awkward and unsound applications of the fourteenth amendment.

Other cases of a similar nature have appeared in the courts more recently,[88] but the only one which presents a sufficiently different facet of the problem to merit examination here is *Sweeney v. City of Louisville*.[89]

In one of its parks the City of Louisville constructed an amphitheatre at its expense, except that the Louisville Park Theatrical Association contributed $5,000. The association is a private non-profit organization incorporated under the laws of Kentucky, and which at its own expense and under its sole direction and supervision, during some of the summer, presented operas, for which an admission fee was charged. The arrangement with the city for these performances was pursuant to a written contract whereby the city maintained the amphitheatre and the association would pay into the city any profit realized from the performances, less $5,000 to make up for the original contribution to the city. Any organizations desiring to use the amphitheatre during the months for which the lease ran were to be required to apply for a sub-lease from the association. No Negro group applied to the association for a sub-lease during the summer. Sweeney and other Negroes, however, did apply for admission to performances and were refused on account of their race. Both the city and the association were made defendants in an action in a federal district court for a declaratory judgment as to the right of access of Negroes to the performances in the amphitheatre. The district court held that the City of Louisville had made a proper lease which did not by its terms prohibit other organizations from using it, nor was there any proof that other organizations had not used it. In view of this and the fact that the city exercised no

[88] See Nash v. Air Terminal Services Inc., 85 F. Supp. 545 (E.D. Va. 1949), concerning access to privately operated restaurant on federal property; Easterly v. Dempster, 112 F. Supp. 214 (E.D. Tenn. 1953), concerning access to a privately operated golf course owned by a city.

[89] 102 F. Supp. 525 (W.D. Ky. 1951).

special control over the operations of the association and, further, the indication that the association actually occupied the amphitheatre for only thirty days, the court held that the complaint against the city was without merit. In dismissing the complaint against the association, the court implicitly held that its acts were not state acts.

In a brief per curiam opinion the Sixth Circuit Court of Appeals affirmed this decision.[87] It held that where the City of Louisville did not participate either directly or indirectly in the operation of the private enterprise, the theatrical association was guilty of no unlawful discrimination in violation of the fourteenth amendment in refusing admission to colored persons. Contemporaneous with the decision in the school segregation cases the United States Supreme Court granted certiorari. In a per curiam opinion the judgment was vacated and the case remanded "for consideration in the light of the Segregation Cases" and "conditions that now prevail."[88] In view of the findings of fact in the trial court, supported on appeal, that the city was not a party to the discrimination, the instructions of the Supreme Court are not particularly edifying. The school segregation cases are authority for a holding that the City of Louisville can no longer directly or indirectly discriminate on the basis of race in granting access to its parks. The fourteenth amendment right, then, is to be free from racial discrimination imposed by the state with respect to state property opened to the public use. The right to be free from racial discriminations imposed by *private persons* with respect to state property opened to the public use is a state right and presents no federal question. Negroes have a federal right not to be denied admission by the state to the operas on account of race. Negroes have a state right not to be denied admission by private persons to the operas because of race.

Obviously, the next question is what happens if the state courts refuse to hold that the Negro has a right of access to state property opened to the public? Is there no federal question to enable one to obtain review in the United States Supreme Court? The answer must be that there is a federal question presented under the equal protection clause if the state court holds that the white person has a right of access and the Negro does not. This is an affirmative declaration of state policy by an organ of the state with respect to land owned by the state, and thus comes within the purview of the fourteenth amendment. The important point in making this differentiation is that the issue is clarified and the proper defendants and remedies can be chosen without unnecessarily

[87] Sub nom. Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir. 1953).
[88] 347 U.S. 971 (1954).

dragging into the picture questions of tax immunity or tort liability of governmental agents.

To complete the picture, it is necessary to take up the special situation of a governmental facility normally open to the public but leased to private persons for short intervals and for purely private purposes. As an illustration the example of the municipal auditorium may be used. This is similar in principle to the amphitheatre case, but the auditorium admits of a much greater variety of activities and is not so subject to seasonal temperature or weather variations. Such auditoriums are almost invariably leased out to various private organizations for one or two-day activities. Some of these activities are open to the public, either free or for an admission charge, while others are not. Assuming the very short term leasing arrangement, the differentiation as to right of access to the activity must rationally turn on whether the private lessee opens the facility to the public or restricts it to some specific private group. First, of course, the municipality must allow free competition in determining which groups shall be given a right to contract for the auditorium. Improper discrimination in leasing the facility would clearly violate the fourteenth amendment. But assuming this phase of the procedure to be fair, then it would appear that there is no violation of either federal or state right for the lessee to limit access to some specific group so long as the public generally is not invited or encouraged to attend. For example, if the lessee is offering a concert performance in a municipal auditorium and urging the public to buy tickets and attend, then right of access cannot be denied on the basis of religion, color, size, or other improper classification. The denial of access on such bases by the lessee would be a denial of a state right. But assume that the city leases the auditorium to the governing body of the southeastern region of the Methodist Church, for the purpose of holding an annual convention of delegates and ministers of that faith to determine church policy. While permission to use such a facility might, broadly construed, be interpreted as an aid to religion in general or an aid to the Methodists in particular, this type of aid certainly ought not to come within the proscribed behavior of *McCollum v. Board of Education*,[89] in which a released time program for religious instruction in school buildings during school hours was held unconstitutional. So long as the city does not discriminate improperly in offering its park facilities for speeches and assemblages, it is perfectly permissible for the city to grant a specific religious organization a permit for a religious meeting on a given day.[90]

[89] 333 U.S. 203 (1948).
[90] See Milwaukee County v. Carter, 258 Wis. 139, 45 N.W.2d 90 (1950).

A fortiori, the city can do the same with an auditorium it owns. And if the lessee chooses not to open the meeting to the public generally, then there is no right, state or federal, of access in the public to the meeting. The lessee can then discriminate on the basis of religion or non-membership in the specific organization, whatever it may be.

(3) *Private operation of a facility open to the public where the operator leases land from a governmental unit and where there is a bona fide, arm's length lease and no improper collusion or control over operation policy exercised by the governmental unit, but where the physical facilities forming the basis of the service to the public are constructed by the lessee out of private capital and owned by the lessee.* In this third situation, as in the category just discussed, it should be clear that the acts of the lessee are not state acts and thus do not come under the fourteenth amendment. The earliest case located which is directly in point is *Swan v. Riverside Bathing Beach Co.,*[61] which dealt with the question of the extension of governmental immunity from suit to a lessee of governmental property under the circumstances set out above.

A private person leased certain property from a city in Kansas for a period of fifteen years, under the terms of the contract. The city agreed to excavate for the pool, provide storm and sanitary sewer lines and lay out certain roads around the pool. The lessee agreed to build and maintain a concrete swimming pool, pay a designated rate to the city for the water used, construct and maintain dressing rooms, and provide proper guards and police facilities. At the end of the fifteen-year lease period, all properties and buildings were to revert to the city.

Kansas law granted, at this time, to municipalities immunity from suit for damages to one injured in a municipal swimming pool through the negligence of its officers or agents. Swan sued the lessee Riverside Bathing Beach Company for damages for its alleged negligence leading to the death of a child. The lessee claimed governmental immunity from liability, and the question presented was whether, under the contract arrangement between lessee and city, the lessee was in fact an agent or employee of the city. The Kansas Supreme Court held that the lessee was not in such category and was not therefore immune from suit in the case. The opinion of the court is noteworthy in that a differentiation is made between a purely private lessee and a "state agent" lessee on the basis of the net effect of the contractual agreement itself.[62]

It is interesting to note that in comparing decisions of courts dealing with a lessee's denial of access on the basis of race with decisions deal-

[61] 128 Kan. 230, 276 Pac. 796 (1929).
[62] Id. at 232, 276 Pac. at 797.

ing with a lessee's attempt to attain governmental immunity from suit, the cases present judicial pressure operating in exactly opposite directions. In the former the scope of state action is being broadened, while in the latter the scope of state action is being narrowed. Clarification of the status of such lessees by proper categorization should simplify decision making in both types of cases.

The most recent statement concerning this category of privately leased government land is found in *Holley v. City of Portsmouth*,[63] decided in April, 1957. Judge Hoffman dealt with the question of the right of Negroes to the use of a municipal golf course. In the course of the opinion the following statement was made as dictum:

> It is not suggested that, where a lessee pays ground rent on a reasonable basis and private capital is used for the construction and operation of the golf course with no expense to the taxpayers, the Tate case should be controlling as such a situation would not be a governmental facility or operation.[64]

It would seem reasonable to conclude, with Judge Hoffman, that where the private lessee himself makes the capital improvements which form the basis for the service offered, he can make such discrimination as any other private operator on purely private property is free to make, and his acts are not state acts. Thus a particular religious group might lease land from the state and construct thereon an orphans' home and restrict admission, constitutionally and legally, to those persons of the lessee's faith. However, the facts in each case must be examined carefully to support a finding that the private improvements are the essential element of the service rendered to the customers and not a mere subterfuge under which immunity from a duty not to discriminate is claimed. Assuredly, there are difficult questions to decide in considering such factors as reverter clauses and options to renew leases.

(4) *Private operation conducted under lease on government land but not open to the public.* This fourth category would seem to present no problems concerning state action, so long as the governmental unit leases in good faith by giving due notice of intention in such a manner that interested parties may avail themselves of equal opportunity to submit bids with respect to the property, and have such bids considered fairly. The grazing of cattle on land privately leased from state governments does not by itself make the lessee's activity a governmental act. The private lessee under these circumstances is obviously not an agent of the governmental unit, and the public has no right of access to the property once the effective date of the lease begins. The only situation

[63] 150 F. Supp. 6 (E.D. Va. 1957).
[64] Id. at 9 n.1.

which poses somewhat of a problem is that discussed earlier, under the second category, concerning the use of a municipal auditorium for activities sometimes public and sometimes private. However, as was indicated in that discussion, the determining factor is the question of whether the facility is to be opened to the public. If so, then the case falls in the second category, above, and the public has a right of access, even though state action may not be present. If not, then the case properly falls into the present area of discussion and there is neither state action violative of the Constitution nor a right of access in the public.

To summarize, it is felt, first, that the fact situations which arise under the general heading of private activities conducted on government property may reasonably and profitably be broken down into four categories, and that such categorization will clarify the legal issues presented in such cases. Secondly, it is suggested that a clear differentiation between the federal and the state rights possessed in the various categories of cases above has not been made in most of the cited cases, and has therefore led to some confusion in the rationale for disposition of these cases.

Private Activities Classified as Governmental Because of Their Public Nature

In the *Dorsey* case, discussed previously, and in several others there is reference to institutions engaged in "matters of high public interest" or agencies performing a "public function," which again harks back to the arguments of Justice Harlan in the *Civil Rights Cases*. The theory sometimes stated in the cases is that such institutions or agencies are, by virtue solely of the function performed, governmental agencies. The best illustration of the point is found in the cases concerning political parties.

The series of cases dealing with the question of Negro voting in the south culminated in a holding that, in the south, at least, even though the activity of a state or local Democratic Party be completely under private control and outside the regulatory pattern of the state, the party is still an instrumentality of the state because of its nature. In *Nixon v. Herndon*,[66] *Nixon v. Condon*,[66] and *Smith v. Allwright*,[67] the United States Supreme Court found state action in the acts of the Texas Democratic Party by virtue of close statutory control, statutory grants of power, and judicial processes in aid of the party's actions and decisions.

[66] 273 U.S. 536 (1927).
[66] 286 U.S. 73 (1932).
[67] 321 U.S. 649 (1944).

But in *Rice v. Elmore*[68] the question was presented of whether the actions of the South Carolina Democratic Party constituted state action despite the legislature's repeal of all statutes relating to the primaries. The trial court held the party to be a state instrumentality, and this view was affirmed in the court of appeals. Judge Parker, speaking for the latter court, stated:

> The fundamental error in defendant's position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery. . . . [W]ith the passage of the years, political parties have become in effect state institutions . . . through which sovereign power is exercised by the people. . . .[69]

In *Terry v. Adams*, the most recent of the white primary cases, the Supreme Court found state action in the nominations of a county organization in Texas called the Jaybird Democratic Association, which consisted of all qualified white voters in the county. In this case the Court went even further than in *Rice v. Elmore*, since the Jaybird primary was in reality a preliminary primary, and only custom dictated that the winners would run unopposed in the regular primary.

The Court's statements in *Terry v. Adams*, taken with that of Justice Cardozo who, in *Nixon v. Condon*, used the phrase "matters of high public interest" in connection with participation in the Texas Democratic Party primary, have led to conjecture concerning the possibility of bringing all of the important functions of society under the same broad rule. While such an extension presents interesting possibilities, it seems that voting for public officials and participation in political party activities are unique phases of life in a democratic society.[70] Consequently, extreme care should be used in transferring some of the broad generalizations found in those opinions into other areas of activity.

An uncautious extension of these generalizations is noted in the theory espoused by some writers[71] to the effect that activities which are "fundamental" or "indispensable" in our society are, by definition, too important not to be considered as governmental functions, even though completely controlled and operated by private persons. The only problems to be solved under this approach are, first, the delineation of the political theory which demands that government undertake positively to

---

[68] 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948).
[69] Id. at 389.
[70] H. B. Mayo speaks of the "procedural liberties sufficient to ensure that a continuing and shifting majority may be arrived at freely." Mayo, "Majority Rule and the Constitution in Canada and the United States," 10 Western Pol. Q. 49, 51 (1957).
[71] See Note, 32 Texas L. Rev. 223 (1953), and the discussion in Nicholson, "The Legal Standing of the South's School Resistance Proposals," 7 S.C.L.Q. 1, 40-45 (1954).

provide all persons with all fundamentals of life, and, second, the determination of which aspects of life are "fundamental."

While the political theory of Karl Marx embraces the idea that government, at least in the transitional stage of its existence, should furnish the fundamentals of life, the anti-democratic aspects of his theory make it a poor format for illustration. The host of more recent socialist writers include many, such as the Fabian Socialists, whose theories may be more acceptable to those in this country who argue for such a goal for the state.[12] T. H. Green does not explicitly argue for such a function, but his theory is at least congenial to the view that the state has the affirmative duty of seeing that all essentials of life are available to all persons. Green holds that the state's task is to make possible the achievement of the good life both by removing obstacles in the path of such achievement and in assisting the individual in realizing his ideal of self-perfection.[13] Somewhat similar is the statement in the Report of the President's Committee on Civil Rights:

> It is not enough that full and equal membership in society entitles the individual to an equal voice in the control of his government; it must also give him the right to enjoy the benefits of society and to contribute to its progress. The opportunity of each individual to obtain useful employment, and to have access to services in the fields of education, housing, health, recreation and transportation, whether available free or at a price, must be provided with complete disregard for race, color, creed, and national origin.[14]

This latter statement stops short of demanding that government *furnish* such necessaries—it merely says that they shall not be denied because of race, color, creed or national origin. With the exception, perhaps, of education and recreation, there is a substantial difference of opinion in the United States as to the degree of direct participation of government in even the admittedly vital areas mentioned in the above quotation. And assuming that general agreement could be obtained to the effect that indispensable functions are governmental functions, or that they relate in some manner to the state even without specific statutory control, then the problem remains of defining the line between the "fundamentals" and the "non-fundamentals" of life.

The analogy of the doctrine of "businesses affected with a public interest" immediately comes to mind in this connection, as does the memory of the tortuous meanderings of the Court in trying to give effect to that doctrine from *Munn v. Illinois*[15] to *Nebbia v. New York*.[16] The

[12] For a general treatment see Coker, Recent Political Thought cc. IV, V (1934).
[13] See The Works of Thomas Hill Green (R. L. Nettleship ed. 1886).
[14] To Secure These Rights 9 (1947).
[15] 94 U.S. 113 (1876).
[16] 291 U.S. 502 (1934).

difficulty was well stated by Justice Holmes in a dissenting opinion in the case of *Tyson & Brother v. Banton*, dealing with the constitutionality of a New York statute which limited the fees charged by theatre ticket brokers:

> But if we are to yield to fashionable conventions, it seems to me that theatres are as much devoted to public use as anything well can be. . . . [T]o many people the superfluous is the necessary, and it seems to me that Government does not go beyond its sphere in attempting to make life livable for them. . . .[77]

Fear of a repetition of the experience during the rise and fall of the affectation doctrine might be sufficient for many to eschew acceptance of the doctrine that the fundamental is governmental. Even for the less timorous, there is considerable doubt as to the desirability of adopting a policy which would classify thousands of formerly private persons as governmental agents, subject to the law of such agents.

That such a theory presents a useful wedge for further expansion of the coverage of the fourteenth amendment through the concept of state action is clear. But the burdensome ramifications of its use must be recognized also, and weighed against the benefits derived.

A related, although more restrictive, theory may be derived by a restatement of the premise. The premise might be put that if a function is governmental in its nature, then the activity is a state instrumentality whether conducted privately or publicly. Thus, electing public officials and participating in political party activities are so vital to the organization and policies adopted by government as to make those agencies carrying out such functions governmental instrumentalities. The danger in such a theory is that there may crop up the old distinction between "governmental" and "proprietary" functions which has plagued the courts in determining the law relative to intergovernmental tax immunities and tort liability of municipalities. The latter two situations present the reverse approach, of course, to determining where the line should be drawn. Instead of the question raised by the latter of "what governmental activities are private?", we have under this state action theory the question of "what private activities are governmental?"

The confusion engendered in attempting to delineate those functions which are "governmental by their very nature" is well illustrated in some of the cases dealing with immunity of various state activities from national taxation, as, for example, liquor dispensaries,[78] university athletic contests,[79] elevated railroads[80] and water works.[81] To avoid this pitfall

[77] 273 U.S. 418, 447 (1927).
[78] South Carolina v. United States, 199 U.S. 437 (1905).
[79] Allen v. Regents of University System of Georgia, 304 U.S. 439 (1938).
[80] Helvering v. Powers, 293 U.S. 214 (1934).
[81] Brush v. Commissioner, 300 U.S. 352 (1937).

and still bring the voting cases within a workable definition of "state action," it is suggested here that the only purely privately operated functions which properly should be considered as governmental are those which are indispensable to the maintenance of democratic government. It should be noted that such a definition does not go so far as to cover operations which are merely useful or desirable as aids to a more efficient or intelligently controlled government. If these are to be included, then we are no better off than if we equate governmental action with operations affected with a public interest. Education is desirable and useful in a democatic system, but it is not indispensable to the maintenance of democratic government in the sense that access to the ballot and the processes of selecting public officials is. Philosophically, perhaps, the man who is properly fed, clad, and housed is in a position to decide public questions in a more rational manner than one who is not. This, however, should not in itself make the functions of furnishing food, clothing and housing governmental functions brought within the coverage of "state action." The criterion must not be merely the finding that a given operation exerts an influence on public policy for the operation to be classified as "governmental" or else—if reports concerning such figures as Napoleon and Mark Antony be given credence—even one's activities relative to procreation would be so categorized.

A different situation is presented when the private organization is exercising authority granted to it by government and is empowered by such grant to create or destroy rights of private persons. The best available illustration is that of the labor union certified by a government agency as exclusive bargaining agent for a specified group of employees. The leading case on this question is *Steele v. L. & N. Railroad*,[83] decided in 1944. The Negro petitioner, a fireman on the L. & N., sued the railroad and the Brotherhood of Locomotive Firemen and Enginemen to have a contract between the two set aside. The Brotherhood was the exclusive bargaining agent for all firemen and enginemen but, at the same time, excluded Negroes from its membership. Following an announcement of their intention, the Brotherhood entered into an agreement with the railroad so as to exclude ultimately all Negro firemen from the service. The state courts of Alabama held that the Railway Labor Act imposed on petitioner and other Negro members the legal duty to comply with the contract terms since the Brotherhood was their legal representative.

The United States Supeme Court reversed the state court, and Chief Justice Stone, speaking for the Court, stated:

[83] 323 U.S. 192 (1944).

> If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.[83]

The Chief Justice, however, chose to avoid the constitutional questions presented by the simple remedy of holding that the act imposed upon the representative of a craft the duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such. Justice Murphy put the case more succinctly when he said that since the union received its authority solely from Congress, it could take no action in the exercise of its delegated powers "which would in effect violate the constitutional rights of individuals."[84]

State Judicial Intervention to Aid Private Discrimination

In 1948 the United States Supreme Court decided the case of *Shelley v. Kraemer*,[85] in which was presented the question of whether the state courts could constitutionally enforce private racially restrictive covenants. The Court held that such action was state action, and that the state court's enforcement of such agreements was a denial of equal protection of the laws. The acts of state judges in their official capacity have long been held to be encompassed within the meaning of state acts under the fourteenth and fifteenth amendments, as was discussed earlier in this study. And the opinion for the Court in the *Shelley* case contains a lengthy collection of cases so holding.[86] While this study is primarily concerned with the distinction between state and private action, rather than the rights involved under the amendments, the whole problem presented by the decision in the *Shelley* case turns on the rights protected against state judicial interference. Without careful examination of this problem, the case may very well be construed as extending to altogether unreasonable lengths.

The question arises whether the holding in the *Shelley* case bars state

---

[83] Id. at 198.

[84] For other cases on the discriminatory powers of bargaining representatives, see Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); James v. Marinship Corporation, 25 Cal. 2d 721, 155 P.2d 329 (1944); Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946).

[85] 334 U.S. 1 (1948). This case was followed by another, Barrows v. Jackson, 346 U.S. 249 (1953), in which the Court held unconstitutional the state court's award of damages in an action for breach of a racially restrictive covenant on authority of the Shelley case. Since the Barrows holding appears to be a perfectly rational consequence of the former case, discussion in this section centers about the Shelley case with no further comment on Barrows.

[86] 334 U.S. at 14 ff.

organs from aiding private persons to effect *any and all* discrimination based on race, religion, creed or other classification which would be considered unconstitutional if made directly by a state organ. To be specific, would the private householder be barred by the *Shelley* rule from obtaining state assistance in his attempt to stop Jehovah's Witnesses (but no other sect) from entering his property? In all reasonableness the private householder should certainly be allowed his eccentricities, if such they be, in determining what private persons shall be permitted the use of his home or property. And his determinations in this respect should be given the bulwark of judicial remedies if necessary to enforce his decision. This circumstance, then, should be outside the application of the *Shelley* rule. The problem which must be solved is the construction of a proper rule which will adequately describe the situations covered by the decision in the *Shelley* case without depriving the private individual of the power to make discriminations or classifications which make life more bearable for him but which would be unconstitutional if made by the government directly. In other words, it is contended here that not every governmental act which would be unconstitutional if adopted as general policy is unconstitutional when it is merely in support of private discrimination.

In *Martin v. City of Struthers*,[87] the Court held unconstitutional, as applied to the distribution of literature by Jehovah's Witnesses, an ordinance barring the knocking on doors or ringing of doorbells of residences in order to deliver handbills. Certainly, then, these prohibitions could not constitutionally have been propounded as public policy by the state courts either. But assuredly the courts can constitutionally come to the rescue of harassed householders and, through application of the law of trespass or by injunction, afford relief. In fact, such was the suggestion of the majority in the *Struthers* case.[88] To hold otherwise leads us to the ridiculous conclusion that when one wants to peddle his product, be it a religion or a magazine, to a private person, all judicial assistance is denied the householder, for it would be state action in denial of a first amendment right, or else a denial of equal protection.

What, then, is the proper rule? In the *Shelley* case the property owner and the would-be purchaser were denied the right to contract for sale of the property solely because the purchaser was a Negro. The important fact in the case was the willingness of both parties to enter into the contractual agreement. It may be said that there inheres in the individ-

[87] 319 U.S. 141 (1943).

[88] Justice Black, speaking for the Court, stated: "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. . . . A city can punish those who call at a home in defiance of the previously expressed will of the occupant . . . ." 319 U.S. at 147-48.

ual a right of contract when bilateral agreement is present. However, a contract contemplates two or more willing parties, and there is no right of contract enforceable unilaterally over the objections of the reluctant party.

Freedom of contract is, of course, no more absolute than any other right, but despite this fact, the state violates the due process clause if it unreasonably restricts this useful mechanism. And state restrictions on the enjoyment of contractual benefits are unconstitutional if based on race or religion. The *Shelley* rule thus bars the state from interposing its authority in order to halt consummation of a contract between agreeable parties when the basis for the interference is the race or religion of one of the parties. Such interference would be state action depriving an individual of a right protected by the fourteenth amendment because of his race or religion. But since there is no unilateral right of contract, the rule does not bar the state from interceding on behalf of a private person who seeks to prevent another person, because of the latter's race or religion, from further efforts to conclude a contract agreement. State action is present, but no right protected by the fourteenth amendment is violated. The same principle would apply to entry on privately owned land for the practice of religion. Once permission of the owner is obtained, the outsider may be said to have acquired a right of religious teaching, within the reasonable restrictions imposed by the state. Until such permission is obtained, no right accrues to practice religious exercises on another's private property, and state punishment for trespass on complaint of the owner does not violate the fourteenth amendment.

The equal protection clause is essentially an explanatory adjunct to the due process clause and for all practical purposes cannot stand alone. The facility with which an equal protection guarantee was written into the fifth amendment is illustrative of this fact. The equal protection clause only becomes operative when there is a denial of some aspect of the right to life, liberty or property. Some rights by their nature are capable of exercise unilaterally, such as speech, but are constitutionally protected within certain limits only if the exerciser has a right to be in the place of exercise. Speeches in the public streets and parks have broad constitutional protection against state interference, since the speakers have a general right to use the public streets and parks for this purpose. The same speeches are broadly protected against state interference when made on private property with the owner's permission, since the speaker has then acquired at least a temporary right to use the property for that purpose. The same speeches on another's private

property have no constitutional protection against state interference requested by the owner, because there is then no right to the use of the property for making speeches. Thus even the fact that the owner denies the use of his property because of religious bias does not make the assistance offered by the state a denial of the equal protection clause of the fourteenth amendment.

This is the only rational basis on which the decision in *Marsh v. Alabama*[89] can be squared with the proper application of the fourteenth amendment. In that case the State of Alabama convicted Jehovah's Witnesses of trespass for continuing, despite warnings, to distribute literature on the streets of a privately owned company town. In setting aside the conviction, the opinions of the majority of the United States Supreme Court said essentially that "this company town looks like a governmental town and therefore it is subject to the constitutional restrictions on the latter in the field of religious exercise." Justice Black even went to the subject of interstate commerce to find a horrible example of what private discretion of the town manager might lead to in the matter of discriminatory street regulation. He stated:

> . . . And, though the issue is not directly analogous to the one before us, we do want to point out by way of illustration that such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce. . . .[90]

---

[89] 326 U.S. 501 (1946).

[90] Id. at 506. This is the sort of hazardous reasoning against which the opening sentences of the present study are directed. As stated there, the Constitution does not restrict private action through its own force except in the thirteenth and twenty-first amendments. Therefore private persons cannot "unconstitutionally interfere with and discriminate against interstate commerce." With the exception of the two amendments mentioned, private persons may act illegally, but they do not act unconstitutionally; only governments and government agents act unconstitutionally. The determination of what sort of acts unreasonably interfere with interstate commerce is a matter for legislative decision where such acts are performed by private persons. It is for Congress to regulate the commerce among the several states when it deems regulation necessary, and the courts are neither delegated that power nor is the court equipped to make a proper analysis of the myriad political factors which must be considered in determining the desirability of a particular type of restriction. The function of the courts in this matter of the commerce clause is to protect the plenary power of Congress over the subject from improper inroads on the part of the States and their subordinate units. It is the judicial task to reconcile the practical demands of a federal system of government with the specific delegation of the commerce power to Congress. It is assuredly not the judicial task to lay down the general policy of what sort of private acts unduly burden or interfere with interstate commerce.

The Fourth Circuit Court of Appeals went astray in just this fashion in deciding the case of Chance v. Lambeth, 186 F.2d 879 (4th Cir.), cert. denied, 341 U.S. 941 (1951). Chance, a Negro, brought suit for damages against Lambeth and the A.C.L. Railroad because of plaintiff's alleged wrongful ejectment from a railroad coach because of race. The railroad had adopted a regulation requiring segregation in the South, and upon Chance's refusal to move to a colored car he was ejected. The court held that the regulation was an unconstitutional burden on interstate commerce. It did not base the holding in any way upon a violation of any act of Congress regulating carriers. Judge Soper, speaking for a unanimous court, said:

> . . . It is true that the regulation of the carrier was not enacted by state authority, although the power of the state is customarily invoked to enforce it; but we know of

The company town is certainly not a governmental unit. It may restrict tenancy of its houses in ways which would be clearly unconstitutional if attempted by the ordinary municipality. Its managers need not be elected, and constitutional debt limits applicable to cities have no relevance in the case of the company town. It is the first rule of judicial restraint to avoid unnecessary generalizations which may place the Court in completely untenable positions later. The question can more properly be brought within the application of the rules of the fourteenth amendment by holding first that the Witnesses had a state right to use the streets for distributing religious literature, since they had been opened up to the public for the ordinary uses to which streets are put (including, since *Hague v. C.I.O.*,[91] communication of ideas) and, second, when the state prosecuted the Witnesses for trespass, it established the element of state action necessary for a finding of unconstitutionality under the fourteenth amendment. If the creation of a congeries of people is sufficient in itself to activate the fourteenth amendment prohibitions against persons exercising any managerial authority over such people, then owners of substantial apartment house projects should take careful note. All things considered, it would seem to be a very dubious proposition to follow.

The conclusion here is that if the rule of *Shelley v. Kraemer* is to be applied reasonably, the Constitution must allow the private individual some measure of intolerance. In all the pressure toward conformity in this society[92] it may well be that for solution to public problems we must look to the rebellious and those with low irritability coefficients. Constitutionally the distinction between state acts in furtherance of private discrimination which are valid and those which are not permissible must rest on whether the victim of the discrimination was exercising a state or federal right—not merely whether the discrimination was based on a classification which would be improper if made directly by the state.

State Inaction: Failure to Prevent or Afford Remedies for a Deprivation of State or Federal Rights

It is time now to return to Justice Bradley's remarks in his opinion for the majority in the *Civil Rights Cases*. He said that the wrongful act of an individual, unsupported by state authority, is simply a private

no principle of law which requires the courts to strike down a state statute which interferes with interstate commerce but to uphold a railroad regulation which is infected with the same vice.
Id. at 883.

[91] 307 U.S. 496 (1939).

[92] Whyte, The Organization Man (1956) is in point.

wrong "if not sanctioned in some way by the state, or not done under state authority." Implicit in this statement is a broader coverage for the fourteenth amendment than can possibly be read into Justice Harlan's dissent. If the quoted statement be rephrased, it might be put in rather forceful language: If a state agent willfully fails to fulfill a legal duty to any person and, as a result of such failure, the person is denied or deprived of any right, then the state in effect becomes a party to the wrong and the fourteenth amendment is violated.[93] Such a rule would be, it seems, a proper paraphrase of Justice Bradley's statement, "if not sanctioned in some way by the state." Thus if a religious speaker fears private interference with his speech, and his requests to local police to furnish protection are willfully and unjustifiably refused, the police are violating the fourteenth amendment. A few cases have appeared in which this question was considered, although none has yet been decided by the United States Supreme Court on this specific point.

The best illustration is *Catlette v. United States*, discussed earlier. A group of Jehovah's Witnesses asked the mayor and the police chief for police protection while distributing religious literature. Not only did the police fail to furnish such protection, but they subjected the Witnesses to various indignities and ejected them from the town. Among other bases for holding that the federal civil rights acts applied to such acts the Court of Appeals for the Fourth Circuit said:

> . . . And since the failure of Catlette to protect the victims from group violence or to arrest the members of the mob who assaulted the victims constituted a violation of his common law duty, his dereliction in this respect comes squarely within the provisions of 18 U.S.C.A. § 52.
>
> It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official State inaction may also constitute a denial of equal protection. . . .[94]

In *Picking v. Pennsylvania Railroad*[95] a damage suit was initiated against the railroad, the Governor of Pennsylvania, and various other persons as a result of the apprehension and transportation of a fugitive to the State of New York from the State of Pennsylvania. During the proceedings, Picking applied to a justice of the peace in Pennsylvania for a hearing on the legality of the apprehension and proposed removal. The justice allegedly refused the hearing. In discussing the question of whether a cause of action lay against the justice under the federal civil rights acts, Chief Judge Biggs stated for the court:

---

[93] For an excellent discussion of the possible application of the criminal provisions of the federal civil rights acts to state inaction, see Carr, Federal Protection of Civil Rights 155-71 (1947). See also, Coleman, "Freedom from Fear on the Home Front," 29 Iowa L. Rev. 415 (1944).

[94] 132 F.2d 902, 907 (4th Cir. 1943).

[95] 151 F.2d 240 (3d Cir. 1945).

> . . . If these allegations be proved it may be concluded that the refusal of Keiffer to act as required by law may have deprived the plaintiffs of their liberty without due process of law in violation of the Fourteenth Amendment. . . . The refusal of a state officer to perform a duty imposed on him by the law of his state because he has conspired with others in a conscious design to deprive a person of civil rights in legal effect may be the equivalent of action taken "under the color" of the law of the state.[96]

Of course the problem in these cases, once the law is accepted, is to determine whether any specific failure to furnish requested police protection or judicial remedies was in fact a culpable defection of duty. But this is a problem for the jury in each instance to determine.

It is the extension of the state inaction theory to areas of purely private controversy which has led to some strangely circuitous reasoning. Suppose an intrastate employer fires an employee because of the latter's religion, or lack of it. Then assume that the ex-employee goes to a state court for a court order directing the employer to reinstate the employee because the employee has a right to his own choice of religion. If the court refuses to issue such an order, does such refusal constitute willful state inaction which directly permits the abridgment of religious belief in violation of the fourteenth amendment? Some speculation exists that such will be the holding in the near future. Rationally, however, it should not fall within the coverage of the fourteenth amendment unless there are added certain important facts—as, for example, a state law barring employers from making religion a test of employment. The reason for excluding this case from fourteenth amendment protection is that no right is violated. In this respect the discussion parallels some of that in connection with the *Shelley* rule. There is no federal or state right (in the absence of statute) to employment irrespective of religion in intrastate business generally. Thus when the state court fails to act in the hypothetical case, it does not fail in any legal duty imposed upon it, and no fourteenth amendment violation takes place.

That there is need to consider this type of fact situation carefully is indicated by an examination of Justice Douglas' dissenting opinion for himself, Chief Justice Warren and Justice Black in the case of *Black v. Cutter Laboratories*.[97] A pharmaceutical company in California discharged an employee on the grounds that she was an active member of the Communist Party and had falsified her application for employment. Her union sought her reinstatement before an arbitration board pursuant to a valid collective-bargaining agreement which authorized discharge for "just cause" only. The board ordered her reinstatement after find-

[96] Id. at 250.
[97] 351 U.S. 292 (1956).

ing that although she was an active member of the Communist Party and had falsified her application for employment, she actually was discharged for union activities. The lower California courts affirmed this order, but the Supreme Court of California reversed.[88] The United States Supreme Court granted certiorari on a petition contending that the decision and opinion violated the equal protection and due process clauses of the fourteenth amendment. Upon examination of the record the Court, with three dissenting votes, held that the writ should be dismissed in view of the California court's construction that "just cause" included membership in the Communist Party and that the decision involved only California's construction of a local contract under local law. If we stipulate the terms of the contract and narrow the issue down to the question of whether a contract permitting discharge of an employee because of Communist membership can constitutionally be upheld by the state courts, then we have the question essentially as the dissenters viewed it. It is the opinion of Justice Douglas which presents the controversial viewpoint for the purposes of this discussion. He stated that it was plain that the judgment of the Supreme Court of California sustained a discharge of this worker because she was a communist, and that such action violated the first amendment rights of the employee. In explaining his position he stated:

> I can better illustrate my difficulty by a hypothetical case. A union enters into a collective-bargaining agreement with an employer that allows any employee who is a Republican to be discharged for "just cause." Employers can, of course, hire whom they choose, arranging for an all-Democratic labor force if they desire. But the courts may not be implicated in such a discriminatory scheme. Once the courts put their imprimatur on such a contract, government, speaking through the judicial branch, acts. *Shelley v. Kraemer*, . . . ; *Barrows v. Jackson*. . . . And it is governmental action that the Constitution controls. Certainly neither a State nor the Federal Government could adopt a political test for workers in defense plants or other factories. It is elementary that freedom of political thought is protected by the Fourteenth Amendment against interference by the States. . . .
> . . . And if the courts lend their support to any such discriminatory program, *Shelley v. Kraemer, supra*, teaches that the Government has thrown its weight behind an unconstitutional scheme to discriminate against citizens by reason of their political ideology. . . .[89]

With all due respect to the dissenting Justices, *Shelley v. Kreamer* teaches no such thing. The *Shelley* rule bars the state judiciary from interfering with the enjoyment of a state or federal right where the basis of the interference rests on an unreasonable classification. Where an

---

[88] 43 Cal. 2d 788, 278 P.2d 905 (1955).
[89] 351 U.S. at 302-03 (footnotes omitted).

individual has no right to take a particular course of action, the state court's assistance in barring the individual from beginning or continuing such action does not violate the fourteenth amendment even though the basis for the private denial of permission be religion, political ideology or other classification which would be improper if used by the state in establishing various rights or in abridging those already existing. The crucial fact in either case is the existence of a state or federal right, and, in the absence of statute, there is no right of private employment irrespective of political affiliation.

The best guess concerning a rule which the dissenters in the *Cutler Laboratories* case would follow is this: Where there exists a right protected by the fourteenth amendment against improper state abridgment, and where the state could, within the due process clause, constitutionally create a similar right running against *private* abridgment, the state court acts in violation of the fourteenth amendment if it fails to offer a remedy, upon request, against such private abridgment. Under such a rule the state remains free to enforce its ordinary trespass laws at the instance of the harassed householder, because the state could not constitutionally take away the householder's freedom to discriminate in his choice of guests. Under the rule the state is *not* free to aid the employer in his attempt to fire an employee who happens to be a member of the Republican Party since the state *can* constitutionally bar the employer from discharging an employee solely because of political affiliation. Further, in the latter case the state must, upon request, furnish the aggrieved employee a remedy against such attempted discharge. In short, what the state *can* do it *must* do to protect the individual against constitutionally unreasonable discriminations on the part of other private persons.

This theory not only includes in entirety the "state inaction" theory expressed in the cited cases, but it goes one step further. Not only must state agents perform all acts demanded of them by common law or by their constitution and statutes, they must, in addition, perform all acts in furtherance of non-discrimination which the fourteenth amendment due process clause would permit them to perform. While such a theory presents a salutary solution to the plaguing problem of energizing a legislative body into action to protect persons from unreasonable private discriminations, there is absolutely no justification for restricting its application to equal protection cases while at the same time excluding due process questions. If the rule is good for one, it is equally applicable to the other clause of the fourteenth amendment. To take a sample question, suppose a group of citizens resident in Smoky City decide that a smoke abatement program should be established in that city. The freeing

of air from an overabundance of impurities certainly represents an enhancement of the citizens' liberty to live in healthful surroundings, as well as an improvement of their real property values. The right to enjoyment of one's property can constitutionally be protected by the state against private abridgment. Therefore, under the theory stated, the state *must*, upon request of the citizens, embark upon a smoke abatement program. Presumably, if the citizens appeal to the courts for a remedy against air pollution, then such remedy would have to be given or the fourteenth amendment would be violated. This goes further than mere judicial proceedings to abate a nuisance, and would require a full-scale program of smoke abatement to be established by the judicial branch. Otherwise the state becomes a party to the abridgment of a property right. The vision of a trial judge substituting his procedures for legislative research, investigation and hearings in the preparation of a fair and comprehensive smoke abatement program presents an absurd picture. And this is a relatively simple problem. Considering the various possibilities inherent in the state police power for improving the health, safety, morals and convenience of the citizens, there is an infinite variety of legislative-type duties which would be laid upon the judges by such a reading of the fourteenth amendment. Judges can and do perform occasionally in a legislative capacity, and this "judicial legislation" is certainly a necessary part of their function. But such functions can be performed only in a limited fashion by judges. Their training, their staff, and their procedures are simply not geared to the practical demands of the legislative process generally. The Supreme Court can readily hold unconstitutional a permit ordinance for street meetings in the City of New York, but, as Justice Jackson suggested,[100] if the Court is not in a position to draw a proper ordinance, it should be cautious in ruling out those drawn by the city. If the Court is unwilling to lay down the specific policy in a first amendment question, then even greater restraint is called for in the other areas of governmental regulations.

It seems that from a practical standpoint the theory implicit in Justice Douglas' statements above is simply not tenable. Restricting the coverage of his theory somewhat, a rule which would properly reckon with the problem of state inaction might be stated thus: Where there exists a state or federal right running against private abridgments, the state acts in violation of the fourteenth amendment if, upon request, it fails to protect this right against private abridgment. Such a theory represents an extension of the *Shelley* case to some degree, since it requires affirmative action on the part of the state, yet it is a workable and logical extension.

[100] Kunz v. New York, 340 U.S. 290 (1951).

It does not require the judicial branch to undertake purely political functions of regulating the "various and interfering interests" of society.

Conclusion

This analysis attempted, first, to indicate the lines along which the concept of state action has developed; second, to point up the practical and theoretical dangers involved in some of the more recently suggested theories on the reach of the state action concept; and, third, to present a logically consistent delineation between state action and private action which will afford broad protections to personal liberties without embroiling the courts either in improper legislative functions or in irrational and burdensome applications of the law of public officers to private persons.

Throughout the whole problem runs the difficult task of expanding personal liberty in certain directions without undermining the responsibility and incentive of local officials under a federal system for expansion of liberty in other directions. Many aspects of economic liberty and enjoyment of property are so inextricably involved in purely local problems as to be irresoluble at the national level on any proper basis. And one need not be dubbed a professional states-righter merely for his recognition of the usefulness of the federal system of government.

Changes in application of the state action concept have enormous ramifications concerning the operation of the federal system and the status of individual rights. Whatever direction expansion of the concept takes—and expansion is a certainty—much careful thought must be given to the consequences of such a move if the results are to prove more beneficial than harmful.

APPENDIX D(4)

Comment: Sit-Ins and State Action—Mr. Justice Douglas, Concurring

KENNETH L. KARST* AND WILLIAM W. VAN ALSTYNE**

Last December the Supreme Court decided three "sit-in" cases. In *Garner v. Louisiana*,[1] the Court struck down disturbing-the-peace convictions of sixteen young Negroes whose only allegedly criminal activity was to sit at "white" lunch counters in a department store, a drug store, and a bus terminal, all in Baton Rouge. The opinion of the Chief Justice for the majority was a disappointment for those who had hoped for a sweeping expansion of the doctrine of state action under the fourteenth amendment. It rested on grounds which were as drab as they are now familiar:

> In the view we take of the cases we find it unnecessary to reach the broader constitutional questions presented, and in accordance with our practice not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record, for the reasons hereinafter stated, we hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment.[2]

With a citation to *Thompson v. City of Louisville*,[3] the Court's constitutional analysis was over; it remained to examine the Louisiana statute to determine the elements of the crime, and to demonstrate by references to the several records that the convictions did not "rest

---

* A.B., University of California, Los Angeles, 1950; LL.B., Harvard University, 1953; Professor of Law, Ohio State University.

** B.A., University of Southern California, 1955; LL.B., Stanford University, 1958; Associate Professor of Law, Ohio State University.

1. 368 U.S. 157 (1961). The *Garner* case was argued and decided along with *Briscoe v. Louisiana* and *Hoston v. Louisiana*. In *Garner*, two Negro students from Southern University "sat in" a drugstore at its lunch counter, after one of them had just bought an umbrella elsewhere in the store. The store served both Negroes and whites, but segregated the races in its seating arrangements. In *Briscoe*, seven Negro students "sat in" the restaurant in the local Greyhound Bus Terminal, which also maintained segregated seating. In *Hoston*, seven Negro students "sat in" a Kress department store at the "white" lunch counter, and did not change seats when they were told that they could be served at the counter across the aisle. Each of the students was arrested, see text accompanying note 28 *infra*, tried, and convicted for disturbance of the peace; each defendant was "sentenced to imprisonment for four months, three months of which would be suspended upon the payment of a fine of $100." 368 U.S. at 161.

2. *Id.* at 163.

3. 362 U.S. 199 (1960).

upon any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace."[4]

But there was something for everyone in the *Garner* case. Those who wanted an opinion on the broader constitutional questions got one from Mr. Justice Douglas. Because his reading of the Louisiana Supreme Court opinions interpreting the statute required the conclusion that the accused Negroes had committed a violation, he reached the question of state action. While prediction is risky, it seems likely that if the *Garner* case is remembered at all, it will be remembered for Mr. Justice Douglas's concurring opinion.

The traditional nature of the opinion's opening gambit does not permit adequate psychological defense against the dazzling moves which are to come:

> It is, of course, state action that is prohibited by the Fourteenth Amendment, not the actions of individuals.[5]

Of course. The reader may settle back, awaiting an extension on the mechanics of *Shelley v. Kraemer*;[6] the arrests were made by policemen, and the convictions were adjudged by state courts. But Mr. Justice Douglas, having lost the last time he tried such a mechanical extension,[7] does not even cite the *Shelley* case. Instead, the state action requirement is to be killed with a new kind of kiss. Three seemingly independent grounds are asserted for holding that the private discrimination on which these convictions are based has satisfied the requirement of state action: (a) The customs of Louisiana, reinforced by the state's general legal patterns, maintain racial discrimination; (b) the restaurant business is "affected with a public interest," and thus subject to the regulatory power of the state; and in fact (c) the state, through its municipalities, had licensed these restaurants.

The opinion thus discards the substance of the state action limitation while maintaining it as a verbal façade. There is, of course, room for argument that the principle of state action has outlived any usefulness it ever had; such arguments have been made, off and on, ever since the adoption of the fourteenth and fifteenth amendments. Occasionally it is said that there is no justification for a traditional state action limitation when certain interests are at stake,

4. 368 U.S. at 163–64.
5. *Id.* at 177.
6. 334 U.S. 1 (1948).
7. Black v. Cutter Labs., 351 U.S. 292, 302–03 (1956) (dissenting opinion).

as in the voting[8] or lynching[9] cases. Others have urged a more thoroughgoing rejection of the requirement of state action,[10] and perhaps the Court is listening. *Griffin v. Illinois*,[11] while obviously distinguishable, certainly looks in the direction of an affirmative state duty to guarantee equality.

If the state action requirement is not discarded, however, it seems unfortunate to assume that it can be satisfied by the skillful use of slogans. If the state action requirement is kept, no doubt the reason will be that it serves—or should serve—real values of constitutional proportion. Even in a unitary government, *some* principle of "governmental action" would be desirable as a protection of individual freedom of choice; the national interest in racial equality, for example, should not prevent an individual attorney from using racial criteria—or any other arbitrary criteria—in the selection of a partner.[12] When an individual's actions strongly affect the interests of many people, we may apply constitutional limits to his freedom of action, on the ground that the impact of his conduct in effect resembles that of governmental conduct. Something like this consideration probably stands behind Mr. Justice Douglas's first ground, based on community customs. But when government acts, we do not worry about subordinating *its* freedom of action; government must justify its conduct, and cannot act arbitrarily. The federal system adds another consideration which supports a

---

8. See United States v. Given, 25 Fed. Cas. 1324 (No. 15210) (D. Del. 1873); Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 19–23 (1959). The case of Terry v. Adams, 345 U.S. 461 (1953), may—but need not—be explained on this broad ground.

9. See *Ex parte* Riggins, 134 Fed. 404, 409 (N.D. Ala. 1904); Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 Law, Guild Rev. 627, 638 (1946). For similar tendencies in other contexts, express or implied, see Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956), 70 Harv. L. Rev. 1299 (1957) (education); Frank & Munro, *The Original Understanding of "Equal Protection of the Law"*, 50 Colum. L. Rev. 131 (1950) (land ownership or use; access to public accommodations).

10. For a recent example, Mr. Justice Harlan's dissent in the Civil Rights Cases, 109 U.S. 3, 26–62 (1883), is echoed in Harris, The Quest for Equality 42 (1960): "The clause does more, therefore, than condemn unequal state laws or the unequal enforcement of equal laws; it requires the states to provide or afford equal protection of the laws. Neither a strenuous exercise in philology nor an examination of usage in 1866 is required to define the word 'deny.' It meant then within the context of the amendment what it meant long before and continues to mean, to refuse to grant, to withhold, to forbid access to, to refrain from giving some claim, right, or favor. Accordingly, the prohibition against the denial of equal protection of the laws is the same thing as a positive requirement which could read, 'Every state shall afford, or furnish, every person within its jurisdiction the equal protection of the laws.'"

11. 351 U.S. 12 (1956).

12. We assume the absence of state fair employment legislation. Even in the absence of such legislation, the state action balance may not fall the same way in the case of a sixty-man law firm which rejects Negro attorneys on racial grounds.

requirement of state action before constitutional limits are to be applied. Such a doctrine decentralizes both the administration of nationally adopted standards and the effective decision whether to promote or retard various competing policies.[13]

The most unsettling aspect of Mr. Justice Douglas's concurring opinion in the *Garner* case is that it ignores these interests, and lends support to treatment of the state action requirement as a gimmick. State action is once again viewed as a kind of conceptual hook; once the hook is found or invented, the racially discriminatory conduct is invalid, without further analysis.

I. The Custom of the Community

The *Civil Rights Cases*[14] of 1883 are the bedrock for the stringent state action limitations on the fourteenth and fifteenth amendments—limitations with which the Court has been wrestling ever since. The cases invalidated the application of an early federal Civil Rights Act to the exclusion of Negroes from places of public accommodation, holding that Congress lacked authority to legislate against "private" discrimination. Yet in the *Garner* case Mr. Justice Douglas employed an unguarded dictum of Mr. Justice Bradley in the *Civil Rights Cases* to reach a very different result; the implication drawn from the dictum is that "state authority in the shape of laws, *customs*, or judicial or executive proceedings" provides the necessary modicum of state action so as to involve the equal protection clause.[15] He went on to demonstrate that at least from the time of *Plessy v. Ferguson*,[16] Louisiana has contributed to a custom of segregation by adopting it as a legislative policy with respect to a vast number of activities. On the strength of these premises, he concluded that a Louisiana lunch counter proprietor in 1961 is constitutionally inhibited from segregating his customers because of race. No particular statute or ordinance compelled segregation in the business establishments involved in *Garner*, but Mr. Justice Douglas felt that the custom, observed by parallel private decisions and uncoerced by state police or state laws, was sufficient nevertheless:

---

13. We have more fully stated our views on the values represented by the state action limitation in Van Alstyne & Karst, *State Action*, 14 Stan. L. Rev. 3 (1961). For application of these views in the sit-in context see *id.* at 52-57.

14. 109 U.S. 3 (1883).

15. *Id.* at 17, quoted in 368 U.S. at 178. The emphasis was added by Mr. Justice Douglas.

16. 163 U.S. 537 (1896).

> If these proprietors also *choose* segregation, *their* preference does not make the action "private," rather than "state," action.[17]

If he is correct, and if he ultimately persuades the Court to adopt this view, then there is no area of social intercourse in the South which is free from the constitutional protections against state action, since the custom is generally one of segregation. Moreover, since virtually every federal civil rights statute enacted since 1866 speaks of "custom" as sufficient to bring a defendant within its provisions,[18] acceptance of Mr. Justice Douglas's interpretation plus immediate enforcement of the federal laws would result in wholesale prosecutions and civil suits under existing statutes.

We have commonly understood, however, that a free, individual decision is the very freedom of choice which the fourteenth amendment is not designed to foreclose. Will a common practice by white persons in a given community hereafter be sufficient to convert the choice of a local service or social club not to accept Negroes into state action which offends the equal protection clause? If convincing survey evidence should reveal that white families in Jackson, Mississippi, customarily refuse to rent rooms in their homes, or to offer dinner at their family tables, to Negroes while occasionally providing such accommodations for whites, can damages be obtained in a federal court under 42 U.S.C. § 1983 and an offending family imprisoned under 18 U.S.C. § 242?[19] And if it makes no difference that the club members or the family were expressing *their* own preferences and *their* own choice in the matter, have we finally resolved that the fourteenth amendment no longer requires state action in the South because of the prevailing custom, but that it continues to require some state action in the North absent a similar custom? Mr. Justice Douglas's opinion suggests an affirmative answer to all of these questions. In doing so, it unnecessarily confounds existing confusion about the fourteenth amendment.

A more careful examination of the interests involved in *Garner* and of the manner in which they compete for constitutional pro-

17. 368 U.S. at 181. (Emphasis added.)

18. See, *e.g.*, 18 U.S.C. § 242 (1958) (carrying the word "custom" through three revisions since its original appearance, Act of May 31, 1870, ch. 114, § 17, 16 Stat. 144); Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1958).

19. Section 1983 provides an action for damages against any person "who, under color of any . . . custom" deprives another person of any right secured by the Constitution. Section 242 makes it a federal misdemeanor for any person "under color of any . . . custom" to deprive another of any rights secured or protected by the Constitution.

tection would have been helpful. As we have suggested elsewhere,[20] the interest of the defendant Negroes involved in *Garner*-type situations is essentially in obtaining light food and refreshment, and perhaps to enjoy the atmosphere and social contact offered in the restaurants.[21] Qualitatively, this interest is not so substantial as interests in shelter, employment, education, or voting, especially where the policy of the management is not to exclude, *i.e.*, to deny access to the light food and refreshment, but only to segregate. One might therefore expect that in view of the less substantial character of the interests which compete for constitutional protection there would be less judicial inclination to extend "state action" than in the voting,[22] education,[23] or housing[24] cases.

Quantitatively, however, custom is significant: it may demonstrate the extent to which the interest of the minority class is affected. If all but one of a dozen lunch counters are available to all persons on an unsegregated basis, the urgency of judicial action to change the policy of the single lunch counter owner to vindicate the minority interest is substantially less. But if all lunch counters are closed to Negroes, the harm to their legitimate desires is conspicuously greater. Thus the element of community custom is certainly relevant, although it surely ought not be conclusive as suggested by Mr. Justice Douglas's opinion.

Competing with these interests in access is the interest of the lunch counter owner in his freedom of choice—choice as to the use of his property, the economic risks he will incur, and the personal associations he will encounter in his trade. In determining whether the fourteenth amendment should be construed so as to deprive him of these freedoms, surely some inquiry as to their particular involvement is demanded. If his establishment is provided by public sub-

20. Van Alstyne & Karst, *supra* note 13, at 54.

21. Additionally, Mr. Justice Harlan properly acknowledged the legitimate interest of the Negroes to demonstrate for the purpose of influencing public opinion with respect to a lawful objective. See Thornhill v. Alabama, 310 U.S. 88 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940); Marsh v. Alabama, 326 U.S. 501 (1946). There may be some doubt, however, whether the acknowledgment of such an interest takes sufficient account of the "reasonable time, place, and manner" doctrine of Kovacs v. Cooper, 336 U.S. 77 (1949), in view of the feasible alternatives available to the Negroes to promote this interest in freedom of speech outside the premises. Unassisted by the vagueness of the local ordinances, the equivocal role of the managers in the *Garner* and *Horton* cases, and the aggressiveness of the local police, perhaps the invasion of the interest in freedom of expression under the circumstances would not have been unconstitutional. This is not to suggest that a consideration of the free speech issue is irrelevant in determining what interests were in the balance, but only to say that its involvement here was comparatively slight.

22. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

23. Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956).

24. Ming v. Horgan, 3 RACE REL. L. REP. 693 (Cal. Super. Ct. 1958).

sidy, if it is clear that he would sustain no loss of trade by pursuing a nondiscriminatory policy, and if he has no personal contact with his customers, the case stands on an entirely different footing, and correspondingly there is less reason to exempt him from the full measure of equal protection required by the fourteenth amendment. These are matters which Mr. Justice Clark doubtless held in mind in the *Burton* case,[25] and they are equally relevant here. Mr. Justice Douglas apparently would make no such distinctions, but would treat these "opposite" cases identically.

Additionally, a substantial difference might be made by a more particular inquiry into the effect of the local custom in depriving the lunch counter owner of his own freedom of choice. If the decisions to have the students arrested and removed from the stores were not made by the owners or managers of the stores, but were, rather, made by the police because it was *their* judgment that the students' presence by itself constituted a breach of peace, then—parallel with the "willing buyer-willing seller" aspect of *Shelley v. Kraemer*[26]—there is not necessarily any conflict between the interests of the owners and that of the students; freedom of choice for both private parties has been foreclosed by the intervention of the police in response to third party pressure. Since third party interests in having the establishment segregated are clearly less substantial than the interests of the Negroes and those of the owner, it would be perfectly proper to apply the fourteenth amendment, as Judge Bazelon suggested in his opinion in the *Hot Shoppes* case.[27] The situation would then be quite close to *Shelley v. Kraemer*. However, the *Garner* cases themselves are not wholly of this character, for the decision to segregate the lunch counters, and even the decision to call the police in at least one case, was made by the manager;[28] thus the interests of the proprietors and of the Negroes were not all on one side, but in competition.

It might still be suggested that the custom of the community effectively deprived the manager of his own freedom of choice in a more subtle fashion, justifying application of the fourteenth amendment. Thus, if the manager concludes from the custom of the white community that, should he follow a personal preference

25. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
26. 334 U.S. 1 (1948).
27. Williams v. Hot Shoppes, Inc., 293 F.2d 835, 844-47 (D.C. Cir. 1961) (dissenting opinion).
28. 368 U.S. at 160, 198-99.

for desegregation, he will lose a disproportionate amount of business to his segregationist competitors, that he will lose his affiliation with various social organizations and otherwise be stigmatized and ostracized, and that his children may be harassed, the choice to maintain segregation is—by definition—not one he had any practical freedom to avoid. Should the indirect coercion of the community, as manifested by its custom, be used to transform his decision to discriminate from a private one to a community-state one?

Again, the answer is that this consideration is relevant in determining the arrangement of interests which would be affected by application of the fourteenth amendment, but these subtle forces ought not, of themselves, tyrannize over all other considerations. Moreover, in deciding what is a private decision and what is a community-imposed decision, there is some risk in separating an individual's personal decision to segregate from the impersonal motives for making the decision. Carried to the limit, such a distinction would suggest that unless an entrepreneur's decision to segregate were solely the product of personal animus toward Negroes on account of race, it was somehow not really *his* decision. Although no personal animus may be involved, when the lunch counter owner assesses the risks to his business in terms of loss of other customers and loss of personal status among his community peers, it is at least his own assessment, however, rather than that of the police or other persons, which leads him to the choice of segregation. Indeed, if we carry a theory of community determinism to its ultimate extreme, it is quite possible to conclude that a decision to discriminate based even on a self-conscious animus toward Negroes is still community-imposed; in the sense that the decision maker was reared in a segregated environment, was spoon-fed his social values, and was subject to the steady conditioning of the community, he never had a "free" choice to become anything other than a segregationist. Thus the fact that custom may tend to dictate a decision to a businessman, pre-empting his own freedom of choice under some circumstances, must fairly be viewed as one element among many under the fourteenth amendment rather than as *the* critical link between the individual's racial discrimination and the state.

The use of "custom" in deciding whether the critical quantum of state action is involved to invoke the fourteenth amendment might also properly vary according to whether the case involves

the self-executing effect of the amendment against a single establishment in a limited case, or whether it involves the general applicability of a federal statute. Where the issue is raised as it was in *Garner*, the net effect of the result under Mr. Justice Douglas's treatment is only to halt segregation in the very establishments involved in the case; the decision obviously has no direct effect on other businesses in the community. And although *stare decisis* makes clear that discrimination by other businesses would be violative of the fourteenth amendment, the amendment itself does not impose any type of penalty likely to deter a continuation of their segregationist policy. Such a situation may put the economic onus of desegregation on the first business required to desegregate by court order, since its customers may take their trade to those stores which continue to segregate.

The *ad hoc* nature of judicial desegregation thus tends to make the first target of a sit-in demonstration the economic fall guy for the community. But where Congress has acted to forbid all businesses of a certain kind to distinguish among customers because of their race, the situation is improved in two ways. First, the legal duty to conform to a uniform policy applies to all alike; assuming the civil or criminal sanctions of the statute are fairly stringent, fewer enterprises will dare to hold out against the policy and risk a lawsuit. If the deterrent effect of the statute can effect a uniform change of policy with respect to all businesses similarly situated, the apprehension of any one owner that he will lose business by desegregating will be significantly reduced.

Second, as has been said previously, for Congress to make the decision may justify greater deference to an interpretation of constitutional power than the Court might justify without the backing of Congress. "Federal intervention as against the states is . . . primarily . . . for congressional determination in our system as it stands,"[29] since "the representative nature of Congress and its sensitivity to local interests—guaranteed by the manner in which it is selected"[30] provide certain political safeguards against arbitrary federal power which are not present in the selection or operation of the Court.

Finally, the consideration of custom also is relevant in evalu-

29. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

30. Van Alstyne & Karst, *supra* note 13, at 11 n.19.

ating the exercise of local responsibility as that exercise bears upon the issue of state action. Where the community stands ready to vindicate the vital interests of its members by responsible local means, something of the value of federalism and its emphasis upon decentralized authority is sacrificed by gratuitously supplanting local remedies with protection by the national authority. Indeed, the willingness of the Court or the Congress to extend national protection may tend to sap the state's incentive to discharge its responsibilities toward its citizens, whether the context be race relations, aid to education, welfare assistance, or something else.

Statement of the value of local decision making merely poses the issue and does not dispose of it in a given case. The desirability of responsible local government cannot be used forever to insulate local irresponsibility behind the orator's demand for deference to the abstraction of "states' rights." To the extent that the long-standing custom of the community and the continued indifference of its legislature make clear that protection of minority interests in the South cannot be achieved without national intervention, custom may properly be reviewed by the Supreme Court in determining the present necessity for construing the fourteenth amendment so as to offer those legitimate interests some shelter. In this connection, the announced policy of Louisiana to encourage segregation, its repeal of the common-law rules affecting innkeepers, and the discriminatory custom of local businesses in keeping with white supremacy all indirectly contribute to the predictable expansion of the concept of state action under the fourteenth amendment.[31]

II. State Power to Regulate and License

In the latter portion of Mr. Justice Douglas's opinion, the chief reliance is on the line of cases which stretches from *Munn v. Illinois*[32] to *Nebbia v. New York*[33] and beyond. Thus there is proposed a test for state action which is coextensive with the vast domain of what is traditionally called the police power. Of that power, Mr. Justice Douglas has said:

> An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.

31. See *id.* at 14–22.
32. 94 U.S. 113 (1877).
33. 291 U.S. 502 (1934).

> Subject to specific constitutional limitations, *when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.*[34]

After all, that was the point in *Nebbia*. The legislature had spoken. The Court abandoned earlier police power formulas in favor of genuine deference to the legislative judgment. The plain and repeated references in the *Nebbia* opinion to the presumption of constitutionality have found reflection in a virtually unbroken series of modern cases in which the Court has consistently rejected due process attacks on legislative regulation of business so long as the legislation has a "rational basis."[35]

Now that the Court has properly resigned its former function as arbiter of the reasonableness of economic regulation, Mr. Justice Douglas proposes to make that very resignation the basis for the most sweeping application of national judicial standards of reasonableness in race relations. The conclusion does not follow, no matter how often one quotes Lord Hale's maxim about businesses "affected with a public interest."[36] The issue is not whether that phrase can be made to serve in a manner remote from its author's context, but whether it is useful to make it do such service.

It is clear, for example, on traditional police power analysis, that there is no due process objection to a statute which forbids motorists to drive on sidewalks or forbids restaurants to serve from unwashed dishes. So also, after *Nebbia* and its progeny, motorists might be required, as a condition of being allowed to drive, to pick up hitchhikers at designated stands during a period of transportation shortage; restaurants might also be limited in the prices they charge or the wages they pay. All these activities are "affected with a public interest" in the sense of the *Nebbia* decision. That phrase

> is the equivalent of "subject to the exercise of the police power"; and it is plain that nothing more was intended by the expression [in *Munn v. Illinois*]. . . .
>
> . . . .
>
> So far as the requirement of due process is concerned, and in the

34. Berman v. Parker, 348 U.S. 26, 32 (1954). (Emphasis added.)

35. *E.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). Morey v. Doud, 354 U.S. 457 (1957), decided on equal protection grounds, can be regarded only as an aberration, as the dissenting opinions of Justices Black and Frankfurter make clear. *Id.* at 470, 472.

36. The phrase comes to us through the opinion of Mr. Chief Justice Waite in *Munn v. Illinois*. See Fairman, *The So-called Granger Cases, Lord Hale, and Justice Bradley*, 5 STAN. L. REV. 587 (1953).

> absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.[37]

Mr. Justice Douglas takes us one step—one leap—further. *Because the Supreme Court will not exercise its veto* to prevent the state legislature from keeping motorists off sidewalks, or requiring them to pick up riders, then the fourteenth amendment—absent implementing legislation—will not permit motorists to pick up only white hitchhikers, refusing rides to Negroes. *Because the Supreme Court will not exercise its veto* to prevent the state legislature from requiring restaurants to be sanitary or to pay a living wage, then the fourteenth amendment—absent implementing legislation—requires the restaurant to open its facilities to all customers, without discrimination based on race. Thus is the fourteenth amendment converted into a self-executing omnibus fair employment and civil rights act, covering all forms of racial discrimination which *could be* reached by state legislative power. Since there is now no effective due process limit in the Supreme Court on state economic regulation under the fourteenth amendment, every business is "affected with a public interest," every business is subject to some regulation by the state, and—Mr. Justice Douglas adds—every business must refrain from conduct which, if performed by the state itself, would be objectionable as a denial of equal protection or due process. "It is, of course, state action that is prohibited by the Fourteenth Amendment, not the action of individuals," but since practically all individual action is subject to some form of state regulation, practically all individual action *is* state action; so the reasoning goes.[38]

We are on no firmer ground when we turn to the municipal

---

37. Nebbia v. New York, 291 U.S. 502, 533, 537 (1934).

38. The decision to make the boundaries of the fourteenth amendment and the state's regulatory power coterminous can also be used inversely, to cut back the state's power so that its civil rights legislation is justified only to the extent that it reaches governmental action. A Washington court has in fact reached this bizarre conclusion. O'Meara v. Washington State Bd. Against Discrimination, 4 RACE REL. L. REP. 664, 682 (Wash. Super. Ct. 1959). The Washington Supreme Court, in affirming on the ground that the statute violated both the equal protection clause of the fourteenth amendment and the privileges and immunities clause of the Washington constitution, found it unnecessary to pass on the issue of state action thus posed. 365 P.2d 1 (Wash. 1961), *cert. denied*, 369 U.S. 839 (1962); see Van Alstyne, *The O'Meara Case and Constitutional Requirements of State Anti-Discrimination Laws*, 8 How. L.J. (Issue 2, forthcoming in 1962).

license aspects of the *Garner* case. Mr. Justice Douglas correctly assumes that a state cannot license a business "to serve only whites or only blacks or only yellows or only browns."[39] But the fact that a state cannot *require* its licensee to segregate does not dispose of the problem of this case. The state action issue should not be determined by reference to the state's power to condition its permission to operate a restaurant on the periodic examination of the restaurant's cleanliness, the adequacy of its refrigeration and food preparation equipment, and the like. The interests at stake are totally different, and this opinion is objectionable precisely because it does not talk about particular interests, but about the public interest in general:

> [O]ne who operates an enterprise under a license from the government enjoys a privilege that derives from the people. . . . [T]he necessity of a license shows that the public has rights in respect of those premises. The business is not a matter of mere private concern.[40]

The opinion thus equates state regulation with state assistance, perhaps on the assumption that any state connection suffices to satisfy the state action requirement. Such a confusion is common, but totally unjustified. If the state gives its assistance to a private enterprise, either by a direct grant of public funds or by more indirect means, then the personal, private interests in the enterprise are to that extent diminished. A man's lunch counter is less *his* castle when it is in a city-owned building, as *Burton v. Wilmington Parking Authority*[41] suggests. The proprietor who operates on state capital, or with the benefit of state assistance, does not have the same quality of private proprietary interest as his unassisted competitor. If the state's license were, as Mr. Justice Douglas says, properly considered as a kind of capital gift from the public, then the reduction of the personal interests of the licensee should importantly influence the resolution of the state action question.

The license requirement in the *Garner* case, however, is only a form of regulation. It is forbidden to operate a restaurant except with a license. In order to get a license, one must apply, perhaps pay a fee or a tax, and submit to certain limitations on the conduct of his business. If he fails to comply with the law's requirements, his license can be revoked. Thus when we say that the operator of

39. 368 U.S. at 184.
40. *Id.* at 184–85.
41. 365 U.S. 715 (1961).

a restaurant must be licensed, the important consequence is that he cannot operate in certain ways: He cannot serve from unwashed plates; he must maintain adequate refrigeration for his food; if he fails to meet these requirements, he will be put out of business. Correspondingly, anyone willing to comply with the requirements will be licensed. There is no magic to a license from the government; it has none of the significance of governmental assistance, but it does perform the state action trick for Mr. Justice Douglas.

The opinion's principal citation in support of the license argument is to *Boman v. Birmingham Transit Co.*,[42] in which the Fifth Circuit properly held that a bus line franchised by a city could not, by its own choice, segregate the seating of its passengers by race. In *Boman*, the state had not required segregation; the company chose it. But the transit company, unlike the restaurants in the *Garner* case, had an exclusive franchise. It was, in other words, a public utility. One may grant that the phrase "public utility" does not solve problems any better than its counterpart, "affected with a public interest." But when the government prevents other would-be bus lines from operating in competition with the transit company, three important consequences follow, none of which is present in the facts of the *Garner* case. First, the government's exclusive license magnifies the impact of the company's decisions on the disadvantaged class—the Negro riders. There is no such similar result when a single lunch counter proprietor decides to segregate his customers, even though he may be licensed by the city. Second, the exclusive franchise gives the transit company an important economic advantage, which it would not have in the absence of the license requirement and the policy of noncompetition; one who operates under an exclusive license plainly *does* enjoy "a privilege that derives from the people." Finally, the economic interest of the monopoly transit company is much less harmed by a judicial ruling forbidding it to discriminate by segregation than is the interest of an individual lunch counter proprietor. A monopoly bus line need not fear any substantial loss of business because of such a judicial decision, because there will be no segregated bus line to which white riders may divert their patronage. Thus the *Boman* case is distinguishable on both sides of the constitutional balance, in the increased impact of the "private" segregation on racial equality and

42. 280 F.2d 531 (5th Cir. 1960).

in the reduced impact of the judicial decision on the interests of the person forbidden to segregate.

• • •

We want to make clear that we do not assert that the facts of the *Garner* case cannot support a conclusion that the state action requirement has been met. Much less do we contend that the *Garner* case itself is wrongly decided. Nevertheless, the choice to rest decision on principles so broad and so different from what has gone before carries with it an obligation to base the new principles on analysis of the relevant interests, even though another technique may be easier or may provide more quotable judicial epigrams.

One who is strongly devoted to the advancement of a uniform national standard of racial equality may be excused for impatience with what may appear to be a technicality. But the state action requirement is not a technicality; it serves legitimate and important constitutional purposes. If the requirement seems to some to be a quibble, a merely technical roadblock in the path of social advance, perhaps a measure of the fault lies with opinions like this one.

SUPREME COURT OF THE UNITED STATES

No. 58.—OCTOBER TERM, 1962.

Rudolph Lombard et al., Petitioners, v. State of Louisiana.	On Writ of Certiorari to the Supreme Court of the State of Louisiana.

[May 20, 1963.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents for review trespass convictions resulting from an attempt by Negroes to be served in a privately owned restaurant customarily patronized only by whites. However, unlike a number of the cases this day decided, no state statute or city ordinance here forbids desegregation of the races in all restaurant facilities. Nevertheless, we conclude that this case is governed by the principles announced in *Peterson* v. *City of Greenville, ante,* p. —, and that the convictions for this reason must be reversed.

Petitioners are three Negroes and one white, college students. On September 17, 1960, at about 10:30 in the morning they entered the McCrory Five and Ten Cent Store in New Orleans, Louisiana. They sat down at a refreshment counter at the back of the store and requested service which was refused. Although no sign so indicated, the management operated the counter on a segregated basis, serving only white patrons. The counter was designed to accommodate 24 persons. Negroes were welcome to shop in other areas of the store. The restaurant manager, believing that the "unusual circumstance" of Negroes sitting at the counter created an "emergency," asked petitioners to leave and, when they did not do so, ordered that the counter be closed. The restaurant man-

ager then contacted the store manager and called the police. He frankly testified that the petitioners did not cause any disturbance, that they were orderly, and that he asked them to leave because they were Negroes. Presumably he asked the white petitioner to leave because he was in the company of Negroes.

A number of police officers, including a captain and major of police, arrived at the store shortly after they were called. Three of the officers had a conference with the store manager. The store manager then went behind the counter, faced petitioners, and in a loud voice asked them to leave. He also testified that the petitioners were merely sitting quietly at the counter throughout these happenings. When petitioners remained seated, the police major spoke to petitioner Goldfinch, and asked him what they were doing there. Mr. Goldfinch replied that petitioners "were going to sit there until they were going to be served." When petitioners still declined to leave, they were arrested by the police, led out of the store, and taken away in a patrol wagon. They were later tried and convicted for violation of the Louisiana criminal mischief statute.[1] This statute, in its application to this case, has all the elements of the usual trespass statute. Each petitioner was sentenced to serve 60 days in the Parish Prison and to pay a fine of $350. In default of

---

[1] La. Rev. Stat., 1950 (Cum. Supp. 1960), § 14:59 (6), provides in pertinent part:

"Criminal mischief is the intentional performance of any of the following acts:

. . . . . .

"(6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

payment of the fine each is to serve 60 additional days in prison. On appeal to the Supreme Court of Louisiana the judgments of conviction were affirmed. 241 La. 958, 132 So. 2d 860. Because of the substantial federal questions presented, we granted certiorari. 370 U. S. 935.

Prior to this occurrence New Orleans city officials, characterizing conduct such as petitioners were arrested for as "sit-in demonstrations," had determined that such attempts to secure desegregated service, though orderly and possibly inoffensive to local merchants, would not be permitted.

Exactly one week earlier, on September 10, 1960, a like occurrence had taken place in a Woolworth store in the same city. In immediate reaction thereto the Superintendent of Police issued a highly publicized statement which discussed the incident and stated that "We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest. . . . [W]e want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana." [2] On September 13,

---

[2] The full text of the statement reads:

"The regrettable sit-in activity today at the lunch counter of a Canal st. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans.

"We urge every adult and juvenile to read this statement carefully, completely and calmly.

"First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group.

"We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population.

"We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue

four days before petitioners' arrest, the Mayor of New Orleans issued an unequivocal statement condemning such conduct and demanding its cessation. This statement was also widely publicized; it read in part:

> "I have today directed the Superintendent of Police that no additional sit-in demonstrations . . . will be permitted . . . regardless of the avowed purpose or intent of the participants. . . .
>
> . . . . .
>
> "It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department." [3]

---

the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.

"Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.

"At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order.

"No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.

"As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.

"We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.

"Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana."

[3] The full text of the Mayor's statements reads:

"I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside

Both statements were publicized in the New Orleans Times-Picayune. The Mayor and the Superintendent of Police both testified that, to their knowledge, no eating establishment in New Orleans operated desegregated eating facilities.

Both the restaurant manager and the store manager asked the petitioners to leave. Petitioners were charged with failing to leave at the request of the store manager. There was evidence to indicate that the restaurant manager asked petitioners to leave in obedience to the directive of the city officials. He told them that "I am not allowed to serve you here. . . . We *have* to sell to you

---

retail stores by sit-in demonstrators or their sympathizers will be permitted.

"The police department, in my judgment, has handled the initial sit-in demonstration Friday and the follow-up picketing activity Saturday in an efficient and creditable manner. This is in keeping with the oft-announced policy of the New Orleans city government that peace and order in our city will be preserved.

"I have carefully reviewed the reports of these two initial demonstrations by a small group of misguided white and Negro students, or former students. It is my considered opinion that regardless of the avowed purpose or intent of the participants, the effect of such demonstrations is not in the public interest of this community.

"Act 70 of the 1960 Legislative session redefines disturbing the peace to include 'the commission of any act as would foreseeably disturb or alarm the public.'

"Act 70 also provides that persons who seek to prevent prospective customers from entering private premises to transact business shall be guilty of disorderly conduct and disturbing the peace.

"Act 80—obstructing public passages—provides that 'no person shall wilfully obstruct the free, convenient, and normal use of any public sidewalk, street, highway, road, bridge, alley or other passage way or the entrance, corridor or passage of any public building, structure, water craft or ferry by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.'

"It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department."

at the rear of the store where we have a colored counter." (Emphasis supplied.) And he called the police "[a]s a matter of routine procedure." The petitioners testified that when they did not leave, the restaurant manager whistled and the employees removed the stools, turned off the lights, and put up a sign saying that the counter was closed. One petitioner stated that "it appeared to be a very efficient thing, everyone knew what to do." The store manager conceded that his decision to operate a segregated facility "conform[ed] to state policy and practice" as well as local custom. When asked whether "in the last 30 days to 60 days [he had] entered into any conference with other department store managers here in New Orleans relative to sit-in problems," the store manager stated: "[w]e have spoken of it." The above evidence all tended to indicate that the store officials' actions were coerced by the city. But the evidence of coercion was not fully developed because the trial judge forbade petitioners to ask questions directed to that very issue.

But we need not pursue this inquiry further. A State, or a city, may act as authoritatively through its executive as through its legislative body. See *Ex parte Virginia*, 100 U. S. 339, 347. As we interpret the New Orleans city officials' statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct. We have just held in *Peterson* v. *City of Greenville*, *ante*, p. —, that where an ordinance makes it unlawful for owners or managers of restaurants to seat whites and Negroes together, a conviction under the State's criminal processes employed in a way which enforces the discrimination mandated by that ordinance cannot stand. Equally the State cannot achieve the same result by an

official command which has at least as much coercive effect as an ordinance. The official command here was to direct continuance of segregated service in restaurants, and to prohibit any conduct directed toward its discontinuance; it was not restricted solely to preserve the public peace in a nondiscriminatory fashion in a situation where violence was present or imminent by reason of public demonstrations. Therefore here, as in *Peterson*, these convictions, commanded as they were by the voice of the State directing segregated service at the restaurant, cannot stand. *Turner* v. *City of Memphis*, 369 U. S. 350.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 58.—October Term, 1962.

Rudolph Lombard et al., Petitioners, v. State of Louisiana. | On Writ of Certiorari to the Supreme Court of the State of Louisiana.

[May 20, 1963.]

Mr. Justice Douglas, concurring.

While I join the opinion of the Court, I have concluded it necessary to state with more particularity why Louisiana has become involved to a "significant extent" (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722) in denying equal protection of the laws to petitioners.

I.

The court below based its affirmance of these convictions on the ground that the decision to segregate this restaurant was a private choice, uninfluenced by the officers of the State. *State* v. *Goldfinch*, 241 La. 958, 132 So. 2d 860. If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder. For the Bill of Rights, as applied to the States through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes. The Third Amendment with its ban on the quartering of soldiers in private homes radiates that philosophy. The Fourth Amendment, while concerned with official invasions of privacy through searches and seizures, is eloquent testimony of the sanctity of private premises. For even when the police enter private precincts they must, with rare exceptions, come armed with a warrant issued by a magistrate. A private person has no standing to obtain even

limited access. The principle that a man's home is his castle is basic to our system of jurisprudence.

But a restaurant, like the other departments of this retail store where Negroes were served, though private property within the protection of the Fifth Amendment, has no aura of constitutionally protected privacy about it. Access by the public is the very reason for its existence.

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama*, 326 U. S. 501, 506.

The line between a private business and a public one has been long and hotly contested. *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, is one of the latest cases in a long chain. The Court, over the dissent of Mr. Justice Brandeis and Mr. Justice Stone, held unconstitutional an Oklahoma statute requiring those manufacturing ice for sale and distribution to obtain a license from the State. Mr. Justice Brandeis' dissent was in the tradition of an ancient doctrine perhaps best illustrated[1] by *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, which upheld a Kansas statute that regulated fire insurance rates. Mr. Justice McKenna, writing for the Court, said, "It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become a public interest." *Id.*, 408. Cf. *Ferguson* v. *Skrupa*, 372 U. S. 726.

Some of the cases reflect creative attempts by judges to make innkeepers, common carriers, and the like per-

[1] See Hamilton, Affectation with Public Interest, 39 Yale L. J. 1089, 1098–1099.

form the public function of taking care of all travelers.[2] Others involve the power of the legislature to impose various kinds of restraints or conditions on business. As a result of the conjunction of various forces, judicial and legislative, it came to pass that "A large province of industrial activity is under the joint control of the market and the state." [3]

The present case would be on all fours with the earlier ones holding that a business may be regulated when it renders a service which "has become a public interest" (*German Alliance Ins. Co.* v. *Kansas, supra,* 408) if Louisiana had declared, as do some States,[4] that a business may not refuse service to a customer on account of race and the proprietor of the restaurant were charged with violating this statute. We should not await legislative action before declaring that state courts cannot enforce this type of segregation. Common-law judges fashioned the rules governing innkeepers and carriers.[5]

---

[2] See Jeremy, The Law of Carriers, Innkeepers, etc. (1815), 4–5, 144–147; Tidswell, The Innkeeper's Legal Guide (1864), c. 1; Schouler, Law of Bailments (2d ed. 1887), §§ 274–329, 330–341; Beale, Innkeepers and Hotels (1906), *passim;* 1 Wyman, Public Service Corporations (1911), §§ 1–5; Burdick, The Origin of the Peculiar Duties of Public Service Companies, 11 Col. L. Rev. 514, 616; Arterburn, The Origin and First Test of Public Callings, 75 U. of Pa. L. Rev. 411.

[3] Hamilton, *supra,* note 1, p. 1110.

[4] See, *e. g.,* McKinney's Cons. N. Y. Laws, Vol. 8, Art. 4; *id.,* Vol. 18, Art. 15; N. J. Stat. Ann., Tit. 10; *id.,* Tit. 18, c. 25; Cal. Civ. Code § 51. Cf. Cal. Health and Safety Code, §§ 35700 (1962 Supp.) *et seq.; Burks* v. *Poppy Constr. Co.,* 20 Cal. Rptr. 609; *Martin* v. *New York,* 201 N. Y. S. 2d 111. See generally, Greenberg, Race Relations and American Law 101–114 (1959); 7 St. Louis U. L. J. 88 (1962).

[5] See Schouler, *op. cit., supra,* note 2, §§ 274, 335; Wyman, *op. cit., supra,* note 2, § 1; Arterburn, *supra,* note 2.

As stated by Holt, C. J., in *Lane* v. *Cotton*, 12 Mod. 472, 484 (1701):

> "[W]herever any Subject takes upon himself a Publick Trust for the Benefit of the rest of his fellow Subjects, he is *eo ipso* bound to serve the Subject in all the Things that are within the Reach and Comprehension of such an Office, under Pain of an Action against him. . . . If on the road a Shoe fall off my Horse, and I come to a Smith to have one put on, and the Smith refuse to do it, an Action will lie against him, because he has made Profession of a Trade which is for the Publick Good, and has thereby exposed and vested an interest of himself in all the King's Subjects that will employ him in the Way of his Trade. If an Inn-keeper refuse to entertain a Guest, when his House is not full, an Action will lie against him; and so against a Carrier, if his Horses be not loaded, and he refuse to take a Packet proper to be sent by a Carrier." [6]

Judges who fashioned those rules had no written constitution as a guide. There were, to be sure, criminal statutes that regulated the common callings.[7] But the civil remedies were judge-made. We live under a constitution that proclaims equal protection of the laws. That standard is our guide. See *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353. And under that standard business serving the public cannot seek the aid

[6] See also, *White's Case* (1558), 2 Dyer 158b; *Warbrooke* v. *Griffin* (1609), 2 Brownl. 254; *Bennett* v. *Mellor* (1793), 5 Term Rep. 273; *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283.

For criminal prosecutions see, *e. g.*, *Rex.* v. *Ivens* (1835), 7 C. & P. 213; *Regina* v. *Sprague* (1899), 63 J. P. 233.

For a collection of the English cases see 21 Halsbury's Laws of England (3d ed. 1957) 441 *et seq.*; 10 Mews Dig. Eng. Cas. L. to 1924, pp. 1463 *et seq.*

[7] Arterburn, *supra*, note 2.

of the state police or the state courts or the state legislatures to foist racial segregation in public places under its ownership and control. The constitutional protection extends only to "state" action, not to personal action. But we have "state" action here, wholly apart from the activity of the Mayor and police, for Louisiana has interceded with its judiciary to put criminal sanctions behind racial discrimination in public places. She may not do so consistently with the Equal Protection Clause of the Fourteenth Amendment.

The criminal penalty (60 days in jail and a $350 fine) was imposed on these petitioners by Louisiana's judiciary. That action of the judiciary was state action. Such are the holdings in *Shelley* v. *Kraemer,* 334 U. S. 1, and *Barrows* v. *Jackson,* 346 U. S. 249.[8] Those cases involved restrictive covenants. *Shelley* v. *Kraemer* was a civil suit to enjoin violation of a restrictive covenant by a Negro purchaser. *Barrows* v. *Jackson* was a suit to collect damages for violating a restrictive covenant by selling residential property to a Negro. Those cases, like the present one, were "property" cases. In those cases, as in the present one, the line was drawn at dealing with Negroes. There, as here, no state legislature was involved, only the state judiciary. The Court said in *Shelley* v. *Kraemer:*

> "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." 334 U. S., at 14.

The list of instances where action of the state judiciary is state action within the meaning of the Fourteenth Amendment is a long one. Many were noted in *Shelley*

[8] See also, *Abstract Investment Co.* v. *Hutchinson,* 22 Cal. Reptr. 309, 317; 10 U. C. L. A. L. Rev. 401.

v. *Kraemer*, 334 U. S., pp. 14–18. Most state convictions in violation of the First, Fourth, or Fifth Amendment, as incorporated in the Due Process Clause of the Fourteenth Amendment, have indeed implicated not the state legislature but the state judiciary, or the state judiciary and the state prosecutor and the state police. *Shelley* v. *Kraemer*—and later *Barrows* v. *Jackson*—held that the state judiciary, acting alone to enforce private discrimination against Negroes who desired to buy private property in residential areas, violated the Equal Protection Clause of the Fourteenth Amendment.

Places of public accommodation such as retail stores, restaurants, and the like render a "service which has become a public interest" (*German Alliance Ins. Co.* v. *Kansas*, *supra*, 408) in the manner of the innkeepers and common carriers of old. The substance of the old common-law rules has no direct bearing on the decision required in this case. Restaurateurs and owners of other places of amusement and resort have never been subjected to the same duties as innkeepers and common carriers.[9] But, what is important is that this whole body of law was a response to the felt needs of the times that spawned it.[10] In our time the interdependence of people has greatly increased; the days of *laissez faire* have largely disappeared; men are more and more dependent on their neighbors for services as well as for housing and the other necessities of life. By enforcing this criminal mischief statute, invoked in the manner now before us, the Louisiana courts are denying some people access to the mainstream of our highly interdependent life solely

[9] See *Marrone* v. *Washington Jockey Club*, 227 U. S. 633; *Madden* v. *Queens County Jockey Club*, 296 N. Y. 249; *Alpaugh* v. *Wolverton*, 36 S. E. 2d 906; *Nance* v. *Mayflower Tavern*, 150 P. 2d 773.

[10] Wyman, *op. cit.*, *supra*, note 2, §§ 1, 2–16, 330; Schouler, *op. cit.*, *supra*, note 2, §§ 274, 335; Beale, *op. cit.*, *supra*, note 2, c. I; Arterburn, *supra*, note 2, 420–426.

because of their race. Yet, "If there is any one purpose of the Fourteenth Amendment that is wholly outside the realm of doubt, it is that the Amendment was designed to bar States from denying to some groups, on account of their race or color, any rights, privileges, and opportunities accorded to other groups." *Oyama* v. *California*, 332 U. S. 633, 649 (concurring opinion).

An innkeeper or common carrier has always been allowed to exclude drunks, criminals and diseased persons, but only because the public's interest in protecting his and his guests' health and property outweighs its interest in providing accommodations for this small group of travelers.[11] As a general rule, innkeepers and carriers cannot refuse their services on account of race; though the rule developed in this country that they can provide "separate but equal" facilities.[12] And for a period of our history even this court upheld state laws giving sanction to such a rule. Compare *Plessy* v. *Ferguson*, 163 U. S. 537, with *Gayle* v. *Browder*, 352 U. S. 903, affirming, 142 F. Supp. 707. But surely *Shelley* v. *Kraemer*, *supra*, and *Barrows* v. *Jackson*, *supra*, show that the day has passed when an innkeeper, carrier, housing developer, or retailer can draw a racial line, refuse service to some on account of color, and obtain the aid of a State in enforcing his personal bias by sending outlawed customers to prison or exacting fines from them.

Business, such as this restaurant, is still private property. Yet there is hardly any private enterprise that does not feel the pinch of some public regulation—from price control, to health and fire inspection, to zoning, to safety measures, to minimum wages and working con-

[11] Wyman, *op. cit.*, *supra*, note 2, c. 18; Schouler, *op. cit.*, *supra*, note 2, §§ 320, 322.

[12] Compare, *e. g.*, *Constantine* v. *Imperial Hotels* (1944), 1 K. B. 693; Wyman, *op. cit.*, *supra*, note 2, §§ 361, 565, 566, with *State* v. *Steele*, 106 N. C. 766, 782, 11 S. E. 478, 484.

ditions, to unemployment insurance. When the doors of a business are open to the public, they must be open to all regardless of race if *apartheid* is not to become engrained in our public places. It cannot by reason of the Equal Protection Clause become so engrained with the aid of state courts, state legislatures, or state police.[13]

II.

There is even greater reason to bar a State through its judiciary from throwing its weight on the side of racial discrimination in the present case, because we deal here with a place of public accommodation under license from the State. This is the idea I expressed in *Garner* v. *Louisiana, supra,* where another owner of a restaurant refused service to a customer because he was a Negro. That view is not novel; it stems from the dissent of the first Mr. Justice Harlan in the *Civil Rights Cases,* 109 U. S. 3, 58–59:

> "In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. It seems to me that, within the principle settled in *Ex parte Virginia,* a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race

[13] See generally, Pollit, Dime Store Demonstrations: Events and Legal Problems of First Sixty Days, 1960 Duke L. J. 315, 350–365; Henkin, *Shelley* v. *Kraemer:* Notes for a Revised Opinion, 110 U. of Pa. L. Rev. 473.

is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States."

The nexus between the State and the private enterprise may be control, as in the case of a state agency. *Pennsylvania* v. *Board of Trusts*, 353 U. S. 230. Or the nexus may be one of numerous other devices. "State support of segregated schools through any arrangement, management, funds, or property cannot be squared" with the Equal Protection Clause. *Cooper* v. *Aaron*, 358 U. S. 1, 19. Cf. *Ghiotto* v. *Hampton*, 304 F. 2d 320. A state-assisted enterprise serving the public does not escape its constitutional duty to serve all customers irrespective of race, even though its actual operation is in the hands of a lessee. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. Cf. *Boynton* v. *Virginia*, 364 U. S. 454. State licensing and surveillance of a business serving the public also brings its service into the public domain. This restaurant needs a permit from Louisiana to operate; [14] and during the existence of the license the State has broad powers of visitation and control.[15] This restaurant is

[14] Under the provisions of Article 7.02 of the Sanitary Code, promulgated by the State Board of Health pursuant to La. Rev. Stat. § 40:11, no person shall operate a public eating place of any kind in the State of Louisiana unless he has been issued a permit to operate by the local health officer; and permits shall be issued only to persons whose establishments comply with the requirements of the Sanitary Code.

[15] Under La. Rev. Stat. § 40:11, 12, 15, 16, 52, and 69, state and local health officials closely police the provisions of the Sanitary Code. They may "enter, examine, and inspect all grounds, structures, public buildings, and public places in execution of a warrant issued in accordance with the constitution and laws of Louisiana," and "arrest . . . all persons violating any rule or regulation of the board or any article or provision of the sanitary code . . . ." Penalties are provided for code violations. See also New Orleans City Code, 1956, §§ 29–55, 56, and 58; Home Rule Charter of the City of New Orleans, § 4–1202 (2).

thus an instrumentality of the State since the State charges it with duties to the public and supervises its performance. The State's interest in and activity with regard to its restaurants extends far beyond any mere income-producing licensing requirement.

There is no constitutional way, as I see it, in which a State can license and supervise a business serving the public and endow it with the authority to manage that business on the basis of *apartheid* which is foreign to our Constitution.

SUPREME COURT OF THE UNITED STATES

No. 68.—October Term, 1962.

Nathaniel Wright et al., Petitioners, v. State of Georgia. | On Writ of Certiorari to the Supreme Court of the State of Georgia.

[May 20, 1963.]

Mr. Chief Justice Warren delivered the opinion of the Court.

Petitioners, six young Negroes, were convicted of breach of the peace for peacefully playing basketball in a public park in Savannah, Georgia, on the early afternoon of Monday, January 23, 1961. The record is devoid of evidence of any activity which a breach of the peace statute might be thought to punish. Finding that there is no adequate state ground to bar review by this Court and that the convictions are violative of due process of law secured by the Fourteenth Amendment, we hold that the judgments below must be reversed.

Only four witnesses testified at petitioners' trial: the two arresting officers, the city recreational superintendent, and a sergeant of police. All were prosecution witnesses. No witness contradicted any testimony given by any other witnesses. On the day in question the petitioners were playing in a basketball court at Daffin Park, Savannah, Georgia. The park is owned and operated by the city for recreational purposes, is about 50 acres in area, and is customarily used only by whites. A white woman notified the two police officer witnesses of the presence of petitioners in the park. They investigated, according to one officer, "because some colored people were playing in the park. I did not ask this white lady how old these

people were. As soon as I found out these were colored people I immediately went there." The officer also conceded that "I have never made previous arrests in Daffin Park because people played basketball there . . . . I arrested these people for playing basketball in Daffin Park. One reason was because they were negroes. I observed the conduct of these people, when they were on the basketball Court and they were doing nothing besides playing basketball, they were just normally playing basketball, and none of the children from the schools were there at that particular time." The other officer admitted that petitioners "were not necessarily creating any disorder, they were just 'shooting at the goal,' that's all they were doing, they wasn't disturbing anything." Petitioners were neat and well dressed. Nevertheless, the officers ordered the petitioners to leave the park. One petitioner asked one of the officers "by what authority" he asked them to leave; the officer responded that he "didn't need any orders to come out there . . . ." But he admitted that "it is [not] unusual for one to inquire 'why' they are being arrested." When arrested the petitioners obeyed the police orders and without disturbance entered the cruiser to be transported to police headquarters. No crowd assembled.

The recreational superintendent's testimony was confused and contradictory. In essence he testified that school children had preference in the use of the park's playground facilities but that there was no objection to use by older persons if children were not there at the time. No children were present at this time. The arrests were made at about 2 p. m. The schools released their students at 2:30 and, according to one officer, it would have been at least 30 minutes before any children could have reached the playground. The officer also stated that he did not know whether the basketball court was reserved

for a particular age group and did not know the rules of the City Recreational Department. It was conceded at the trial that no signs were posted in the park indicating what areas, if any, were reserved for younger children at particular hours. In oral argument before this Court it was conceded that the regulations of the park were not printed.

The accusation charged petitioners with assembling "for the purpose of disturbing the public peace . . . ." and not dispersing at the command of the officers. The jury was charged, with respect to the offense itself, only in terms of the accusation and the statute.[1] Upon conviction five petitioners were sentenced to pay a fine of $100 or to serve five months in prison. Petitioner Wright was sentenced to pay a fine of $125 or to serve six months in prison.

Petitioners' principal contention in this Court is that the breach of the peace statute did not give adequate warning that their conduct violated that enactment in derogation of their rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. This contention was plainly raised at the trial, both in a demurrer to the accusation and in motions for a new trial, and was pressed on appeal to the Georgia Supreme Court. Both the demurrer and new trial motions raised a number of other issues. The Georgia Supreme Court held that error in the denial of the motions for a new trial could not be considered because it was not properly briefed on the appeal. But the court neverthe-

---

[1] The statute, Ga. Code Ann., 1953, § 26-5301 provides:

"Unlawful Assemblies—Any two or more persons who shall assemble for the purpose of disturbing the public peace or committing any unlawful act, and shall not disperse on being commanded to do so by a judge, justice, sheriff, constable, coroner, or other peace officer, shall be guilty of a misdemeanor."

less seemed to pass upon the claim because it had been raised in the demurrer,[2] and affirmed the convictions. 217 Ga. 453, 122 S. E. 2d 737. Certiorari was granted. 370 U. S. 935.

Since there is some question as to whether the Georgia Supreme Court considered petitioners' claim of vagueness

---

[2] The Georgia court refused to consider two of the constitutional claims asserted in the demurrer. But these allegations charged only unconstitutional administration of the statute. It is well settled in Georgia that the constitutionality of the statute upon which the charge is based may be attacked by demurrer. The Georgia Supreme Court, over 65 years ago, held that "[u]nder the general demurrer [to the accusation] the constitutionality of the law under which the accused was arraigned is brought into question." *Newman* v. *State*, 101 Ga. 534, 536, 28 S. E. 1005 (1897). This rule was later qualified to require the defendant to set out the ground of his attack with particularity in the demurrer. See, *e. g.*, *Henderson* v. *Georgia*, 123 Ga. 465, 466, 51 S. E. 385, 386. In numerous cases it has been assumed that a constitutional objection on the ground of vagueness may properly be made by demurrer. *Teague* v. *Keith*, 214 Ga. 853, 108 S. E. 2d 489; *Harris* v. *State*, 191 Ga. 243, 12 S. E. 2d 64; *Carr* v. *State*, 176 Ga. 747, 169 S. E. 201; *Dalton* v. *State*, 176 Ga. 645, 169 S. E. 198; *Carr* v. *State*, 176 Ga. 55, 166 S. E. 827, 167 S. E. 103; *Hughes* v. *State Board of Medical Examiners*, 162 Ga. 246, 134 S. E. 42. See also, *Henderson* v. *State*, 113 Ga. 1148, 39 S. E. 446. In other cases the Georgia Supreme Court has held that certain procedures, other than a demurrer, do not constitute the proper method to attack the constitutionality of the statute upon which the charge or claim was based. In each of these cases the Georgia court specifically stated that a demurrer would constitute a proper procedural device. *Eaves* v. *State*, 113 Ga. 749, 758, 39 S. E. 318, 321; *Boswell* v. *State*, 114 Ga. 40, 41, 39 S. E. 897; *Hendry* v. *State*, 147 Ga. 260, 265, 93 S. E. 413, 415; *Starling* v. *State*, 149 Ga. 172, 99 S. E. 619; *Savannah Elec. Co.* v. *Thomas*, 154 Ga. 258, 113 S. E. 806; *Moore* v. *State*, 194 Ga. 672, 22 S. E. 2d 510; *Stone* v. *State*, 202 Ga. 203, 42 S. E. 2d 727; *Loomis* v. *State*, 203 Ga. 394, 405, 47 S. E. 2d 58, 64; *Flynt* v. *Dumas*, 205 Ga. 702, 54 S. E. 2d 429; *Corbin* v. *State*, 212 Ga. 231, 91 S. E. 2d 764; *Renfroe* v. *Wallace*, 214 Ga. 685, 107 S. E. 2d 225.

Respondent does not argue that an adequate state ground exists insofar as petitioners' claim of vagueness was raised in the demurrer.

to have been properly raised in the demurrer,[3] we prefer to rest our jurisdiction upon a firmer foundation. We hold, for the reasons set forth hereinafter, that there was no adequate state ground for the Georgia court's refusal to consider error in the denial of petitioners' motions for a new trial.

I.

A commentator on Georgia procedure has concluded that "[p]robably no phase of pleading in Georgia is fraught with more technicalities than with respect to raising constitutional issues."[4] Examination of the Georgia cases bears out this assertion. In an extraordinary number an attempt to raise constitutional issues has been frustrated by a holding that the question was not properly raised or pursued. But "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24. See also *Cove* v. *Griffith*, 266 U. S. 32; *Stromberg* v. *California*, 283 U. S. 353; *Terminiello* v. *Chicago*, 337 U. S. 1; *Staub* v. *City of Baxley*, 355 U. S. 313; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449.

In this case the Georgia Supreme Court held that error in the denial of the motions for a new trial could not be considered because "[t]here was no argument, citation of authority, or statement that [the grounds for reversal stated in the new trial motions] . . . were still relied upon." The court found "the applicable rule, as laid down in *Henderson* v. *Lott*, 103 Ga. 326 (2) (136 SE

[3] The question arises because of the Georgia rule against speaking demurrers, *i. e.*, demurrers which rely upon facts not stated in the accusation. Though the demurrer itself (in stating the claim of vagueness) did not set forth new facts, petitioners' constitutional claim is established only by considering the State's evidence in connection with the accusation and the statute.

[4] Leverett, Georgia Practice and Procedure (1957), 38.

403), [to be] . . . : 'Assignments of error not insisted upon by counsel in their briefs or otherwise will be treated by this Court as abandoned. A mere recital in briefs of the existence of an assignment of error, without argument or citation of authorities in its support, and without a statement that it is insisted upon by counsel, is insufficient to save it from being treated as abandoned.' ". 217 Ga., at 454–455; 122 S. E. 2d, at 740. Presumably the court was restating the requirements of § 6–1308 of the Georgia Annotated Code of 1935. That section provides: "All questions raised in the motion for new trial shall be considered by the appellate court except where questions so raised are expressly or impliedly abandoned by counsel either in the brief or upon oral argument. A general insistence upon all the grounds of the motion shall be held to be sufficient."

To ascertain the precise holding of the Georgia court we must examine the brief which the petitioners submitted in connection with their appeal. It specifically assigned as error the overruling of their motions for a new trial. And in the section of the brief devoted to argument it was stated:

> "Plaintiffs-in-Error had assembled for the purpose of playing basketball and were in fact only playing basketball in a municipally owned park, according to the State's own evidence. Nevertheless, they were arrested and convicted under the said statute which prohibited assemblies for the purpose of 'disturbing the public peace or committing any unlawful act.' Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Murray Winters* v. *New York*, 333 U. S. 507 . . . . Plaintiffs-in-Error could not possibly have predetermined from the wording of the statute that it would have punished as a misdemeanor an assembly for the purpose of playing basketball."

Obviously petitioners did in fact argue the point which they press in this Court. Thus the holding of the Georgia court must not have been that the petitioners abandoned their argument but rather that the argument could not be considered because it was not explicitly identified in the brief with the motions for a new trial. In short the Georgia court would require the petitioners to say something like the following at the end of the paragraph quoted above: "*A fortiori* it was error for the trial court to overrule the motions for a new trial." As was said in a similar case coming to us from the Georgia courts, this "would be to force resort to an arid ritual of meaningless form." *Staub* v. *City of Baxley, supra,* at 320. The State may not do that here any more than it could in *Staub.* Here, as in *Staub,* the state ground is inadequate. Its inadequacy is especially apparent because no prior Georgia case which respondent has cited nor which we have found gives notice of the existence of any requirement that an argument in a brief be specifically identified with a motion made in the trial court. "[A] local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures . . . , cannot avail the State here, because petitioner[s] could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court . . . ." *N. A. A. C. P.* v. *Alabama, supra,* at 457. We proceed to a consideration of the merits of petitioners' constitutional claim.

II.

Three possible bases for petitioners' convictions are suggested. First, it is said that failure to obey the command of a police officer constitutes a traditional form of breach of the peace. Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution. The

command of the officers in this case was doubly a violation of petitioners' constitutional rights. It was obviously based, according to the testimony of the arresting officers themselves, upon their intention to enforce racial discrimination in the park. For this reason the order violated the Equal Protection Clause of the Fourteenth Amendment. See *New Orleans Park Improvement Assn.* v. *Detiege*, 358 U. S. 54, affirming 252 F. 2d 122. The command was also violative of petitioners' rights because, as will be seen, the other asserted basis for the order—the possibility of disorder by others—could not justify exclusion of the petitioners from the park. Thus petitioners could not constitutionally be convicted for refusing to obey the officers. If petitioners were held guilty of violating the Georgia statute because they disobeyed the officers, this case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute. Cf. *Winters* v. *New York*, 333 U. S. 507; *Stromberg* v. *California*, 283 U. S. 359; see also *Cole* v. *Arkansas*, 333 U. S. 196.

Second, it is argued that petitioners were guilty of a breach of the peace because their activity was likely to cause a breach of the peace by others. The only evidence to support this contention is testimony of one of the police officers that "The purpose of asking them to leave was to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people." But that officer also stated that this "was [not] unusual traffic for that time of day." And the park was 50 acres in area. Respondent contends the petitioners were forewarned that their conduct would be held to violate the statute. See *Samuels* v.

State, 103 Ga. App. 66, 118 S. E. 2d 231. But it is sufficient to say again that a generally worded statute, when construed to punish conduct which cannot be constitutionally punished, is unconstitutionally vague. And the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present. *Taylor* v. *Louisiana*, 370 U. S. 154; *Garner* v. *Louisiana*, 368 U. S. 157, 174; see also *Buchanan* v. *Warley*, 245 U. S. 60, 80–81.

Third, it is said that the petitioners were guilty of a breach of the peace because a park rule reserved the playground for the use of younger people at the time. However, neither the existence nor the posting of any such rule has been proved. Cf. *Lambert* v. *California*, 355 U. S. 225, 228. The police officers did not inform them of it because they had no knowledge of any such rule themselves. Furthermore, it is conceded that there was no sign or printed regulation which would give notice of any such rule.

Under any view of the facts alleged to constitute the violation it cannot be maintained that petitioners had adequate notice that their conduct was prohibited by the breach of the peace statute. It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process. *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Connally* v. *General Construction Co.*, 269 U. S. 385; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; see also *United States* v. *National Dairy Products Corp.*, 372 U. S. 29.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71.—October Term, 1962.

James Richard Peterson, et al., Petitioners, v. City of Greenville. | On Writ of Certiorari to the Supreme Court of South Carolina.

[May 20, 1963.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The petitioners were convicted in the Recorder's Court of the City of Greenville, South Carolina, for violating the trespass statute of that State.* Each was sentenced to pay a fine of $100 or in lieu thereof to serve 30 days in jail. An appeal to the Greenville County Court was dismissed, and the Supreme Court of South Carolina affirmed. 239 S. C. 298, 122 S. E. 2d 826. We granted certiorari to consider the substantial federal questions presented by the record. 370 U. S. 935.

The 10 petitioners are Negro boys and girls who, on August 9, 1960, entered the S. H. Kress store in Greenville and seated themselves at the lunch counter for the

*S. C. Code, 1952 (Cum. Supp. 1960), § 16-388:

"Entering premises after warned not to do so or failing to leave after requested.

"Any person:

"(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned, within six months preceding, not to do so or

"(2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative, Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days."

purpose, as they testified, of being served. When the Kress manager observed the petitioners sitting at the counter, he "had one of [his] . . . employees call the Police Department and turn off the lights and state the lunch counter was closed." A captain of police and two other officers responded by proceeding to the store in a patrol car where they were met by other policemen and two state agents who had preceded them there. In the presence of the police and the state agents, the manager "announced that the lunch counter was being closed and would everyone leave" the area. The petitioners, who had been sitting at the counter for five minutes, remained seated and were promptly arrested. The boys were searched, and both boys and girls were taken to police headquarters.

The manager of the store did not request the police to arrest petitioners; he asked them to leave because integrated service was "contrary to local customs" of segregation at lunch counters and in violation of the following Greenville City ordinance requiring separation of the races in restaurants:

> "It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:
>
> "(a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;

"(b) Separate tables, counters or booths;

"(c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;

"(d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;

"(e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races." Code of Greenville, 1953, as amended in 1958, § 31–8.

The manager and the police conceded that the petitioners were clean, well dressed, unoffensive in conduct, and that they sat quietly at the counter which was designed to accommodate 59 persons. The manager described his establishment as a national chain store of 15 or 20 departments, selling over 10,000 items. He stated that the general public was invited to do business at the store and that the patronage of Negroes was solicited in all departments of the store other than the lunch counter.

Petitioners maintain that South Carolina has denied them rights of free speech, both because their activity was protected by the First and Fourteenth Amendments and because the trespass statute did not require a showing that the Kress manager gave them notice of his authority when he asked them to leave. Petitioners also assert that they have been deprived of the equal protection of the laws secured to them against state action by the Fourteenth Amendment. We need decide only the last of the questions thus raised.

The evidence in this case establishes beyond doubt that the Kress management's decision to exclude petitioners from the lunch counter was made because they were Negroes. It cannot be disputed that under our decisions

"Private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722; *Turner* v. *City of Memphis,* 369 U. S. 350.

It cannot be denied that here the City of Greenville, an agency of the State, has provided by its ordinance that the decision as to whether a restaurant facility is to be operated on a desegregated basis is to be reserved to it. When the State has commanded a particular result it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in, and in fact, has removed that decision from the sphere of private choice. It has thus effectively determined that a person owning, managing or controlling an eating place is left with no choice of his own but must segregate his white and Negro patrons. The Kress management, in deciding to exclude Negroes, did precisely what the city law required.

Consequently these convictions cannot stand, even assuming, as respondent contends, that the manager would have acted as he did independently of the existence of the ordinance. The State will not be heard to make this contention in support of the convictions. For the convictions had the effect, which the State cannot deny, of enforcing the ordinance passed by the City of Greenville, the agency of the State. When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.

Reversed.

SUPREME COURT OF THE UNITED STATES

Nos. 71, 58, 66, 11 AND 67.—OCTOBER TERM, 1962.

71	James Richard Peterson, et al., Petitioners, *v.* City of Greenville.	On Writ of Certiorari to the Supreme Court of South Carolina.
58	Rudolph Lombard et al., Petitioners, *v.* State of Louisiana.	On Writ of Certiorari to the Supreme Court of the State of Louisiana.
66	James Gober et al., Petitioners, *v.* City of Birmingham.	On Writ of Certiorari to the Court of Appeals of the State of Alabama.
11	John Thomas Avent et al., Petitioners, *v.* State of North Carolina.	On Writ of Certiorari to the Supreme Court of the State of North Carolina.
67	F. L. Shuttlesworth and C. Billups, Petitioners, *v.* City of Birmingham.	On Writ of Certiorari to the Court of Appeals of the State of Alabama.

[May 20, 1963.]

MR. JUSTICE HARLAN, concurring in the result in No. 71, and dissenting in whole or in part in Nos. 58, 66, 11, and 67.

These five racial discrimination cases, and No. 68, *Wright* v. *Georgia* (*ante*, p. ——) in which I join the opinion of the Court, were argued together. Four of them arise out of "sit-in" demonstrations in the South and in-

volve convictions of Negro students[1] for violations of criminal trespass laws, or similar statutes, in South Carolina (*Peterson, ante,* p. ——), Louisiana (*Lombard, ante,* p. ——), Alabama (*Gober, ante,* p. ——), and North Carolina (*Avent, ante,* p. ——) respectively. Each of these convictions rests on state court findings, which in my opinion are supported by evidence, that the several petitioners had refused to move from "white" lunch counters situated on the premises of privately owned department stores after having been duly requested to do so by the management. The other case involves the conviction of two Negro ministers for inciting, aiding, or abetting criminal trespasses in Alabama (*Shuttlesworth, ante,* p. ——).

In deciding these cases the Court does not question the long-established rule that the Fourteenth Amendment reaches only state action. *Civil Rights Cases,* 109 U. S. 3. And it does not suggest that such action, denying equal protection, may be found in the mere enforcement of trespass laws in relation to private business establishments from which the management, of its own free will, has chosen to exclude persons of the Negro race.[2] Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether there has been "State action of a particular character" (*Civil Rights Cases, supra,* at 11)—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination.

This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in

[1] Except for one white student who participated in a demonstration. *Lombard, ante,* p. ——.

[2] It is not nor could it well be suggested that general admission of Negroes to the stores prevented the management from excluding them from service at the white lunch counters.

our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.

My differences with the Court relate primarily to its treatment of the state action issue and to the broad strides with which it has proceeded in setting aside the convictions in all of these cases. In my opinion the cases call for discrete treatment and results.

I.

The Peterson Case (No. 71).

In this case, involving the S. H. Kress store in Greenville, South Carolina, the Court finds state action in violation of the Fourteenth Amendment in the circumstance that Greenville still has on its books an ordinance (*ante*, p. ——) requiring segregated facilities for colored and white persons in public eating places. It holds that the *mere existence* of the ordinance rendered the State's enforcement of its trespass laws unconstitutional, quite irrespective of whether the Kress decision to exclude these petitioners from the white lunch counter was actually influenced by the ordinance. The rationale is that the

State, having compelled restaurateurs to segregate their establishments through this city ordinance, cannot be heard to say, in enforcing its trespass statute, that Kress' decision to segregate was in fact but the product of its own untramelled choice. This is said to follow because the ordinance removes the operation of segregated or desegregated eating facilities "from the sphere of private choice" and because "the State's criminal processes are employed in a way which enforces" the ordinance. *Ante*, p. —.

This is an alluring but, in my view, a fallacious proposition. Clearly Kress might have preferred for reasons entirely of its own not to serve meals to Negroes along with whites, and the dispositive question on the issue of state action thus becomes whether such was the case, or whether the ordinance played some part in the Kress decision to segregate. That is a question of fact.

Preliminarily, I do not understand the Court to suggest that the ordinance's removal of the right to operate a segregated restaurant "from the sphere of private choice" renders the private restaurant owner the agent of the State, such that his operation of a segregated facility *ipso facto* becomes the act of the State. Such a theory might well carry the consequence that a private person so operating his restaurant would be subject to a Civil Rights Act suit on the part of an excluded Negro for unconstitutional action taken under color of state law (cf. *Monroe* v. *Pape*, 365 U. S. 167)—an incongruous result which I would be loath to infer that the Court intends. Kress is of course a purely private enterprise. It is in no sense "the repository of state power," *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 286, and this segregation ordinance no more makes Kress the agent or delegate of the State than would any other prohibitory measure affecting the conduct of its business. The Court does not intimate anything to the contrary.

The majority's approach to the state action issue is in my opinion quite untenable. Although the right of a private restaurateur to operate, if he pleases, on a segregated basis is ostensibly left untouched, the Court in truth effectually deprives him of that right in any State where a law like this Greenville ordinance continues to exist. For a choice that can be enforced only by resort to "self-help" has certainly become a greatly diluted right, if it has not indeed been totally destroyed.

An individual's right to restrict the use of his property, however unregenerate a particular exercise of that right may be thought, lies beyond the reach of the Fourteenth Amendment. The dilution or virtual elimination of that right cannot well be justified either on the premise that it will hasten formal repeal of outworn segregation laws or on the ground that it will facilitate proof of state action in cases of this kind. Those laws have already found their just constitutional deserts in the decisions of this Court, and in many communities in which racial discrimination is no longer a universal or widespread practice such laws may have a purely formal existence and may indeed be totally unknown. Of course this is not to say that their existence on the books may never play a significant and even decisive role in private decision-making. But the question in each case, if the right of the individual to make his own decisions is to remain viable, must be: was the discriminatory exclusion in fact influenced by the law? Cf. *Truax* v. *Raich*, 239 U. S. 33.[8] The inexorable rule

[8] In *Truax* the Court, in finding state action in violation of the Fourteenth Amendment, relied on the evidence showing that an alien employee had been discharged by his employer solely because of the latter's fear of criminal penalties for noncompliance with a state statute prohibiting the employment of more than a certain number of aliens. The Court stressed the importance of "the freedom of the employer to exercise his judgment without illegal interference or *compulsion* . . . ." *Id.*, at 38. (Emphasis added.)

which the Court lays down reflects insufficient reckoning with the course of history.

It is suggested that requiring proof of the effect of such laws in individual instances would involve "attempting to separate the mental urges of the discriminators" (*ante*, p. ——). But proof of state of mind is not a novel concept in the law of evidence, see 2 Wigmore, Evidence (3d ed. 1940), §§ 385–393, and such a requirement presents no special barriers in this situation. The mere showing of such an ordinance would, in my judgment, make out a *prima facie* case of invalid state action, casting on the State the burden of proving that the exclusion was in fact the product solely of private choice. In circumstances like these that burden is indeed a heavy one. This is the rule which, in my opinion, even-handed constitutional doctrine and recognized evidentiary rules dictate. Its application here calls for reversal of these convictions.

At the trial existence of the Greenville segregation ordinance was shown and the city adduced no rebutting evidence indicating that the Kress manager's decision to exclude these petitioners from the white lunch counter was wholly the product of private choice. All doubt on that score is indeed removed by the store manager's own testimony. Asked for the reasons for his action, he said: "It's contrary to local custom *and* its also the ordinance that has been discussed" (quite evidently referring to the segregation ordinance). (Emphasis added.) This suffices to establish state action, and leads me to join in the judgment of the Court.

II.

The Lombard Case (No. 58).

In this case, involving "sit-ins" at the McCrory store in New Orleans, Louisiana, the Court carries its state

action rule a step further. Neither Louisiana nor New Orleans has any statute or ordinance requiring segregated eating facilities. In this instance state action is found in the public announcements of the Superintendent of Police and the Mayor of New Orleans, set forth in the Court's opinion (*ante*, p. ——), which were issued shortly after "sit-in" demonstrations had first begun in the city. Treating these announcements as the equivalent of a city ordinance, the Court holds that they served to make the State's employment of its "trespass" statute against these petitioners unconstitutional, again without regard to whether or not their exclusion by McCrory was in fact influenced in any way by these announcements.

In addition to what has already been said in criticism of the *Peterson* ruling, there are two further factors that make the Court's theory even more untenable in this case.

1. The announcements of the Police Superintendent and the Mayor cannot well be compared with a city ordinance commanding segregated eating facilities. Neither announcement was addressed to restaurateurs in particular, but to the citizenry generally. They did not press private proprietors to segregate eating facilities; rather they in effect simply urged Negroes and whites not to insist on nonsegregated service in places where segregated service obtained. In short, so far as this record shows, had the McCrory store chosen to serve these petitioners along with whites it could have done so free of any sanctions or official constraint.

2. The Court seems to take the two announcements as an attempt on the part of the Police Superintendent and the Mayor to perpetuate segregation in New Orleans. I think they are more properly read as an effort by these two officials to preserve the peace in what they might reasonably have regarded as a highly charged atmosphere. That seems to me the fair tenor of their exhortations.

If there were nothing more to this case, I would vote to affirm these convictions for want of a sufficient showing of state action denying equal protection. There is, however, some evidence in the record which might indicate advance collaboration between the police and McCrory with respect to these episodes. The trial judge refused to permit defense counsel to pursue inquiry along this line, although counsel had made it perfectly clear that his purpose was to establish official participation in the exclusion of his clients by the McCrory store. I think the shutting off of this line of inquiry was prejudicial error.

For this reason I would vacate the judgment of the state court and remand the case for a new trial so that the issue of state action may be properly explored.

III.

The Gober Case (No. 66).

This case concerns "sit-ins" at five different department stores in Birmingham, Alabama. Birmingham has an ordinance requiring segregated facilities in public eating places.[4]

It is first necessary to consider whether this ordinance is properly before us, a question not dealt with in this Court's *per curiam* reversal. The Alabama Court of Appeals refused to consider the effect of the ordinance on petitioners' claim of denial of equal protection, stating

---

[4] General City Code of Birmingham (1944), § 369: "It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment."

that "there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property." 133 So. 2d, at 701.

This, on the one hand, could be taken to mean that the Birmingham ordinance was not properly before the Court of Appeals because it had not been specially pleaded as a defense. We would then be faced with the necessity of deciding whether such a state ground is adequate to preclude our consideration of the significance of the ordinance. In support of the view that such a ground exists respondent refers us to Alabama Code (1958), Tit. 7, § 225, requiring matters of defense to be pleaded specially in a civil case,[5] and to the statement of the Court of Appeals that "[t]his being an appeal from a conviction for violating a city ordinance, it is quasi criminal in nature, and subject to rules governing civil appeals," 133 So. 2d, at 699.

On the other hand, in view of the last sentence in the Court of Appeals' statement—"The prosecution was for a criminal trespass on private property"—it may be that the court simply shared the apparent misapprehension of the trial judge as to the materiality of the segregation ordinance in a prosecution laid only under the trespass statute.[6] This view of the matter is lent some color by the circumstance that, although Alabama Code (1958), Tit. 7, § 429 (1), rendered the ordinance judicially noticeable, the Court of Appeals' opinion does not address itself at all to the question whether the ordinance, bearing as it did on the vital issue of state action in this trespass prose-

[5] "The defendant may plead more pleas than one without unnecessary repetition; and, if he does not rely solely on a denial of the plaintiff's cause of action, must plead specially the matter of defense."

[6] See the printed record in this Court, pp. 24–26.

cution, was in truth a "matter of defense" within the meaning of § 225.[7]

In this muddy posture of things it is impossible to say whether or not these judgments are supportable on an adequate and independent state ground. Because of this, and in light of the views I have expressed in the *Peterson* case (*supra*, pp. 3–6), two things are called for. *First*, the parties should be afforded an opportunity to obtain from the Alabama Court of Appeals a clarification of its procedural holding respecting the Birmingham segregation ordinance. If the Court of Appeals holds that it is procedurally foreclosed from considering the ordinance, the adequacy of such a state ground would then of course be a question for this Court. *Second*, if the Court of Appeals holds that it is not foreclosed from considering the ordinance, there should then be a new trial so that the bearing of the ordinance on the issue of state action may be fully explored. To these ends I would vacate the judgments below and remand the case to the Alabama Court of Appeals.

IV.

The Avent Case (No. 11).

In this case it turns out that the City of Durham, North Carolina, where these "sit-ins" took place, also had a restaurant segregation ordinance.[8] In affirming

[7] In this connection it is not at all clear that the state rules relating to civil actions apply to *all* phases of this prosecution. The Court of Appeals referred only to their application to *appeals* in this type of case, and it may be that the special pleading rule of § 225 does not apply in a trespass prosecution. The Alabama cases cited by the Court of Appeals, see 133 So. 2d, at 699, shed no light on this question, and respondent has not referred to any other relevant authority.

[8] Code of Durham (1947), c. 13, § 42: "In all licensed restaurants, public eating places and 'weenie shops' where persons of the white

these convictions the North Carolina Supreme Court evidently proceeded, however, on the erroneous assumption that no such ordinance existed. 118 S. E. 2d 47.

In these circumstances I agree with the Court that the case should be returned to the State Supreme Court for further consideration. See *Patterson* v. *Alabama*, 294 U. S. 600. But disagreeing as I do with the premises on which the case will go back under the majority's opinion in *Peterson*, I must to that extent dissent from the opinion and judgment of the Court.

V.

The Shuttlesworth Case (No. 67).

This last of these cases concerns the Alabama convictions of two Negro clergymen, Shuttlesworth and Billups, for inciting, aiding, or abetting alleged violations of the criminal trespass ordinance of the City of Birmingham.

On the premise that these two petitioners were charged with inciting, aiding, or abetting only the "sit-ins" involved in the *Gober* case (*ante*, p. ——), the Court, relying on the unassailable proposition that "there can be no conviction for aiding and abetting someone to do an innocent act" (*ante*, p. ——), holds that these convictions must fall in consequence of its reversal of those in the *Gober* case. The difficulty with this holding is that it is based on an erroneous premise. Shuttlesworth and Billups were not charged *merely* with inciting the *Gober*

---

and colored races are permitted to be served with, and eat food, and are allowed to congregate, there shall be provided separate rooms for the separate accommodation of each race. The partition between such rooms shall be constructed of wood, plaster or brick or like material, and shall reach from floor to the ceiling. Any person violating this section shall, upon conviction, pay a fine of ten dollars and each day's violation thereof shall constitute a separate and distinct offense."

"sit-ins" but *generally* with inciting violations of the Birmingham trespass ordinance. And I do not think it can be said that the record lacks evidence of incitement of "sit-ins" other than those involved in *Gober*.[9] Hence the Court's reversal in *Gober* cannot well serve as the ground for reversal here.

There are, however, other reasons why, in my opinion, these convictions cannot stand. As to Billups, the record shows that he brought one of the students to Shuttlesworth's home and remained there while Shuttlesworth talked. But there is nothing to indicate Billups' purpose in bringing the student, what he said to him, or even whether he approved or disapproved of what Shuttlesworth urged the students to do. A conviction so lacking in evidence to support the offense charged must fall under the Fourteenth Amendment. *Thompson* v. *Louisville*, 362 U. S. 199.

On this score the situation is different with respect to Shuttlesworth. Given (1) the then current prevalence of

---

[9] At the trial testimony was introduced showing that Gober and Davis (two of the 10 defendants in the *Gober* case), as well as "other persons" who "were present . . . in the Court room" when the defendants in the *Gober* case were tried for trespass, attended the meeting at Shuttlesworth's house. There was also testimony that "other boys who attended the meeting" participated in "sit-ins" in Birmingham on the same day that the *Gober* "sit-ins" occurred. The record does not reveal whether the *Gober* defendants were the *only* persons who participated in the "sit-ins," nor whether there were others who were incited by Shuttlesworth but who did not thereafter take part in "sit-in" demonstrations. The trial court's statement that "you have here the ten students and the Court thinks they were misused and misled into a violation of a City Ordinance" was made in the course of sentencing the *Gober* defendants, not Shuttlesworth or Billups (the trials of both of these groups of defendants having been conducted *seriatim* by the same judge, who reserved sentencing until all trials had been completed). It was in no sense a finding of fact with respect to the crimes with which Shuttlesworth and Billups had been charged.

"sit-in" demonstrations throughout the South,[10] (2) the commonly understood use of the phrase "sit-in" or "sit-down" to designate a form of protest which typically resulted in arrest and conviction for criminal trespass or other similar offense, and (3) the evidence as to Shuttlesworth's calling for "sit-down" volunteers and his statement that he would get any who volunteered "out of jail," I cannot say that it was constitutionally impermissible for the State to find that Shuttlesworth had urged the volunteers to demonstrate on privately owned premises despite any objections by their owners, and thus to engage in criminal trespass.

Nevertheless this does not end the matter. The trespasses which Shuttlesworth was convicted of inciting may or may not have involved denials of equal protection, depending on the event of the "state action" issue. Certainly one may not be convicted for inciting conduct which is not itself constitutionally punishable. And dealing as we are in the realm of expression, I do not think a State may punish incitement of activity in circumstances where there is a substantial likelihood that such activity may be constitutionally protected. Cf. *Garner* v. *Louisiana*, 368 U. S. 157, 196–207 (concurring opinion of this writer). To ignore that factor would unduly inhibit freedom of expression, even though criminal liability for incitement does not ordinarily depend upon the event of the conduct incited.[11]

---

[10] See Pollitt, Dime Store Demonstrations: Events and Legal Problems of First Sixty Days, Duke L. J. 315, 317–337 (1960). Apparently the state courts took judicial notice of such demonstrations in Alabama, which they evidently had the right to do. See, *e. g.*, *Green* v. *Mutual Benefit Health & Accident Assn.*, 267 Ala. 56, 99 So. 2d 694.

[11] See Wechsler, Jones and Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, 61 Col. L. Rev. 571, 621–628 (1961).

Were I able to agree with the Court that the existence of the Birmingham segregation ordinance without more rendered all incited trespasses in Birmingham immune from prosecution, I think outright reversal of Shuttlesworth's conviction would be called for. But because of my different views as to the significance of such ordinances (*supra*, pp. 4–6), I believe that the bearing of this Birmingham ordinance on the issue of "substantiality" in Shuttlesworth's case, no less than its bearing on "state action" in the *Gober* case, involves questions of fact which must first be determined by the state courts. I would therefore vacate the judgment as to Shuttlesworth and remand his case for a new trial.

These then are the results in these cases which in my view sound legal principles require.

SUPREME COURT OF THE UNITED STATES

No. 67.—OCTOBER TERM, 1962.

F. L. Shuttlesworth and C. Billups, Petitioners, v. City of Birmingham. | On Writ of Certiorari to the Court of Appeals of the State of Alabama.

[May 20, 1963.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The petitioners, both Negro ministers, were tried and convicted in the Birmingham, Alabama, Recorder's Court for aiding and abetting a violation of the city criminal trespass ordinance. The complaint filed with respect to Shuttlesworth charged:

> "Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months before the beginning of this prosecution, and within the City of Birmingham or the police jurisdiction thereof, did incite or aid or abet in the violation of an ordinance of the City, to-wit, Section 1436 [1] of the General City Code of Birmingham of 1944, in that F. L. Shuttlesworth did incite or aid or abet another person to go or remain on the premises of another after being warned not to do so, contrary to and in violation of

[1] Birmingham General City Code, 1944, § 1436 provides:

"*After Warning*—Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties."

Section 824[2] of the General City Code of Birmingham of 1944." (Footnotes added.)

An identical complaint was filed charging Billups.

On appeal to the Circuit Court petitioners received a trial *de novo* and were again convicted. Petitioner Shuttlesworth was sentenced to 180 days in jail at hard labor and a fine of $100. Petitioner Billups was sentenced to 30 days and a fine of $25. On further appeal to the Alabama Court of Appeals the convictions were affirmed. —— Ala. App. ——, 134 So. 2d 213, 215. The Alabama Supreme Court denied writs of certiorari. 134 So. 2d 214, 215. Because of the grave constitutional questions involved, we granted certiorari. 370 U. S. 934.

Though petitioners took separate appeals, they were jointly tried in the Circuit Court. The evidence is sketchy in character. Only one witness testified, a city detective who had listened to petitioners' trial in the Recorder's Court.[3] The detective testified to his recollection of the testimony of two college boys whom (among others) petitioners were alleged to have incited to commit the criminal trespass.

These two boys were James E. Gober and James Albert Davis. They were convicted for criminal trespass in a separate proceeding subsequent to petitioners' trial. In *Gober* v. *City of Birmingham, infra,* p. ——, decided this day, we hold on the authority of *Peterson* v. *City of Greenville, ante,* p. ——, that the convictions of Gober and Davis are constitutionally invalid. The detective stated

---

[2] Birmingham General City Code, 1944, § 824 provides:

"It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor."

[3] Petitioners objected to all of this testimony as hearsay and on constitutional grounds, but these objections were overruled.

that in the Recorder's Court Gober and Davis had testified as follows:

James Gober and James Albert Davis, both Negro college students, went to the home of petitioner, Rev. Shuttlesworth, on March 30, 1960, where there were other college students. Petitioner, Rev. Billups, drove Davis there, and Billups was present when Shuttlesworth asked for volunteers to participate in "sit-down demonstrations." Gober "testified that in response to Rev. Shuttlesworth asking for volunteers to participate in the sit-down strikes that he volunteered to go to Pizitz at 10:30 and take part in the sit-down demonstrations." A list was made by someone, and Shuttlesworth announced he would get them out of jail. Gober and Davis participated in sit-down demonstrations on the following day as did others who were present.

This is the sole evidence upon which the petitioners were convicted. There was no evidence that any of the demonstrations which resulted from the meeting were disorderly or otherwise in violation of law.

Petitioners contend that there is no evidence to show guilt of the charged offense. See *Garner* v. *Louisiana*, 368 U. S. 157; *Thompson* v. *Louisville*, 362 U. S. 199. We need not reach that question since there is a more compelling reason why these convictions cannot stand.

Petitioners were convicted for inciting, aiding, and abetting a violation of the city trespass ordinance. The trespass "violation" was that committed by the petitioners in *Gober* v. *City of Birmingham*, 373 U. S. —.[4] Since the convictions in *Gober* have been set aside, it fol-

[4] The trial court stated, "[Y]ou have the ten students and the Court thinks they were misused and misled into a violation of a City Ordinance and has so ruled." As we understand the record, these convictions were based upon the inciting of the 10 students who are the petitioners in *Gober*.

lows that the present petitioners did not incite or aid and abet any crime, and that therefore their own convictions must be set aside.

It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act. See, *e. g.*, *Edwards* v. *United States*, 286 F. 2d 681 (C. A. 5th Cir. 1960); *Meredith* v. *United States*, 238 F. 2d 535 (C. A. 4th Cir. 195–); *Colosacco* v. *United States*, 196 F. 2d 165 (C. A. 10th Cir. 195–); *Karrell* v. *United States*, 181 F. 2d 981, 985 (C. A. 9th Cir. 1950); *Manning* v. *Biddle*, 14 F. 2d 518 (C. A. 8th Cir. 1926); *Kelley* v. *State*, — Fla. —, 83 So. 909 (1920); *Commonwealth* v. *Long*, — Ky. —, 56 S. W. 2d 524, 525 (1933); *Cummings* v. *Commonwealth*, 221 Ky. 301, —, 298 S. W. 943, 948 (1927); *State* v. *St. Philip*, 169 La. 468, 125 So. 451, 452 (1929); *State* v. *Haines*, 51 La. Ann. 733, 25 So. 372 (1899); *Wages* v. *State*, — Miss. —, 49 So. 2d 246, 298 (1950); *State* v. *Cushing*, — Nev. —, 120 P. 2d 208, 215 (1941); *State* v. *Hess*, — Wis. —, 288 N. W. 275, 277 (1939); cf. *Langham* v. *State*, 243 Ala. 564, —, 11 So. 2d 131, 137 (1942).

Reversed.

APPENDIX F

California Law Review

VOL. 39 JUNE, 1951 No. 2

Thirteenth Amendment to the Constitution of the United States

CONSUMMATION TO ABOLITION AND KEY TO THE FOURTEENTH AMENDMENT

Jacobus tenBroek[*]

Section 1. Neither Slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

—*The Thirteenth Amendment to the United States Constitution.*

I.

IN THE political, social, economic and judicial history of the United States, the Thirteenth Amendment has had a minor, even an insignificant part. Its history, subsequent to enactment, has never lived up to its historic promise as the "grand yet simple declaration of the personal freedom of all of the human race within the jurisdiction of this government."[1] Designed for the sweeping and basic purpose of sanctifying and nationalizing the right of freedom, few indeed, have successfully invoked it. Under its aegis, peonage—compulsory labor for debt—was uprooted as a legal institution in New Mexico by act of Congress passed in 1867. Later applications of this statute and the Amendment have struck at state laws which, while appearing merely to punish fraud among laborers, had the actual effect of punishing failure to perform labor contracts and thus of peonizing the victims. Statutes of Alabama, Georgia and Florida were nullified which made it a criminal offense to obtain advances of money under a promise to perform labor but with intent to defraud and which further made the failure to perform the labor prima facie evidence of the intent to defraud.[2] Also nullified was an Alabama code provision under which additional criminal prosecutions were available to keep a person already convicted of crime

[*] University of California. This article in a somewhat altered form is a portion of a book to be published during 1951 by the University of California Press as TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT.

[1] Mr. Justice Miller in Slaughter House Cases, 16 Wall. 36 (U.S. 1873).

[2] Pollock v. Williams, 322 U.S. 4 (1943); Taylor v. Georgia, 315 U.S. 25 (1941); Bailey v. Alabama, 219 U.S. 219 (1911).

at labor to satisfy the demands of his employer who had paid his fine and costs.[3] This is the sum of the Amendment's bounty. The Amendment is not broad enough, the Supreme Court has held, to protect Negroes against being driven from their job by force and terror;[4] to prevent color discriminations in the use of public conveyances, hotels and theaters;[5] to condemn covenants forbidding the transfer of land to persons of negro blood;[6] to authorize Congress to punish those who "conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws or of equal privileges or immunities under the laws."[7]

In reaching these rulings the Supreme Court has expressed and acted upon two central ideas. The first is a conception of what the Amendment denounces. In this view, it denounces "slavery and involuntary servitude." These terms, "all understand," refer to "a condition of enforced compulsory service of one to another." They do not refer to the badges, incidents and indicia which historically accompanied the "condition of enforced compulsory service" and which were its legal supports and concomitants. Consequently, the Amendment which abolished slavery did not protect men in the rights which slavery denied. The denial of these rights—the right to contract, sue, own property, enter the common callings of one's choice, for example—though an inseparable incident to slavery was not what constituted slavery. The second is a conception of the relationship of the Thirteenth and Fourteenth Amendments and of the nature and province of each. According to this view, both Amendments are basically prohibitive in character and therefore basically negative. They merely forbid the invasion of certain rights. The congressional enforcement power, appended to both Amendments, is limited to the obstruction and removal of such invasions. It does not extend to the affirmative protection of the rights the invasion of which is forbidden. There, however, the comparison ends. The prohibition of the Thirteenth Amendment is absolute; that of the Fourteenth is restricted to certain violators. Under the Thirteenth Amendment legislation may be "direct and primary" operating upon the acts of individuals whether sanctioned by state authority or not. Under the Fourteenth Amendment, legislation is confined to counteracting state laws and the actions of state officials. Finally, the freedom guaranteed by the Thirteenth Amendment is not nearly as comprehensive as the "liberty" safeguarded by the due process clause of the Fourteenth Amendment; nor does it include the privileges and immunities of citizens of the United States or the equal protection of the laws protected by the other two clauses of Section One of the Fourteenth Amendment.

The purpose of this article is to consider the historical correctness or incorrectness of these two ideas which, save for a brief period immediately

[3] Reynolds v. United States, 98 U.S. 145 (1879).
[4] Hodges v. United States, 203 U.S. 1 (1906).
[5] Civil Rights Cases, 109 U.S. 3 (1883).
[6] Corrigan v. Buckley, 271 U.S. 323 (1926).
[7] United States v. Harris, 106 U.S. 629 (1883); Butler v. Perry, 240 U.S. 328 (1916); Robertson v. Baldwin, 165 U.S. 275 (1897).

following the adoption of the Amendment, have been repeatedly reaffirmed through seventy-five years of interpretation and now are dogmatically accepted. The questions to be examined are: What were the historical purposes of the Thirteenth Amendment? Was its "inciting cause" solely the liberation of the enslaved Negroes? Was its intent merely to effect release from physical bondage or was it to abolish as well the badges and incidents of that bondage? Was the Thirteenth Amendment only the first step in a comprehensive three-step plan designed, first, through the Thirteenth Amendment, to abolish chattel slavery; second, through the Fourteenth Amendment, to restore the freed Negro to a condition of civil equality; and third, through the Fifteenth Amendment, to safeguard him in his political rights—or contrarywise, was the Thirteenth Amendment, standing alone, intended to establish freedom and to protect all men, black and white, bond and free fully and equally in the enjoyment of all the essential rights which inhere in and constitute that freedom?

If the Thirteenth Amendment is viewed first as the constitutional consummation of organized abolitionism and then as repeated and re-enacted by the Fourteenth Amendment the historical answers to these questions must be returned in favor of the broadest alternative. The evidence that the Thirteenth Amendment was so intended drawn from the period of the introduction and adoption of the Thirteenth Amendment and particularly from the congressional debates upon it will be the subject of this investigation.[8]

II.

The original proposition for a constitutional amendment abolishing slavery throughout the United States was introduced in the House by James M. Ashley of Ohio on the 14th of December, 1863. Ashley managed the Amendment in the House; Lyman Trumbull of Illinois in the Senate. It was debated bitterly and at length in the spring of 1864. It rode to easy victory in the Senate but failed to secure the requisite two-thirds majority in the House. This failure made it an issue in the presidential campaign of that year. In December, released from the limitations of his border-state policy by Maryland's voluntary abolition of slavery and sustained by the popular decision at the polls, Lincoln threw his full weight behind the Amendment. The earlier negative action of the House was reconsidered in January, 1865, and, after a long debate in which nearly one-third of the members participated, was finally reversed.

The discussions in the House and Senate in the spring of 1864 constitute the first debate over the Thirteenth Amendment; those in the House in January, 1865, the second. Since these were integrally a part of a single episode, we shall consider them together. A third important congressional debate respecting the Thirteenth Amendment occurred in December, 1865 and the spring of 1866 in connection with the Freedmen's Bureau and Civil

[8] The evidence drawn from the goals and constitutional theory developed and disseminated by the abolitionists over the preceding thirty years is produced and examined in TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (to be published 1951).

Rights Bills and other implementing legislation. This debate will be separately examined.

III.

The congressional debates in the spring of 1864 and January 1865 make plain that the traditionally accepted limiting answers to the questions posed above were not the answers originally intended by the Amendment's sponsors or contemplated by its opponents.

As might be imagined from the subject and the historic occasion of these debates, rambling discursions into history, morals, religion and politics were the order of the day. But, though the debates were, in these respects, long and pedestrian, as concerns the meaning of the Amendment, they were singularly illuminating. In fact, in one crucial phase, they were unique: Many of the consequences of the Amendment forecast by the opponents, far from being denied or minimized by the sponsors, were espoused as the very objects desired and intended to be accomplished by the measure.

With the South no longer present in the Halls of Congress and the outcome of the Civil War more or less clearly discernible, the whole character of the slavery debate shifted. Slavery was defended as a positive good and the true condition of the African race only by such rare "vestigial remainders" of an earlier age as Fernando Wood of New York. Abolitionist barbs about inhumanity, immorality, irreligion and sin now evoked little response. The Christianizing, civilizing and humanitarian merits of slavery were conspicuously not presented. The economic and social argument that slavery was indispensable to the prosperity and cultural refinement of the South, central features of the positive good dogma, became subdued and peripheral. Natural rights to property, always a constitutional bulwark to the slavery system from the time of the Picken's speech and the Pinckney Report in 1836, also had practically vanished, though abolition by constitutional amendment was the ultimate contingency which the natural rights argument was best adapted to meet. These positions, occupied for thirty years by pro-slavery forces, now were left unmanned. In short, the battle had ceased to be over slavery itself. With the victory of Northern arms, slavery as a legal institution was at an end, save in a few border states where it could not hope long to survive surrounded by a free nation. Those who resisted the Thirteenth Amendment—spokesmen of the loyal slave states, Democrats and a few conservative Republicans—were in small part fighting a rear-guard action for a pro-slavery cause they knew to be lost. Far more importantly, they were organizing all of their forces for a last-ditch stand against the second of the two revolutions which had been in progress: The revolution in federalism.

The principal argument put forward by the congressional opponents of the Thirteenth Amendment, accordingly, was that the measure constituted an unwarrantable invasion of the rights of the states and a corresponding unwarrantable extension of the power of the central government. In fact, so unwarrantable was the invasion and the extension as to violate the basic conditions of the federal compact, destroy the federal character of the

government and subvert the whole constitutional system. "Within the scope and reason of the Constitution," said Fernando Wood, Democrat of New York:

> . . . any amendment to it would be legitimate when ratified by the required three-fourths of the states; but for those three-fourths to attempt a revolution in social or religious rights by seizing upon what was never intended to be delegated by any of the parties to the compact would be a prodigy of injustice. Carried out under the forms of law, a wrong more fatally so because made by the very highest authority. If an amendment were now proposed to the Constitution declaring an establishment of religion or prohibiting the free exercise of it by the citizen, it would be parallel with the present and no more obnoxious than this is to merited condemnation . . . . The local jurisdiction over slavery was one of the subjects peculiarly guarded and guaranteed to the states, and an amendment ratified by any number of states less than the whole, though within the letter of the article which provides for amendments, would be contrary to the spirit of the instrument, and so in reality an act of gross bad faith.[9]

It would therefore be unconstitutional. It would revolutionize rather than amend the Constitution.[10]

The opponents of the Amendment did not stop with sweeping declamation. In one speech after another they itemized their fears and apprehensions, the factors which made the measure revolutionary. "The slavery issue," said Anton Herrick of New York, "which this resolution seeks to finally settle . . . is legitimately merged in the higher issue of the right of the states to control their domestic affairs, and to fix each for itself the status, not only of the negro, but of all other people who dwell within their borders."[11] " . . . the amendment," added William S. Holman, of Indiana, "confers on Congress the power to invade any state to enforce the freedom of the African in war or peace. What is the meaning of all that? Is freedom the simple exemption from personal servitude? No, Sir, mere exemption from servitude is a miserable idea of freedom. A pariah in the state, a subject but not a citizen, holding any right at the will of the governing power. What is this but slavery?"[12] Concluded Robert Mallory of Kentucky: ". . . You propose to leave them (the emancipated negroes) where they are freed, and protect them in their right to remain there. You do not intend, however, to leave them to the tender mercies of those states. You propose by a most flagrant violation of their rights to hold the control of this large class in these various states in your own hands."[13] That the object of the Amendment was not only to free the negroes but to "make them our equals before the law," was a constant source of complaint.[14] Elijah Ward of New York, expressing his opposition to the Thirteenth Amendment, said,

[9] CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864).

[10] Davis of Kentucky, *id.* at App. 104; Saulsbury of Delaware, *id.* at 1364; Powell of Kentucky, *id.* at 1483.

[11] *Id.* at 2615.

[12] *Id.* at 2692.

[13] *Id.* at 2982-83.

[14] See, *e.g.*, CONG. GLOBE, 38th Cong., 2d Sess. 179-80, 216 (1865).

"We are now called upon to sanction a Joint Resolution to amend the Constitution so that all persons shall be equal under the law, without regard to color, and so that no person shall hereafter be held in bondage."[15]

Thus, the case of those who resisted the passage of the Thirteenth Amendment was built almost entirely on opposition to the expansion and consolidation of the national power. With slavery already dead, that expansion and consolidation would be neither great nor of continuing importance if the Amendment effected only a "simple exemption from personal servitude." The thing that gave the revolution in federalism significance was the sweeping conception of what the amendment did. Beyond toppling over the corpse of slavery, most if not all elements of the congressional opposition asserted that the amendment would guarantee to the emancipated negro a basic minimum of rights—equality before the law, protection in life and person, opportunity to live, work and move about—and that Congress would be empowered to safeguard and protect these. Outside of this area of basic agreement, opinions varied. Some charged that the amendment was designed to bring about social equality;[16] others that miscegenation[17] was within its purview; still others, that the enfranchisement[18] of the negro was intended. But these diversities do not obscure the hard core of common understanding among the opposition as to the meaning of the amendment and what it would do.

The case made out by the sponsors and supporters of the Thirteenth Amendment was no less explicit on this central issue. The amendment was presented not as one step in a series of steps yet to come, not as an act of partial fulfillment, not as the opportunistic achievement of a limited objective. It was exultantly held up as "the final step," "the crowning act," "the capstone upon the sublime structure"; the joyous "consummation of abolitionism." To the proponents of the amendment, though slavery was dead, the remote contingency of resurrection had to be provided against; the incidents of slavery had yet to be obliterated; the emancipated negro and his white friends had to be protected in the privileges and civil liberties of free men; and the federal power as the instrument for achieving these purposes had to be permanently assured. Victory in both revolutions needed to be appropriately symbolized and made permanent.

Throughout the debates, these were the points the abolitionists hammered home with ardor and relentlessness. As had been true of their constitutional attack from the time of its original formulation, two major ideas were combined and recombined into a single argument and purpose: First, the Lockean presuppositions about natural rights and the protective function of government; second, slavery's denial of these rights and this protection not only to the blacks, bond and free, but to the whites as well. The opening speech in the House debate, delivered by James F. Wilson of Iowa,[19]

[15] Cong. Globe, 38th Cong., 2d Sess. 177 (1865).
[16] Cong. Globe, 38th Cong., 1st Sess. 2944, 2987 (1864).
[17] *Id.* at 1465, 2979.
[18] *Id.* at 180, 216, 2963.
[19] Cong. Globe, 38th Cong., 1st Sess. 1199 (1864).

chairman of the Judiciary Committee and co-author of the Amendment, emphasized both of these elements and their interrelationship with clearness and force. The system of slavery, Wilson argued, violated the clauses of the Preamble, disregarded the supremacy of the Constitution, and denied the privileges and immunities of citizens of the United States guaranteed by the comity clause. Among those privileges and immunities were the rights of the First Amendment—"freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition." These were rights which belonged "to every American citizen, high or low, rich or poor . . . ." Yet to what extent were they respected as the supreme law of the land "in states where slavery controlled legislation, presided in the courts, directed the executives, and commanded the mob?" "Twenty millions of free men in the free states," he answered, "were practically reduced to the condition of semi-citizens of the United States; for the enjoyment of their rights, privileges and immunities as citizens depended upon a perpetual residence north of Mason's and Dixon's line. South of that line the rights which I have mentioned, and many more which I might mention, could be enjoyed only when debased to the uses of slavery." He concluded, "it is quite time, Sir, for the people of the free states to look these facts squarely in the face and provide a remedy which shall make the future safe for the rights of each and every citizen." That remedy, thus aimed at the broad objective of making, "the future safe for the rights of . . . every citizen," was the seemingly narrow prohibition on slavery and involuntary servitude contained in the Thirteenth Amendment.

The arraignment of slavery by Henry Wilson, veteran and eloquent abolitionist Senator from Massachusetts, followed this same familiar pattern.[30] Slavery was the "prolific mother" of mobbings, beatings, violence, southern maltreatment of northern seamen and citizens. Wilson asserted:

> If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or pertaining to it, . . . when this amendment to the Constitution shall be consummated, the shackle will fall from the limbs of the hapless bondman . . . the schoolhouse will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance. Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom. Then the wronged victim of the slave system, the poor white man . . . impoverished, debased, dishonored by the system that makes toil a badge of disgrace, and the instruction of the brain and soul of a man a crime, will . . . begin to run the race of improvement, progress and elevation.

Senator Harlan of Iowa elaborated on "the necessary incidents of slavery which it was the specific object of the amendment to abolish. These were: "the breach of the conjugal relationship"; the abolition of the par-

[30] *Id.* at 1315, 1321, 1324 (1864).

ental relation, "robbing the offspring of the care and attention of his parents"; abolition "of the relation of person to property," "the destruction of the slaves' capacity to acquire and hold" (property), and the imposition of "this disability on their posterity forever"; denial to the slaves "of a status in court," especially, "the right to testify," "the suppression of the freedom of speech and press, not only among those downtrodden people themselves but among the white race"; "perpetuity of the ignorance of its victims."[21] This Amendment, argued E. C. Ingersoll of Illinois, will mean "freedom of speech," "the right to proclaim the eternal principles of liberty, truth and justice in Mobile, Savannah, or Charleston with the same freedom and security as . . . at the foot of Bunker Hill Monument." It "will secure to the oppressed slave his natural and God-given rights . . . a right to live, and live in a state of freedom . . . a right to breathe the free air, and to enjoy God's free sunshine . . . . A right to till the soil, to earn his bread by the sweat of his brow, and to enjoy the rewards of his own labor . . . . A right to the endearments and enjoyment of family ties." The Amendment will mean "that the rights of mankind, without regard to color or race, are respected and protected."[22] "This proposed Amendment is designed," argued William D. Kelley of Pennsylvania, " . . . to accomplish the very purpose with which they charged us in the beginning, namely, the abolition of slavery in the United States, and the political and social elevation of Negroes to all the rights of white men."[23]

"The effect of such Amendment," said Godlove S. Orth, of Indiana, will be to prohibit slavery in these United States, and be a practical application of that self-evident truth, 'that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.'" What shall be done with the former slaves and their masters? " . . . giving to each equal protection under the law, bid them go forth with the Scriptural injunction, 'in the sweat of thy face shalt thou eat bread.'"[24] Argued James M. Ashley of Ohio:[25]

> Slavery has for many years defied the government and trampled upon the National Constitution, by kidnapping, imprisoning, mobbing, and murdering white citizens of the United States guilty of no offense except protesting against its terrible crimes. It has silenced every free pulpit within its terrible control, . . . it has denied the masses of poor white children within its power the privilege of free schools and made free speech and a free press impossible within its domain; . . . it so constituted its courts that the complaints and appeals of these people could not be heard by reason of the decision "that black men had no rights which white men were bound to respect."[26]

---

[21] CONG. GLOBE, 38th Cong., 1st Sess. 1439, 1440 (1864).
[22] *Id.* at 2989, 2990.
[23] *Id.* at 2987.
[24] CONG. GLOBE, 38th Cong., 2d Sess., pt. 1, 142-43 (1865).
[25] *Id.* at 13, 139.
[26] See also CONG. GLOBE (1864, 1865) for the speeches of Thomas T. Davis of New York at 154 (Jan. 7, 1865); John A. Kasson of Iowa at 193 (Jan. 10, 1865); Nathaniel B.

Thus the congressional debates in the spring of 1864 and January 1865 explode the traditionally accepted beliefs about the scope and meaning of the Thirteenth Amendment. They show that the proponents of the measure intended thereby a revolution in federalism; that the opponents of the Amendment understood that intended purpose and made it virtually the sole basis of their opposition to the Amendment; that thus the Amendment was passed by Congress in the face of the well-articulated fear that it would revolutionize the federal system and the publicly expressed purpose to do so, that is, with complete agreement between proponents and opponents as to its effect. To grasp this revolution, these debates make clear, one need only to appreciate the three-fold meaning of the word "slavery" as then used and understood. What was the "slavery" which the Thirteenth Amendment would abolish?

In the first place, the Amendment would strike "the shackle . . . from the limbs of the hapless bondman." It would destroy slavery's "chattelizing, degrading and bloody codes." Slavery in its narrowest and strictest sense —slavery as legally enforceable personal servitude—would thus be forever "put down and extinguished." This much the Amendment would certainly do. But this much had already been done by other acts and events. With respect to slavery in this primary and limited sense, little remained to be accomplished by the Amendment except to give "completeness and permanence to emancipation." And that the Amendment was intended to do.

Secondly, slavery which was within the reach of the Amendment extended far beyond the personal burden of the slaves and the characteristics of immediate bondage. The congressional debates repeated what the history of abolitionism had already made abundantly clear. The free colored person, South and North, as the abolitionists knew and had labored for him, was only less degraded, spurned and restricted than his enslaved fellow. He bore all the burdens, badges and indicia of slavery save only the technical one. His freedom along with that of his enshackled brother had been an integral part of the life and work of "the Great Crusade." His slavery as well as that of the "hapless bondman" was to be abolished by the Thirteenth Amendment.

The opposite of slavery is liberty. The liberty which the abolition of slavery would bring about, spelled out by thirty years of anti-slavery controversy, was now again itemized and detailed in the congressional debates. The Amendment would "convert into a man that which the law had declared to be a chattel." It would be "a practical application of that self-evident truth 'that all men are created equal; that they are endowed by their Creator with certain unalienable rights.'" It would "bring the Constitution into avowed harmony with the Declaration of Independence." It

Smithers of Delaware at 217 (Jan. 11, 1865); Green Clay Smith of Kentucky at 237 (Jan. 12, 1865); James S. Rollins of Missouri at 258 (Jan. 13, 1865); William Higby of California at 478 (Jan. 28, 1865); Lyman Trumbull of Illinois (1st Sess.) at 1313 (Mar. 28, 1864); John B. Henderson of Missouri at 1465 (April 7, 1864); Charles Sumner of Massachusetts at 1479-83 (April 8, 1864); Daniel Morris of New York at 2615 (May 31, 1864); John F. Farnsworth of Illinois at 2979 (June 15, 1864).

would recognize and confirm the principle that "nature made all men free and entitled them to equal rights before the law." It would "secure to the oppressed slave his natural and God-given rights," "the sacred rights of human nature," "the rights of mankind." It would assure that these rights were "respected and protected"; it would "give to each, equal protection under the law." It would safeguard the right to be educated to the "race imbruted by long years of enforced ignorance." "The hallowed family relations of husband and wife, parent and child," would "be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom." It would guarantee to the free Negro "the right to live," "the capacity to acquire and hold property," the "right to till the soil, to earn his bread by the sweat of his brow, and to enjoy the rewards of his own labor." It would make certain that all of these rights would receive "the protection of the government," the protection of "equal laws," and that the Negro would be given "a status in court," especially the untrammeled right to testify.

Thirdly, the slavery which was to be abolished by the Amendment consisted of the incidents of the system which impaired and destroyed the rights of the whites. In part, the framers, sponsors and supporters of the Thirteenth Amendment felt that, with chattel bondage abolished and the Negro elevated to legal and civil equality, the pulsing heart of the system would be stilled and all of the appendages would soon atrophy and disappear. Some of the outgrowths—the "nameless woes," the "sumless agonies of civil war," the "sweltered venom" filling the hearts of the Southern people, the "dark and malignant hatred of the free states"—some of these outgrowths of slavery would die automatically and they could not in any event be legislated out of existence. Others could; and the Thirteenth Amendment was intended as specific legislation or as authorizing specific legislation against these. It was meant to be a direct ban against many of the evils radiating out from the system of slavery as well as a prohibition of the system itself. It would bring to an end the "kidnapping, imprisoning, mobbing and murdering" of "white citizens of the United States, guilty of no offense." It would make it possible for white citizens to exercise their constitutional right under the comity clause to reside in Southern states regardless of their opinions. It would carry out the constitutional declaration "that each citizen of the United States shall have equal privileges in every other state." It would protect citizens in their rights under the First Amendment and comity clause to freedom of speech, freedom of press, freedom of religion and freedom of assembly. It would "make the future safe for the rights of each and every citizen."

This then was the slavery which the Thirteenth Amendment would abolish: the involuntary personal servitude of the bondman; the denial to the blacks, bond and free, of their natural rights through the failure of the government to protect them and to protect them equally; the denial to the whites of their natural and constitutional rights through a similar failure of government. Stated affirmatively, and in the alternative phrases and con-

cepts used repeatedly throughout the debates, the Thirteenth Amendment would: first, guarantee the equal protection of the laws to men in their natural and to citizens in their constitutional rights; and/or, second, safeguard citizens of the United States equally in their constitutional privileges and immunities; and/or, running a bad but nevertheless articulated third, enforce the constitutional guarantee to all persons against deprivation of life, liberty, or property without due process of law.

Just as the major elements of unity in abolitionist constitutional and natural rights theory emerged in the congressional debates over the Thirteenth Amendment and formed the explicitly articulated as well as the broadly historical basis of the Amendment, so the divergent elements of abolitionist doctrine equally manifested themselves. They also supply a basis of the Amendment and add to our understanding of it.

As it had long before and did even more sharply later, the question of the enfranchisement of the Negro divided anti-slavery men, leadership as well as rank-and-file. Those who thought of this as an immediately desirable goal or as a necessary consequence of the social compact or the Constitution were, however, undoubtedly a small minority. In the congressional debates, Democratic spokesmen often insisted that the Republicans intended, under the Thirteenth Amendment, to give the freed Negro the vote, "to be used throughout all time for the purpose of keeping control of the federal government, and of the (Southern) states."[27] Such politically minded Jacobins as Stevens, Wade and Chandler doubtless saw the likely party advantage to be derived from giving the Negro the vote. That the enfranchisement of the freedmen would result from the Thirteenth Amendment or could be achieved under it, whether for partisan political or more generally abolitionist ends, was, however, not avowed or admitted even by the most extreme of the Radicals. If it was believed at all by those who put the Amendment across, it belongs in the category of secret or conspiratorial intentions. Josiah B. Crinnell, representative from Iowa, spoke the stock and historically correct answer of the abolitionists to the charges of the Democrats:

> But we are met with another objection, that if we emancipate we must enfranchise also. I deny the conclusion; but I should not be deterred from the move, even if it were correct. A recognition of natural rights is one thing, a grant of political franchises is quite another. We extend to all white men the protection of law when they land upon our shores. We grant them political rights when they comply with the conditions which those laws prescribe. If political rights must necessarily follow the possession of personal liberty, then all but male citizens in our country are slaves.[28]

The principal source of disagreement among the abolitionists revealed by the debates over the Thirteenth Amendment was, of course, the very one which had served as the basis of the only important doctrinal difference on constitutional questions which had developed in the movement. It had

[27] CONG. GLOBE, 38th Cong., 2d Sess. 179 (1865).
[28] *Id.* at 302.

originated in the late thirties and persisted down through the Civil War. It had nothing to do with the scope of abolitionist objectives. It had to do only with the constitutional means of achieving those objectives. Did Congress have the power by direct action to abolish slavery in the states under the Constitution as it existed or was an amendment necessary before such action could be taken? In other words, was the Thirteenth Amendment declaratory or amendatory? Did it simply reaffirm what the Constitution already provided or did it change the Constitution or add to it?

On this question the abolitionists were split. Some hardened constitutional apostates, like Charles Sumner, unequivocally took the position in the debates that the Thirteenth Amendment would be entirely declaratory, that under the Constitution as it then stood Congress could, "by a single brief statute . . . sweep slavery out of existence." In Sumner's view, such a statute was authorized by the common defense and war clauses, by the republican form of government guaranty, and by the due process provision of the Fifth Amendment. The last named, especially was "in itself alone a whole bill of rights," "an express guarantee of personal liberty and an express prohibition against its invasion anywhere," "in itself . . . a source of power" for Congress to carry out the guarantee and to enforce the prohibition everywhere in the country.[29] Other abolitionist sponsors of the Amendment leaned heavily on the declaratory theory but were less explicit about congressional power to enforce the anti-slavery provisions of the Constitution and perhaps believed that it did not exist. Wilson's important March 18, 1864 speech typified and gave expression to the attitude of this group.[30] It was left to James M. Ashley of Ohio, however, to state the declaratory theory in its basically nationalistic, anti-state compact constitutional ramifications.[31] In an able speech, delivered in January, 1865, he substantially recapitulated the doctrine developed by Spooner and Tiffany, and, in some phases, by J. Q. Adams. "The unity and citizenship of the people," Ashley asserted, "existed before the Revolution, and before the national Constitution." In fact, it was in order "to secure" this "unity," this "pre-existing nationality," this "national citizenship," for which "life, fortune and honor" had been periled in the Revolution that the Constitution was formed. "The utter indefensibility of the state sovereignty dogmas, and . . . the supreme power intended by the framers of the Constitution to be lodged in the National Government" were particularly demonstrated by the republican form of government guarantee and the comity clause of the Constitution. The comity clause "secures nationality of citizenship"; "a universal franchise which cannot be confined to states, but belongs to the citizens of the Republic."

The abolitionists who believed that the Thirteenth Amendment was amendatory, that it would revise or change the Constitution, harkened back to the stand of the American Anti-Slavery Society, adopted originally in its

---

[29] Cong. Globe, 38th Cong., 1st Sess. 1479 *et seq.* (1864).

[30] *Supra* note 19.

[31] Cong. Globe, 38th Cong., 2d Sess. 1384 (1865).

Constitution of 1833 and copied in the Constitutions of most of the state and local anti-slavery societies. The United States Constitution not only did not authorize Congress to uproot slavery in the states where it existed but it protected slavery there. Elsewhere—in the District of Columbia, in the Territories—Congress possessed the power and the duty to act in behalf of freedom. And, moreover, Congress was bound to exercise the powers it possessed over the District, the Territories and interstate commerce to hedge slavery in, to confine it "to the spots it already polluted." But beyond that, Congress could not constitutionally go "to touch slavery in the states." ". . . such, Sir, was my position," said Thaddeus Stevens, the leading exponent of this view in the 1865 debates, "not disturbing slavery where the Constitution protected it, but abolishing it wherever we have the constitutional power, and prohibiting its further extension." "As the Constitution now stands" "the subject of slavery has not been entrusted to us by the states, and . . . therefore it is reserved."[83]

Placed in the context of this constitutional divergency among the abolitionists, the function of the Thirteenth Amendment is not confused but clarified. The split between the declaratory and amendatory theorists shows that there was disagreement about how the Thirteenth Amendment affected the pre-existing Constitution but none about the meaning of the Constitution after the adoption of the Amendment. To the declaratory theorists who believed both that the Constitution was anti-slavery and that Congress was empowered to carry out the anti-slavery provisions of it, the Thirteenth Amendment would confirm, reaffirm, reiterate; it would bring out anew the true nature of the Constitution which had been "degraded to wear chains so long that its real character" was "scarcely known." To the declaratory theorists who believed that the Constitution was anti-slavery but that a power of enforcement was lacking, the Thirteenth Amendment commanded freedom all over again and provided a means "to carry it into effect," "a remedy" against disobedience. To the amendatory theorists the Thirteenth Amendment brought about a fundamental change: it took from the states what hitherto had been constitutionally reserved to them, the power to protect or promote slavery; it abolished slavery throughout the country, nationalized the right of freedom and made the national Congress the organ of enforcement. Thus, in the eyes of all abolitionists, the Thirteenth Amendment either gave or confirmed congressional power to enforce a constitutional prohibition against slavery everywhere in the United States; and the liberty which Congress now had constitutional mandate to enforce was not just the liberty of the blacks but the liberty of the whites as well and included not just freedom from personal bondage but protection in a wide range of natural and constitutional rights. The revolution in federalism had been given its ultimate constitutional sanction.

IV.

The Thirteenth Amendment was declared ratified and in force on December 18th, 1865. Meanwhile, on December 5th the 39th Congress had

[83] *Id.* at 265-66.

convened. The great issues of reconstruction which that Congress was to face were emerging and taking shape in men's minds: fiscal retrenchment, the re-establishment of balance between civil and military authority, rebuilding the political structure of the rebel states, finding a new basis on which to resurrect the shattered economy and society of the South. Standing in the forefront of these problems was what to do with the freedmen, "the everlasting, inevitable Negro." This was the question which "puzzled all brains and vexed all statesmanship." Loosened not only from the legal but the economic ties which fixed their place in society and their part in production, many of them wandering aimlessly about the countryside or huddled near Northern Army camps and in philanthropic centers, the victims alike of continued white oppression and of their own long past of slavery, the former bondmen constituted a vast relief and welfare problem as well as a problem of legal protection and Lockean political theory. All shades of Republican opinion agreed that the care of the race emancipated by the war and made by circumstances the wards of the nation was the responsibility of the nation. "We have," said Thaddeus Stevens, "turned or are about to turn loose four million slaves without a hut to shelter them or a cent in their pockets. The diabolical laws of slavery have prevented them from acquiring an education, understanding the commonest laws of contract, or of managing the ordinary business of life. This Congress is bound to look after them until they can take care of themselves."[83]

The national responsibility had been discharged in part by an earlier comprehensive act passed in the preceding March, coordinating and centralizing through the Freedmen's Bureau existing war time organizations for the care of the liberated Negro. The bureau had been given far-reaching jurisdiction: It had been made the general guardian and, backed by the United States Army, the guarantor of the general welfare and interests of the former slaves. It had been given charge of their family relations and was to supervise charitable relief and educational work among them. It was to aid them in the purchase or lease of land and to distribute abandoned lands to them. It had been given jurisdiction of all controveries in which freedmen were involved whether blacks alone were concerned or whites also were parties. The whole realm of Negro-White labor relations in the South had been made the province of the bureau. It was to safeguard the freedmen against victimization by white employers, against oppressive working conditions and unreasonably low wages, against coercion, intimidation or anything remotely approaching involuntary labor or actual slavery. The bureau had been thus empowered to play an important, if not a determinative part, in the process of reorganizing and reconstituting the social and economic life of the South and in insuring genuine freedom to the former slaves.

But at best protection afforded by the Freedmen's Bureau was temporary, irregularly administered, and inadequate. Broader and more explicitly statutory guarantees were regarded as necessary if the freedmen were to be

[83] Cong. Globe, 39th Cong., 1st Sess. 74 (1865).

given both something more than parchment rights and freedom from the forms of bondage. Hardly were the doors of the 39th Congress opened before an assortment of bills was introduced for this purpose. Representative Farnsworth of Illinois offered a resolution which, though concerned primarily with the rights of Negro soldiers, declared generally that "as all just powers of government are derived from the consent of the governed, that cannot be regarded as a just government which denies a large portion of its citizens who share its pecuniary and military burdens" the right to express their consent, "and which refuses them full protection in the enjoyment of their inalienable rights."[34] Representative Benjamin F. Loan of Missouri submitted a resolution directing the select committee on freedom to consider "legislation securing the freedmen and the colored citizens of the states recently in rebellion the political and civil rights of other citizens of the United States."[35] Senator Henry Wilson of Massachusetts sponsored a bill confined to the rebel states and to be enforced by the Army and Freedmen's Bureau. It declared null and void all "laws, statutes, acts, ordinances, rules and regulations" establishing or maintaining "any inequality of civil rights and privileges" on account of color or previous slavery.[36] Senator Sumner of Massachusetts introduced two bills embodying much the same program. They struck down in the Confederate States "all laws and customs . . . establishing any oligarchical privileges and any distinction of rights on account of color or race." They ordained that "all persons in such states are recognized as equal before the law." They gave the courts of the United States exclusive jurisdiction of all suits, criminal or civil, to which a person of African descent was a party.[37]

These proposals all failed of enactment. They are significant because they show that the early statutory plans to safeguard the human rights and essential interests of the freedmen revolved about certain central ideas: "full protection in the enjoyment of their inalienable rights"; "equality of civil rights and privileges"; the same rights as other citizens; equality before the law. The common denominator, settled in men's minds by thirty years of abolitionist proselytization as the basis for and a means of achieving Negro rights, was thus the concept of the equal protection of the laws for men's civil, i.e., natural, rights. The failure to adopt these measures was not due to any doubts about the propriety or adequacy of the basis and means. They were immediately replaced in the Republican program by other measures featuring the same elements. The principal objection made by fellow Republicans was rather that the legislation was too narrowly conceived, being based on the war power, confined to the rebel states, and aimed only at the annulment of bad laws. The great need and opportunity was to make the protection permanent, to cast it in universal form (though immediately and primarily the boon of the freedmen), to make it applicable to the whole

[34] *Id.* at 46.
[35] *Id.* at 69.
[36] *Id.* at 39.
[37] *Id.* at 91-95.

country and to ground it firmly not in the old Constitution but in the New Amendment.

In the achievement of these wider purposes the leadership of Senator Trumbull in his capacity as chairman of the Senate Judiciary Committee soon became dominant. As he saw it, the task was to "abolish slavery, not only in name but in fact." Because "it is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights," Congress must "give effect to the provision . . . making all persons free."[38] It must wipe out the remnants, badges and indicia of slavery. It was to enable Congress to do this—or rather to remove all doubt and argument about Congress' power to do this—that Section Two of the Thirteenth Amendment had been added. The time had come to implement that Amendment and use that power. Trumbull's Civil Rights Bill and its supplementary companion, an Amendment to the Freedman's Bureau Act, became almost immediately the heart of the Republican legislative program.

The congressional battle that raged around these two bills[39] constituted the third important debate over the Thirteenth Amendment. By the Amendment, the principle of universal liberty had been established. The Freedmen's Bureau and Civil Rights bills represented the efforts of the Amendment's framers, acting contemporaneously with its ratification, to implement the Amendment and define the principle. This debate, accordingly, had the distinct advantage of being evoked by specific legislative plans, of being tied down to a particular application of the liberty insured by the Amendment. As a result, not only did attention necessarily focus on Section Two of the Amendment granting Congress power of enforcement, but the persons and the rights protected, the area of asserted state sovereignty invaded and the notion of liberty itself—all were given concrete significance.

Basically, the two acts proceeded upon exactly the same theory: That the way to implement the Thirteenth Amendment and secure liberty was to protect men in their "civil rights and immunities" and to do so directly through the national government—the agents of the bureau in the one case, the federal courts in the other. The rights and immunities thus to be nationalized and protected, morover, were not to be "left to the uncertain and ambiguous language" of a general formula. They, or some of them were to be "distinctly specified." Section One of the Civil Rights Bill and Section Seven of the Freedmen's Bureau Bill, accordingly, contain an identical list of the civil rights of men to be guaranteed by the national government. The list is short but the rights enumerated are sweeping. The first—"the right to make and enforce contracts"—safeguards men in their labor relations, business affairs and ordinary transactions. The second—the right to buy, sell and own real and personal property—is virtually indispensable in our system to the maintenance of life itself, let alone anything like economic improvement. The third—the right "to sue, be parties and give evidence"—

[38] Cong. Globe, 39th Cong., 1st Sess. 43 (1865).

[39] And also to some extent around the other implementing legislation, especially Senator Wilson's bill summarized above.

guarantees access to the judiciary as the normal means of maintaining rights; guarantees, that is, the protection of the courts. The fourth—the right to "full and equal benefit of all laws and proceedings for the security of person and estate"—is an explicit guarantee of the "full" and "equal" protection of men in their persons and their property by laws. The right to the equal protection of the laws—the right to have other civil rights protected and equally by laws—is thus itself counted among men's fundamental "civil rights and immunities." Moreover, this is not only a matter of receiving the benefit of such laws. The detriment of the laws, the punishment under them, may not be unequal, may not be different for identical offenses, without a similar violation of civil rights.

Taken together, read in the light of their abolitionist origins and stated purposes, these bills were the practical application of the idea of equality as an essential principle of liberty. They represented the progress from abolitionist constitutional and political theory to abolitionist law, from doctrine to enactment. Consistent with those origins and purposes, and with the facts of federalism as the abolitionists had learned them, in a third of a century of struggle the federal government alone was to be the agency of enforcement. Thus was effected a complete nationalization of the civil or natural rights of persons.

Neither of the bills was confined to the Negro. The Freedmen's Bureau Bill extended the protection and services of the bureau to "refugees and freedmen in all parts of the United States." The Civil Rights Bill covered "the inhabitants of any state or territory of the United States." The first, however, dealt almost exclusively with freedmen and black refugees, contained many welfare and educational features which had a special relevance to the Negro, and extended beyond the rebel states in order to permit the bureau to operate in loyal Delaware and Kentucky where slavery had been abolished by the Thirteenth Amendment and to aid the thousands of freedmen who had migrated into Southern Illinois, Indiana and Ohio. The Civil Rights Bill was intended to be permanent, truly countrywide and inclusive of "persons of all races." The debates over these bills contain many references to loyal southern whites "who have been reduced from men almost to chattels because of their fidelity to our flag, to our constitution, and to this country" and who therefore need national "care" and "protection."[40]

Nor was either of these bills restricted to the corrective removal of discriminatory state legislation or official action. The Freedmen's Bureau Bill prohibited the denial of the mentioned rights if the denial was "in consequence of any state or local law, ordinance, police, or other regulation, custom, or prejudice. . . ." The use of the word "custom" to some extent, and of the word "prejudice" altogether, removes the limitation imposed by the earlier words in the section. An abrogation of civil rights made "in consequence of any state or local . . . custom or prejudice" might as easily be perpetrated by private individuals or by unofficial community activity as by state officers armed with statute or ordinance. Moreover, Section Seven

[40] Cong. Globe, 39th Cong., 1st Sess. 498 (1866).

of the Freedmen's Bureau Bill was part of a large and comprehensive system for the care of the freedmen. That system encompassed not merely safeguarding the Negro against discriminatory state legislation, but against invasions of his rights and the essential conditions of his freedom from whatever source private outrage, employer oppression or official action. The language of the Civil Rights Bill is more ambiguous. While it provides that "the inhabitants of every race and color . . . shall have the same right to make and enforce contracts," and so forth, a possibly restrictive proviso is added: "Any law, statute, ordinance, regulation or custom, to the contrary notwithstanding." If this proviso be taken to limit the category of invaders of "the same rights to make and enforce contracts" and so forth, and if the omission of the word "prejudice" from the list be emphasized, the case for confining the application of the bill to the nullification of state acts is put in its most favorable light. Thus to confine the bill, however, overlooks the use of the word "custom." It also disregards the fact that the proviso may not apply to the prohibition, appearing earlier in the same sentence, against any "discrimination in civil rights or immunites among the inhabitants." But, in any event, the "full and equal benefit" provisions of both the Civil Rights and Freedmen's Bureau bills immediately broadened their coverage to include state inaction as well as state action. "Full and equal benefit" of all laws and proceedings for the protection of person and property can in many cases, only be afforded by extending protection to the unprotected rather than withdrawing protection from those who have it. Invasions of civil rights made possible by the failure of the state to supply protection, consequently, fall within the language set forth.

The congressional debates make this point clear. A great deal was said about the infamous Black Codes. They were only less rigorous than the slave codes which they had replaced. Under them, the freedman was socially an outcast, industrially a serf, legally a separate and oppressed class. Slavery, abolished by the organic law of the nation, was in fact revived by these statutes of the states. Knowledge of this was prominently displayed in the Congressional Globe. The Black Codes were read, analyzed, dissected in detail. Their obliteration unquestionably was a specific object of the Freedmen's Bureau and Civil Rights bills. But the senators and representatives also had before them a sizeable body of data bearing on the treatment of the Negro, the loyal White and the Northerner in the South by private individuals and unofficial groups. General Grant's report, in other respects most helpful to the conservatives, was used by the radicals for its declaration that "in some form, the Freedmen's Bureau is an absolute necessity until civil law is established and enforced, securing to the freedmen their rights and full protection." Carl Schurz's report, while conflicting with that of General Grant with respect to many aspects of national policy and conditions in the South, agreed in its emphasis on the need to protect the freedmen both against "oppressive legislation" and "private persecution." Accounts in newspapers north and south, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced to show

that "murder, shootings, whippings, robbing and brutal treatment of every kind," were "daily inflicted" on freedmen and their white friends.[41] Much of this evidence was contested as to its truth, but, true or false, it showed the realm of fact that was within the contemplation of those who framed and put across the Freedmen's Bureau and Civil Rights bills. Moreover, though opponents denied or minimized the facts asserted, they did not contend that the bills in question would not reach such facts if they did exist. Private outrage and atrocity were, equally with the Black Codes, evils which this legislation was designed to correct.

The persistent questions now recur: How was this vast system for the national protection of the civil rights of men "of all races" derived from the Thirteenth Amendment? Could it be sustained by a mere prohibition against "slavery and involuntary servitude?" Are these words of the Amendment of such a character as to accomplish or confirm a revolution in the federal system?

The answers to these questions, abundantly and clearly supplied by the earlier debates over the Thirteenth Amendment, were now again repeated by the sponsors and supporters of the Civil Rights and Freedmen's Bureau bills. Not so however with respect to those who opposed them. Democrats and a fringe of conservative Republicans now switched to a restrictive interpretation of the Thirteenth Amendment. The liberal view of its language which they had adopted in opposing its passage they now rejected as never having been correct. The evil of Negro elevation and equality which they had loudly proclaimed it would bring about they now insisted had not been intended to be achieved by it.

In the third debate over the Thirteenth Amendment, the Democrats and some Republicans took the position, first, that the Amendment merely dissolved the relation of master and slave. Said Senator Edgar Cowan of Pennsylvania, for example, "nobody pretends that it [the Amendment] was to be wider in its operation than to cover the relation which existed between the master and his Negro African slave . . . that particular relation and the breaking of it up, is the subject of the first clause of the Amendment, and it does not extend any further, and cannot by any possible implication, contortion, or straining, be made to go further. . . ." Section two "was intended . . . to give to the Negro the privilege of the habeas corpus; that is, if anybody persisted in the face of the constitutional amendment in holding him as a slave, that he should have an appropriate remedy to be delivered."[42]

To this narrow constructionist argument as to the meaning of "slavery" and its abolition, was added weight from another source, namely, Seward's folly in labeling Section Two of the Amendment, a limitation on rather than a grant of power to Congress.[43] Though the interpretation and the motive

[41] See *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 95, 168, 339, 340, 438, 503.

[42] CONG. GLOBE, 1st Sess., 39th Cong.: Cowan at 499 (Jan. 30, 1866); Saulsbury at 113 (Dec. 21, 1865), 476 (Jan. 29, 1866); Hendricks at 317 (Jan. 19, 1866).

[43] Seward, as Secretary of State, telegraphed the provisional governor of South Carolina, Perry, when the latter objected that Section Two of the Thirteenth Amendment might be con-

behind it were not difficult to explain, in view of Seward's well-known conciliatory and political tendencies to be all things to all men, yet, coming from one with Seward's connections with the administration and former connections with the abolitionist movement, this pronouncement supplied welcome ammunition to the Democrats and reactionaries who resisted all change. It also had an effect upon the radicals. While many of them denounced it as untenable, Thaddeus Stevens accepted it as a statement of administration policy and therefore as showing the necessity for a new amendment.

Still a third basis of the narrow constructionism now expressed by the Democrats and some Republicans related directly to the revolution in federalism brought about by the Thirteenth Amendment if it were held to sustain the Freedmen's Bureau and Civil Rights bills. Those measures, it was clearly recognized, were an exercise of congressional power in the regulation of the civil status of the inhabitants of the states, vested in the United States courts a jurisdiction over property, contracts, and crimes hitherto all but universally conceded to be the exclusive province of the states, and established the national government as the protector of the individual rights against state oppression or against oppression due to state inaction. To many a conservative of that day, unaware of or still resisting the great change that thirty years of abolitionism had wrought and the Civil War had confirmed this "seemed like a complete revelation of the diabolical spirit of centralization, of which only the cloven hoof had been manifested heretofore." "Are we to alter," asked Cowan, "the whole frame and structure of the laws, are we to overturn the whole Constitution in order to get at a remedy for these people?" The Thirteenth Amendment "never was intended to overturn this government and revolutionize all the laws of the states everywhere." "If under color of this constitutional Amendment, we have a right to pass such laws as these," "we have a right to overturn the states themselves completely."[44]

While the opponents of the Freedmen's Bureau and Civil Rights bills, in the third debate over the Thirteenth Amendment, thus precisely reversed their position as to the meaning and effect of the Amendment, sponsors and supporters of the legislation adhered strictly to their earlier expressed doctrines. Senator Trumbull, a principal draftsman both of the Thirteenth Amendment and the Civil Rights Bill, in his speech opening the debate on the latter, described their relationship to each other. The Civil Rights Bill, he said, was "intended to give effect" to the Thirteenth Amendment by securing "to all persons within the United States practical freedom."[45] "Of

strued as authorizing legislation protecting civil rights that his objection was "querulous," that the clause was restrictive in its character. CONG. GLOBE, 1st Sess., 39th Cong. 43 (1865).

[44] CONG. GLOBE, 1st Sess., 39th Cong. (1866); Cowan at 499.

[45] Few of the radicals took the cavalier view of the constitutional problem that Senator Fessenden did. He was very doubtful about the constitutionality of the bureau bill, especially the land purchase provisions. He thought he might in an extreme case go as far as Trumbull and say this was necessary to make the slave free and that Congress could do whatever was necessary for that purpose. "I cannot work the problem out, and nobody else can, to show that in the Constitution itself there is a clear power; but I can work the problem out to show that

what avail," he asked, "was the immortal Declaration" of Independence to the millions of slaves? "Of what avail to the citizens of Massachusetts, who, a few years ago, went to South Carolina to enforce a constitutional right in court, that the Constitution of the United States declared that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states? And of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding states laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?

"It is the intention of this bill to secure those rights." What rights? The natural rights of men specified in the Declaration and the privileges and immunities of citizens under the comity clause. Trumbull implies here and makes plain elsewhere in his speech that these two sources referred to the same rights. How is the protection of these natural rights of men, these privileges and immunities of citizens—as now listed in the Civil Rights Bill—authorized by the Thirteenth Amendment?

Said Trumbull:

> It is difficult, perhaps, to define accurately what slavery is and liberty is. Liberty and slavery are opposite terms; one is opposed to the other. We know that in a civil government, in organized society, no such thing can exist as natural or absolute liberty. Natural liberty is defined to be the—
>
> "Power of acting as one thinks fit, without any restraint or control, unless by the law of nature, being a right inherent in us by birth, and one of the gifts of God to man in his creation, when he imbued him with the faculty of will."
>
> But every man who enters society gives up a part of this natural liberty, which is the liberty of the savage, the liberty which the wild beast has, for the advantages he obtains in the protection which civil government gives him. Civil liberty, or the liberty which a person enjoys in society, is thus defined by Blackstone:
>
> "Civil liberty is not other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public."
>
> That is the liberty to which every citizen is entitled; that is the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States, originally and more especially by the Amendment which has recently been adopted: and in a note to Blackstone's Commentaries it is stated that—
>
> "In this definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit."
>
> Then, sir, I take it that any statute which is not equal to all, and which deprived any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited. We may, perhaps, arrive at a more

---

the power may be found when the positive necessity of the thing is apparent, where the thing must be done, and must be done by the Government as a consequence of other things that it was compelled to do, and that it had a perfect right to do." *Id.* at 366.

correct definition of the term "citizen of the United States" by referring to that clause of the Constitution which I have already quoted, and which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." What rights are secured to the citizens of each State under that provision? Such fundamental rights as belong to every free person.[46]

[46] Many other speeches are to the same effect. Senator John Sherman of Ohio expressed his belief that "it is the duty of Congress to give to the freedmen of the southern States *ample protection in all their natural rights*." The Thirteenth Amendment left "no doubt" of the power of Congress to do so. "Here," he said, "is not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation. Now, unless a man may be free without the right to sue and be sued, to plead and be impleaded, to acquire and hold property, and to testify in the court of justice, then Congress has the power, by the express terms of this amendment, to secure all these rights. To say that a man is a freeman and yet is not able to assert and maintain his right, in a court of justice, is a negation of terms. Therefore the power is expressly given to Congress to secure all their rights of freedom by appropriate legislation. The reason why this power was given is also drawn from the history of a clause of the Constitution," namely, the comity clause, Article 4, Section 2. "There never was any doubt about the construction of this clause of the Constitution —that is, that a man who was recognized as a citizen of one State had the right to go anywhere within the United States and exercise the immunity of a citizen of the United States; but the trouble was in enforcing this constitutional provision." "To avoid this very difficulty, that of a guarantee without a power to enforce it, this second section of the constitutional amendment was adopted, which does give to Congress in clear and express terms the right to secure, by appropriate legislation, to every person within the United States, liberty." CONG. GLOBE, 39th Cong., 1st Sess. 41 (1866).

Senator William Stewart, moderate from Nevada, said, "I am in favor of legislation under the constitutional amendment that shall secure to him [the freedman] a chance to live, a chance to hold property, a chance to be heard in the courts, a chance to enjoy his civil rights, a chance to rise in the scale of humanity, a chance to be a man. . . . We have given him freedom, and that implies that he shall have all the civil rights necessary to the enjoyment of that freedom. The Senator from Illinois has introduced two bills [the Freedmen's Bureau and Civil Rights bills] well and carefully prepared, which if passed by Congress will give full and ample protection under the constitutional amendment to the negro in his civil liberty; and guarantee to him civil rights, to which we are pledged." *Id.* at 298; see similar remarks by Stewart, *id.* at 110, 111, 297, 445.

Senator Henry Wilson of Massachusetts argued . . . "we must see to it that the man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that he can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man, who knows that his cabin, however humble, is protected by the just and equal laws of his country." *Id.* at 111.

Senator Henry S. Lane from Indiana maintained: "They [the negroes] are free by the constitutional amendment lately enacted, and entitled to all the privileges and immunities of other free citizens of the United States. It is made your especial duty by the second section of that amendment, by appropriate legislation to carry out that emancipation. If that second section were not embraced in the amendment at all your duty would be as strong, the duty would be paramount, to protect them in all rights as free and manumitted people. I do not consider that the second section of that amendment does anything but declare what is the duty of Congress, after having passed such an amendment to the Constitution of the United States, to secure them in all their rights and privileges."

"What are the objects sought to be accomplished by this bill? That these freedmen shall be secured in the possession of all the rights, privileges, and immunities of freemen; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment." *Id.* at 602.

See also Trumbull's remarks, *id.* at 322, and Senator Sumner's remarks, *id.* at 91. See Cook, *id.* at 1123.

Martin F. Thayer of Pennsylvania maintained that the constitutional foundation of the Civil Rights Act was to be found in the Thirteenth Amendment, the comity clause and that

Trumbull thus elaborated the natural rights philosophy underlying the Thirteenth Amendment and implementing legislation. While he later points to the black codes as instances of discriminatory state legislation which it is the aim of his bills to prevent, it is plain from this excerpt that he is also thinking of individual action based on custom or prejudice and made possible by the absence of state legislation or other restraint. Accordingly, he argues that in a state of nature all men are free to act as they please, without any restraint, except such as may be imposed by the law of nature. Upon entering society "every man . . . gives up a part of this natural liberty . . . for the advantages he obtains in the protection which the civil government gives him." So liberty or civil liberty is what one gets in society as a result

---

clause "which guarantees to all the citizens of the United States their rights to life, liberty and property." *Id.* at 2464.

Representative James F. Wilson of Iowa, chairman of the House Judiciary Committee, introduced the Civil Rights Bill in the House with even more sweeping constitutional declarations than those of Trumbull in the Senate. He planted the bill squarely upon the Thirteenth Amendment which made "a specific delegation of power to Congress." He argued "A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. Anything which protects him in the possession of these rights insures him against reduction to slavery." But if the bill "in its enlarged operation step out of the bounds of this express delegation of power," Wilson found it constitutional still. He said "if citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family. Whatever these great fundamental rights are, we must be invested with power to legislate for their protection or our Constitution fails in the first and most important office of government." Wilson went on to find that these "great fundamental rights" were the natural rights of men. He defined them with Blackstone and Kent as the right to personal security, personal liberty and private property. "Before our Constitution was formed, the great fundamental rights which I have mentioned, belonged to every person who became a member of our great national family. No one surrendered a jot or tittle of these rights by consenting to the formation of the Government. The entire machinery of government as organized by the Constitution was designed, among other things, to secure a more perfect enjoyment of these rights. A legislative department was created that laws necessary and proper to this end might be enacted. A judicial department was erected to expound and administer the laws. An executive department was formed for the purpose of enforcing and seeing to the execution of these laws. And these several departments of government possess the power to enact, administer, and enforce the laws 'necessary and proper' to secure these rights which existed anterior to the ordination of the Constitution.

"Upon this broad principle I rest my justification of this bill. I assert that we possess the power to do those things which governments are organized to do; that we may protect a citizen of the United States against a violation of his rights by the law of a single State; that by our laws and our courts we may intervene to maintain the proud character of American citizenship; that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States; that the right to exercise this power depends upon no express delegation, but runs with the rights it is designed to protect; that we possess the same latitude in respect to the selection of means through which to exercise this power that belongs to us when a power rests upon express delegation; and that the decisions which support the latter maintain the former." *Id.* at 1118.

Senator Reverdy Johnson of Maryland took a narrower view of the Thirteenth Amendment but believed that the attributes of citizenship could be conferred on the free Negro by authorising him under the judiciary article to sue, contract, be a witness, etc. "If I am right . . . that we can authorize them to sue, authorize them to contract, authorize them to do everything short of voting, it is not because there is anything in the Constitution of the United States that confers the authority to give to a negro the right to contract, but it is because it is a necessary, incidental function of a Government that it should have authority to provide that the rights of everybody within its limits shall be protected, and protected alike." *Id.* at 530.

of governmental restraint on the conduct of others. Without such governmental restraint, that is, without such laws and their enforcement, there is no civil liberty. Hence the absence of laws is a denial or withholding the protection which was the reason for creating or entering civil society. All of this was said so often and so earnestly, not only by Trumbull but by the rest of the sponsors of this combined constitutional and legislative program that it cannot be doubted as the common doctrinal foundation. Constitutional historians, too, have well understood it. The reason it bears repetition and re-emphasis here is that Trumbull and the other sponsors did what constitutional historians have not so well understood; he took the next step of articulating the relationship of this natural rights philosophy to the concept of the equal protection of the laws. "Then, Sir," he said in summing up, "I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited." Civil rights which are "secured to other citizens"—"secured" how? By the only method by which rights can be secured, namely, by supplying protection, by imposing restraints on those who would invade the rights. Hence, "depriviation" or "denial" of laws "not equal to all" will occur just as much by failure to supply the protection or impose the restraints as by black codes imposing special burdens on a selected class.

Emphasizing this same central issue Senator Jacob M. Howard from Michigan, cast the argument in terms of the rights that were denied to slaves. "What is a slave?" A slave, Howard answered after the manner of abolitionists for thirty years preceding, "had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law.... He owned no property, because the law prohibited him. He could not take real or personal estate either by sale, by grant, or by descent, or by inheritance. He did not own the bread he earned and ate. He stood upon the face of the earth completely isolated from the society in which he happened to be; he was nothing but a chattel, subject to the will of his owner, and unprotected in his rights by the law of the state where he happened to live."[47] The opposite of the slave is the free man; the opposite of slavery is liberty. The Thirteenth Amendment's abolition of slavery, therefore, is a declaration "that all persons in the United States should be free." But what is freedom? Freedom is the possession of those rights which were denied to the slave, i.e., natural or civil rights. The Radicals differed as to the length of the list of natural rights but they agreed that it was at least as long as that presented in Section One of the Civil Rights and Section Seven of the Freedmen's Bureau bills. The possession of these rights depends upon protection by government; indeed, so much so, that protection by government is regarded as one of men's civil rights or as a "necessary incident" of men's civil rights. Governments act through laws and hence the protection which governments are instituted to supply must

[47] Cong. Globe, 39th Cong., 1st Sess. 503-504 (1866).

be by laws. Thus the Thirteenth Amendment made all men free, that is, restored civil rights to those who had been deprived of them and entitled them to the protection of the laws—in this case, according to Section Two, the laws of Congress.

William Lawrence, a member of the Ohio delegation, in a carefully worked out speech delivered in the House marked out the foundations of the Civil Rights Bill in even greater detail and comprehensiveness.[48] He argued that "so far as there is any power in the state to limit, enlarge or declare civil rights, all these are left to the states." In this sense, the Civil Rights Act merely provided that "whatever" of the listed civil rights "may be enjoyed by any shall be shared by all citizens in each state." All of this, however, was subject to the "limitation that there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by state constitutions or laws." Thus far, Lawrence is saying that, within the area of its optional operation, if the state acts at all, it must treat everybody alike. But with respect to "the inherent and inalienable rights, pertaining to every citizen" the state must refrain from passing "constitutions and laws" which "abolish or abridge them." The duty of the state, however, does not end with the observance of this negative limitation. Lawrence goes on to add: "There is in this country no such thing as legislative omnipotence. When it is said in state constitutions that 'all legislative power is vested in a Senate and House of Representatives,' authority is not thereby conferred to destroy all that is valuable in citizenship. Legislative powers exist in our system to protect, not to destroy, the inalienable rights of men." In the case of the inalienable rights of men or citizens, then, the obligation of the state is not discharged until it has furnished whatever protection is necessary to maintain those rights, *i.e.*, full or ample protection.

Lawrence then bears down directly on citizenship and its particular rights. The citizenship section of the Civil Rights Act, he said, was declaratory. But even if it weren't, the national government by virtue of its sovereignty and the constitutional section about a rule of uniform naturalization has complete authority over citizenship, including the power to declare what rights appertain to it. Lawrence quotes the Declaration of Independence, the Preamble and the Fifth Amendment to show that three of the rights of citizens are life, liberty and property. "It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and independent of laws and all constitutions." Furthermore, not only are these rights "inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so."

> It is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a con-

[48] *Id.* at 1832.

> tract to secure the privilege and the rewards of labor. It is worse than mockery to say that men may be clothed by the national authority, with the character of citizens, yet may be stripped by state authority of the means by which citizens exist . . . .
>
> Every citizen, therefore, has the absolute right to life, the right to personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.

It is not enough to note that this statement of Lawrence is an explicit articulation of the natural rights philosophy and that in it the natural rights of men are identified also as the rights appertaining to citizenship, important though these facts are in understanding both the significance of the Thirteenth Amendment and the concepts and clauses of the Fourteenth Amendment. Even more significant is the way in which Lawrence ties all this up with the equal protection concept and thus spells out the meaning of that concept. The equal protection requirement is itself a "necessary incident" of men's natural rights and consists of a negative limitation and an affirmative command. Failure of the legislature to supply the protection which it was instituted to supply is a denial of the requirement quite as much as a legislative enactment singling out a particular group for abusive treatment. Lawrence repeats this point over and over again. "Now," he said, "there are two ways in which a state may undertake to deprive citizens of these absolute, inherent and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them."[49]

In the discussion of the scope and nature of the Thirteenth Amendment and the constitutionality of the Freedmen's Bureau bill and Civil Rights bills the role of the idea of equality, it can be seen, again was a dominant one. This results from the close connection between the idea of equality and the idea of governmental protection. In truth, the fact of very great importance is that these two notions often were inseparably intermingled. "I have thought," said Timothy H. Howe, abolitionist Senator from Wisconsin, "that it belonged to republican institutions to carry out, to execute the doctrines of the Declaration of Independence, to make men equal. That they are not equal in social estimation, that they are not equal in mental culture, that they are not equal in physical stature, I know very well; but I have thought the weaker they were the more the government was bound to foster and protect them. If government be designed for the protection of the weak, certainly the weaker men are the more they need its protec-

[49] Again Lawrence said, "If the people of a state should become hostile to a large class of naturalized citizens and should enact laws to prohibit them and no other citizens from making contracts, from suing, from giving evidence, from inheriting, buying, holding, or selling property, or even from coming into the state, that would be prohibitory legislation. If the state should simply enact laws for native born citizens and provide no law under which naturalized citizens could enjoy anyone of these rights, and should deny them all protection by civil process or penal enactments, that would be a denial of justice."

tion."[60] So it is the protection of the laws that makes men equal. Moreover, this was not an attitude confined to the radicals. Senator Edgar Cowan, Pennsylvania conservative, put it thus: "What is meant by equality" is that if a man "is assailed by one stronger than himself the government will protect him to punish the assailant. It means that if a man owes another money the government will provide a means by which the debtor shall be compelled to pay, . . . that if an intruder and trespasser gets upon his land he shall have a remedy to recover it. That is what I understand by equality before the law."[61]

The usual notion of the equal protection of the laws is that it is a comparative concept. The requirement is met if one man has the same right as another. Men are protected equally if all of them are not protected. This comparative view was the one expressed by Senator Henry Wilson of Massachusetts.

He said:

> By the equality of man, we mean that the poorest man, be he black or white . . . is as much entitled to the protection of the law as the richest and proudest man . . . . We mean that the poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the law of the land . . . . That the poor man's cabin though it may be the cabin of a poor freedman in the depths of the Carolinas is entitled to the protection of the same law that protects the palace of a Stewart or an Astor.[62]

The significant thing is that these two conceptions, both identifying equality and governmental protection, but the one stating the equal protection of the laws as a comparative, the other as an absolute right of individuals are basically identical. The first blush impression that they are different arises from a failure to realize that there is a constant and assumed factor in both of them, namely, the obligation of government to supply protection. When Wilson says that the poor man has the same right to protection that the rich man does, he is not saying that the poor man would have no complaint if neither he nor the rich man received protection. He is saying in effect that the rich man has a right to protection; the poor man has a right to protection; they have the same right to protection. Both are entitled, all men are entitled, to the protection of the laws. If some men do not receive it, they are denied the full or the equal protection of the laws. If all men receive the full protection of the laws, they equally receive the protection of the laws or they receive the equal protection of the laws. On the other hand, if men equally receive the protection of the laws, they all receive the full protection of the laws since it is assumed that the protection of the laws will always be supplied in some form and to most people. In this context, the "equal" protection of the laws and the "full" protection of the laws are virtually synonyms. The use of both words, "full" and "equal" in the Freedmen's Bureau and Civil Rights bills is thus highly

[60] Cong. Globe, 38th Cong., 1st Sess. 498 (1864).
[61] *Id.* at 342.
[62] *Id.* at 343.

significant. Elsewhere, throughout the discussion and in other bills, these words are used sometimes together, sometimes alternatively, but always redundantly or interchangeably.

The equal protection of the laws, then, as an integral part of the social compact-natural rights doctrine, and as nourished, matured and understood by the abolitionists, was far from the simple command of comparative treatment that courts and later generations have made it. Freemen, all men, were entitled to have their natural rights protected by government. Indeed, it was for that purpose and that purpose only that men entered society and formed governments. Once slavery was abolished, the legal pretense for withholding the protection of the laws from some people was at an end. Those people, too, must then be protected fully, equally. The equal protection of the laws, is thus a command for the full or ample protection of the laws. It is basically an affirmative command to supply the protection of the laws. This is its primary character. Its negative on governmental action is secondary and almost incidental. In the words of Senator Yates' resolution, it is a command that all persons "shall be protected in the full and equal enjoyment of all their civil . . . rights."[58] This view makes intelligible Trumbull's otherwise odd statement that "any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty, and is in fact, a badge of servitude which, by the Constitution, is prohibited."

In a revealing impromptu speech on December 19, 1865, Senator Trumbull summed up the essential features of the Thirteenth Amendment and his purpose in sponsoring the Freedmen's Bureau Bill:

> I desire to give notice that I shall to-morrow, or on some early day thereafter, ask leave to introduce a bill to enlarge the powers of the Freedmen's Bureau so as to secure freedom to all persons within the United States, and protect every individual in the full enjoyment of the rights of person and property and furnish him with means for their vindication. In giving this notice I desire to say that it is given in view of the adoption of the constitutional amendment abolishing slavery. I have never doubted that, on the adoption of that amendment it would be competent for Congress to protect every person in the United States in all the rights of person and property belonging to the free citizen; and to secure these rights is the object of the bill which I propose to introduce. I think it important that action should be taken on this subject at an early day for the purpose of quieting apprehensions in the minds of many friends of freedom lest by local legislation or a prevailing public sentiment in some of the States persons of the African race should continue to be oppressed and in fact deprived of their freedom, and for the purpose also of showing to those among whom slavery has heretofore existed that unless by local legislation they provide for the real freedom of their former slaves, the federal government will, by virtue of its own authority, see that they are fully protected.
>
> The bill which I desire to introduce is intended to accomplish these ob-

[58] Cong. Globe, 39th Cong., 1st Sess. 472 (1866), Senator Richard Yates, Illinois (Jan. 29, 1866).

> jects. I hope there may be no necessity for enforcing such a bill in any part of the Union; but I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the states and local authorities, by legislation or otherwise, deny these rights, it is incumbent on us to see that they are secured.[54]

This casual utterance, is a clear-cut expression of the state's affirmative duty to protect as well as its negative obligation not to pass discriminatory legislation, of the authority of Congress to protect Negroes against individual invasions of their new-found freedom and civil rights when the inaction of the state or its failure to supply protection make such invasions possible, and of the Thirteenth Amendment as the constitutional foundation upon which this radical redistribution of power rested. Trumbull speaks of securing freedom to all persons and protecting every individual in "the full enjoyment of the rights of persons and property" and the means of their vindication. Later it is plain he is thinking entirely of blacks and is using these universal words simply because he is intent on raising the blacks to the standard of the whites. The use of the universal words thus has a significance inextricably intertwined with the idea of equality. "Full enjoyment of the rights of persons and property" and the means of their vindication is the "equal" enjoyment of these rights. That enjoyment on the part of the recently freed Negroes was rendered far less than full or equal by legislative enactments, such as the Black Codes, prohibitory in their nature which singled out the Negro for separate and abusive treatment. These accordingly fell within the ban of the Amendment and of congressional power. "Full enjoyment of the rights of persons and property" was less than a reality also by reason of "a prevailing public sentiment in some of the States;" that is to say, that by reason of the deep-rooted prejudices and attitudes toward the Negro translated into private action and community pressure, "persons of the African race continue to be oppressed and in fact deprived of their freedom." So these, too, are within the ban of the Amendment and within the reach of congressional power under it. Not however as an original matter. The primary duty of protection is still with the states. It is only when acting they act discriminatorily or when not acting they fail to supply protection against private inroads the federal power springs into life. The Southerners are accordingly told that "unless by local legislation they provide for the real freedom of their former slaves, the federal government will by virtue of its own authority see that they are fully protected." So "full enjoyment of the right of person and property" is the same as "equal enjoyment" of those rights; and the "full enjoyment" of such rights depend upon (1) the absence of discriminatory state legislative or other official action and (2) the presence of adequate affirmative protection

[54] Cong. Globe, 39th Cong., 1st Sess. 472 (1866), Senator Richard Yates, Illinois (Jan. 29, 1866).

to prevent or cope with individual invasions. This then is equal protection. At the very foundation of the system constructed out of the Thirteenth Amendment and the Freedmen's Bureau and Civil Rights Bills is an idea of "equal protection" as far flung as the problem of human rights and as substantive as any guarantee of those absolute rights could well be.

The striking thing then about the Thirteenth Amendement is that it was intended by its drafters and sponsors as a consummation to abolitionism in the broad sense in which thirty years of agitation and organized activity had defined that movement. The Amendment was seen by its drafters and sponsors as doing the whole job—not just cutting loose the fetters which bound the physical person of the slave; but restoring to him his natural, inalienable and civil rights; or what was the same thing in other words, guaranteeing to him the privileges and immunities of citizens of the United States. Slavery and liberty were contradictory and mutually exclusive states. If slavery were abolished then liberty must exist. But liberty in society, civil liberty, consists of natural liberty as restrained by human laws protecting all men in their antecedent rights and being both general and equal. Nor, carrying out this well articulated major premise and the diplomacy of the Fathers in 1787 was any word of caste or color used in the Amendment. And so within its ambit is the power "to secure freedom to all persons and protect every individual in the full enjoyment of person and property and the means of their vindication." Thus underlying the narrow words of the Amendment and imported by them into the Constitution are the theories of Locke, the Declaration of Independence, the Declaration of Rights in the state constitutions and the fundamental principles of the common law. This was the effect of a prohibition of slavery and involuntary servitude; and a grant of power to Congress to enforce it by appropriate legislation designated the agency and imposed the responsibility for the protection of the rights thus nationalized.[55]

V.

The one point upon which historians of the Fourteenth Amendment all agree, and indeed, which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and Civil Rights bills, particularly the latter, beyond doubt.[56]

[55] Three of the Justices of the Supreme Court, in opinions delivered at circuit before the post bellum reaction and counterrevolution had set in, took this broad view of the Thirteenth Amendment and concluded that the Civil Rights Act was constitutional under it: Justice Swayne in United States v. Rhodes, 1 Abb. 28 (U. S. 1866); Chief Justice Chase in Matter of Elizabeth Turner, 1 Abb. 84 (U. S. 1867); Justice Bradley in United States v. Cruikshank, 1 Woods 308, 318 (U. S. 1874). The *Rhodes* case involved the right of a Negress to testify against a white man in the courts of Kentucky, denied by the laws of that state. In the *Turner* case, the Chief Justice struck down under the "full and equal benefit of all laws" provision of the Civil Rights Act, a Maryland system for apprenticing freed Negro children to their former masters under conditions more rigorous than those applied to other apprentices. See also Smith v. Moody, 26 Ind. 299, 306 (1866); People v. Washington, 36 Cal. 658 (1869); *cf.* Bowlin v. Commonwealth, 2 Bush 5 (Kentucky 1867).

[56] Flack, The Adoption of the Fourteenth Amendment (1908); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949); Warsoff, Equality and the Law (1938).

The principal source and nature of the doubt have already been indicated in the discussion of the third debate over the Thirteenth Amendment. The doubt related to the capacity of the Thirteenth Amendment to sustain this far-reaching legislative program. The Thirteenth Amendment, it had been argued, was designed merely to free the slave from personal bondage. Section Two restricted rather than enlarged its scope. And, in any event, the amendment could not be construed as destroying or seriously modifying the federal system as it existed hitherto. Primarily these arguments were raised by those who were basically opposed to the Civil Rights and Freedmen's Bureau bills. But the impetus thus given a new amendment was augmented by other doubts entertained by some of the staunchest friends of the legislation. From the very beginning of the Thirty-ninth Congress, there were those who felt that the rights secured in the Civil Rights and Freedmen's Bureau bills, especially as they applied to the Negro, should be placed beyond the power of shifting congressional majorities. This group did not question the program by which the rights of individuals were nationalized, by which the jurisdiction of the states was ousted if not properly exercised and that of Congress and the Federal courts instituted. They felt that this program should be made an inescapable obligation of the whole federal government—not merely a discretionary alternative of Congress—by fixing it in the Constitution itself. This idea, well defined at the beginning of the Thirty-ninth Congress among the radicals, gradually spread and became the conviction of the overwhelming majority of all Republicans, radicals and conservatives alike.

Thus the Thirteenth Amendment played an important part in the evolution of the Fourteenth Amendment, not as universalizing freedom which the Fourteenth Amendment presupposes, or as the first step in a comprehensive two or three step plan, but because, after its passage, doubts about its adequacy became so serious as to make it seem advisable to try to do the same job all over again by another amendment. And the character of the doubts, the existence of which gave rise to the new amendment and which that amendment was intended to remove, tell much about the meaning of the new amendment. The statutory plan which the Fourteenth Amendment was to place beyond all constitutional doubt and the substantive provisions of which it was to incorporate was intended "to protect every individual in the full enjoyment of the rights of person and property." That statutory plan did supply the means of vindicating those rights through the instrumentalities of the federal government. It did intrude the federal government between the state and its inhabitants. It did constitute the federal government the protector of the civil, i.e. the natural rights of the individual. It did interfere with the states' right to determine disputes relating to property, contracts and crimes. It did "revolutionize the laws of the states everywhere." It did overturn the pre-existing division of powers between the state and the central government. All of these things can be read in the words of the Civil Rights bills. Their presence there, can be amply confirmed by resorting to the intentions of the framers, the circumstances which brought

the act forth, the historical experience which the act was designed to culminate and embody. The fact that the new amendment was written and passed, at the very least, to make certain that that statutory plan was constitutional, to remove doubts about the adequacy of the Thirteenth Amendment to sustain it, and to place its substantive provisions in the Constitution itself, should place the minimum capacity of the new amendment beyond controversy.

VI.

The anti-slavery backgrounds of the Civil War amendments are conceded by all. The nature of those backgrounds, however, have been almost entirely forgotten.

In its bearing on the Constitution and the Civil War amendments, the anti-slavery movement must be viewed, first, as a great historic experience in the national life of the United States. The Civil War amendments were the culmination and embodiment of that experience. As such, their meaning is to be gathered from the comprehensive goals of the abolitionist crusade, from the abrogation of the natural rights of men, bond and free, black and white, which were the active causes of that crusade, from the unmistakable nationalistic implications of the abolitionist movement, and from the constitutional theory which the abolitionists evolved to fit those goals, causes and implications. Read in this way, the Thirteenth and Fourteenth Amendments can only be taken to assure national constitutional and governmental protection of men in their natural rights or of citizens in their privileges and immunities fully and equally and regardless of federal principles—natural rights which accordingly government could never allow to be abrogated by others and could itself abrogate only when forfeited by crime proved by established legal procedures.

The anti-slavery origins of the Civil War amendments may be viewed, second, in a far narrower framework: in the limited context of the immediate political and legislative history—say 1861 to 1866—which encompassed the actual translation of crusading goal into constitutional amendment, of abstract doctrine into concrete enactment. The short range history and the limited context show the manner in which the translation was made and confirm and repeat conclusions derived from the long range history and the broad context.

The Republican Party, operating through its eventual control of Congress, propelled by an internal machine made up of radicals and downright abolitionists, moving forward under a platform whose anti-slavery constitutional principles and statements were directly traceable through Giddings and Chase to organized abolitionist origins—having achieved political power and capitalizing on the outcome of the Civil War carried through a combined constitutional and legislative program consisting of the Thirteenth Amendment, the Freedmen's Bureau and Civil Rights bills, and the Fourteenth Amendment. In doing so, they employed the constitutional ideas, the very concepts and clauses which, a quarter of a century earlier,

had been evolved by Birney and Weld, Stanton and Wright, Stewart and Tiffany, Goodell, Gerrit Smith, Chase and Olcott.

The Thirteenth Amendment nationalized the right of freedom. It thereby nationalized the equal right of all to enjoy protection in those natural rights which constitute that freedom. The Freedmen's Bureau Bill and the Civil Rights Act supplied national government protection to the rights of contract, of property, of the equal protection of the courts and of the "full and equal benefit of all laws for the security of person and property." These two measures were legislative implementations of the Thirteenth Amendment as authorized by its second section. The Fourteenth Amendment reenacted the Thirteenth Amendment and made the program of legislation designed to implement it constitutionally secure or a part of the Constitution. The Fourteenth Amendment added again, as the Thirteenth Amendment had done earlier, a power and duty of congressional enforcement. The national protection of men in their natural rights or of citizens in their privileges and immunities which was the basic idea of this whole repeatedly reenacted program—expressed in its language, reiterated in the debates upon it, emphasized in the circumstances which brought it forth stage by stage, and made inevitable by the historic experience and movement which it culminated and embodied—extended to individuals without regard to the private or governmental character of the violator and was both constitutional and congressional.

APPENDIX G

Federal Food, Drug, and Cosmetic Act.
Federal Firearms Act.
Federal Hazardous Substances Labeling Act.
Federal Power Act.
Federal Trade Commission Act.
Federal Water Pollution Control Act.
Fur Products Labeling Act.
Hot-Oil Act.
Interstate Commerce Act.
Investment Company Act of 1940.
Labor-Management Relations Act, 1947.
Labor-Management Reporting and Disclosure Act of 1959.
Meat Inspection Acts.
Narcotics Manufacturing Act of 1960.
Natural Gas Act.
Plant Quarantine Act.
Poultry Products Inspection Act.
Securities Act of 1933.
Securities Exchange Act of 1934.
Sherman Act.
Tobacco Inspection Act.
Trust Indenture Act of 1939.
United States Cotton Standards Act.
United States Grain Standards Act.
Work Hours Act of 1962.
Anti-Rebate Act (Railroads).
Atomic Energy Act.
Automobile Information Disclosure Act.
Boiler Inspection Acts (Railroads).
Clayton Act.
Communications Act.
Fair Labor Standards Act.
False Branding and Marketing Act.
Federal Coal Mine Safety Act.
Federal Explosives Act.

O

Copy 2

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

1580

HEARINGS

BEFORE THE

COMMITTEE ON COMMERCE
UNITED STATES SENATE

EIGHTY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 1732

A BILL TO ELIMINATE DISCRIMINATION IN PUBLIC ACCOMMODATIONS AFFECTING INTERSTATE COMMERCE

PART 1

JULY 1, 2, 3, 8, 9, 10, 11, 12, 15 16, 17, 18, and 22, 1963

Serial 26

Printed for the use of the Committee on Commerce

U.S. GOVERNMENT PRINTING OFFICE

91-544 WASHINGTON : 1963

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C., 20402 - Price $2

COMMITTEE ON COMMERCE

WARREN G. MAGNUSON, Washington, *Chairman*

JOHN O. PASTORE, Rhode Island
A. S. MIKE MONRONEY, Oklahoma
STROM THURMOND, South Carolina
FRANK J. LAUSCHE, Ohio
RALPH YARBOROUGH, Texas
CLAIR ENGLE, California
E. L. BARTLETT, Alaska
VANCE HARTKE, Indiana
GALE W. McGEE, Wyoming
PHILIP A. HART, Michigan
HOWARD W. CANNON, Nevada

NORRIS COTTON, New Hampshire
THRUSTON B. MORTON, Kentucky
HUGH SCOTT, Pennsylvania
WINSTON L. PROUTY, Vermont
J. GLENN BEALL, Maryland

EDWARD JARRETT, *Chief Clerk*
RALPH W. HORTON, *Assistant Chief Clerk*
GERALD B. GAINSTEIN, *Chief Counsel*
JEREMIAH J. KENNEY, Jr., *Assistant Chief Counsel*

CONTENTS

Pages 1–686 are contained in part 1 of these hearings.
Pages 687–1524 are contained in part 2.

ALPHABETICAL LIST OF WITNESSES AND DATE OF APPEARANCE

U.S. SENATORS, GOVERNORS, AND PROFESSORS OF LAW

STATEMENTS SUBMITTED FOR THE RECORD

COMMUNICATIONS RECEIVED FOR THE RECORD

APPENDIXES

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

MONDAY, JULY 1, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee convened at 10 a.m., in room 318, Old Senate Office Building, Hon. Warren G. Magnuson, chairman of the committee, presiding.

The CHAIRMAN. The committee will come to order.

We begin this morning public deliberations on the most important and sensitive bill that has been referred to this committee in many years, S. 1732, the Interstate Public Accommodations Act of 1963. The eyes of a Nation and the world, with sometimes conflicting opinions, are on us, and I for one am painfully aware of the too-long deferred responsibility that we confront.

The chairman has already made known his views as a cosponsor along with seven other committee members. I will not repeat those views here.

There are, we know, differences among us—some not as to ultimate goals but as to the appropriate public policies for getting to these goals. These very differences will produce a final record clarifying the constitutional powers of Congress to act in this field, the role of the States, the rights and obligations of privately owned public facilities, and the rights of all citizens to equal treatment in public accommodations.

What should be known now is the care, deliberation, and promptness that we intend the committee should employ. It is planned to continue hearings the full week beginning July 8, and the full week beginning July 15. If additional time is needed, sessions will be scheduled for the week beginning July 22. At the same time as hearings are running, the committee has asked practicing lawyers and legal scholars on a nationwide basis to contribute briefs and opinions on the bill and its various sections. When hearings have been concluded, the committee will immediately begin markup and executive session consideration. No effort will be spared to bring this work to a proper and prompt conclusion.

In the last few days, 2 States—Kentucky and Delaware—have joined 30 other States and the District of Columbia in adopting laws against discrimination in public accommodations. This still leaves a substantial number of States and a substantial number of people without this affirmative protection.

[1] Professional staff counsel assigned to this hearing: Gerald B. Grinstein.

(The bill and amendments follow:)

[S. 1732, 88th Cong., 1st sess.]

A BILL To eliminate discrimination in public accommodations affecting interstate commerce

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Interstate Public Accommodations Act of 1963."

FINDINGS

SEC. 2. (a) The American people have become increasingly mobile during the last generation, and millions of American citizens travel each year from State to State by rail, air, bus, automobile, and other means. A substantial number of such travelers are members of minority racial and religious groups. These citizens, particularly Negroes, are subjected in many places to discrimination and segregation, and they are frequently unable to obtain the goods and services available to other interstate travelers.

(b) Negroes and members of other minority groups who travel interstate are frequently unable to obtain adequate lodging accommodations during their travels, with the result that they may be compelled to stay at hotels or motels of poor and inferior quality, travel great distances from their normal routes to find adequate accommodations, or make detailed arrangements for lodging far in advance of scheduled interstate travel.

(c) Negroes and members of other minority groups who travel interstate are frequently unable to obtain adequate food service at convenient places along their routes, with the result that many are dissuaded from traveling interstate, while others must travel considerable distances from their intended routes in order to obtain adequate food service.

(d) Goods, services, and persons in the amusement and entertainment industries commonly move in interstate commerce, and the entire American people benefit from the increased cultural and recreational opportunities afforded thereby. Practices of audience discrimination and segregation artificially restrict the number of persons to whom the interstate amusement and entertainment industries may offer their goods and services. The burdens imposed on interstate commerce by such practices and the obstructions to the free flow of commerce which result therefrom are serious and substantial.

(e) Retail establishments in all States of the Union purchase a wide variety and a large volume of goods from business concerns located in other States and in foreign nations. Discriminatory practices in such establishments, which in some instances have led to the withholding of patronage by those affected by such practices, inhibit and restrict the normal distribution of goods in the interstate market.

(f) Fraternal, religious, scientific, and other organizations engaged in interstate operations are frequently dissuaded from holding conventions in cities which they would otherwise select because the public facilities in such cities are either not open to all members of racial or religious minority groups or are available only on a segregated basis.

(g) Business organizations are frequently hampered in obtaining the services of skilled workers and persons in the professions who are likely to encounter discrimination based on race, creed, color, or national origin in restaurants, retail stores, and places of amusement in the area where their services are needed. Business organizations which seek to avoid subjecting their employees to such discrimination and to avoid the strife resulting therefrom are restricted in the choice of location for their offices and plants. Such discrimination thus reduces the mobility of the national labor force and prevents the most effective allocation of national resources, including the interstate movement of industries, particularly in some of the areas of the Nation most in need of industrial and commercial expansion and development.

(h) The discriminatory practices described above are in all cases encouraged, fostered, or tolerated in some degree by the governmental authorities of the States in which they occur, which license or protect the businesses involved by means of laws and ordinances and the activities of their executive and judicial officers. Such discriminatory practices, particularly when their cumulative effect throughout the Nation is considered, take on the character of action by the States and therefore fall within the ambit of the equal protection clause of the fourteenth amendment to the Constitution of the United States.

(1) The burdens on and obstructions to commerce which are described above can best be removed by invoking the powers of Congress under the fourteenth amendment and the commerce clause of the Constitution of the United States to prohibit discrimination based on race, color, religion, or national origin in certain public establishments.

RIGHT TO NONDISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

SEC. 3. (a) All persons shall be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the following public establishments:

(1) any hotel, motel, or other public place engaged in furnishing lodging to transient guests, including guests from other States or traveling in interstate commerce;

(2) any motion picture house, theater, sports arena, stadium, exhibition hall, or other public place of amusement or entertainment which customarily presents motion pictures, performing groups, athletic teams, exhibitions, or other sources of entertainment which move in interstate commerce; and

(3) any retail shop, department store, market, drugstore, gasoline station, or other public place which keeps goods for sale, any restaurant, lunchroom, lunch counter, soda fountain, or other public place engaged in selling food for consumption on the premises, and any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire, if—

(i) the goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers.

(ii) a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce.

(iii) the activities or operations of such place or establishment otherwise substantially affect interstate travel or the interstate movement of goods in commerce, or

(iv) such place or establishment is an integral part of an establishment included under this subsection.

For the purpose of this subsection, the term "integral part" means physically located on the premises occupied by an establishment, or located contiguous to such premises and owned, operated, or controlled, directly or indirectly, by or for the benefit of, or leased from the persons or business entities which own, operate or control an establishment.

(b) The provisions of this Act shall not apply to a bona fide private club or other establishment not open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (a).

PROHIBITION AGAINST DENIAL OR INTERFERENCE WITH THE RIGHT TO NONDISCRIMINATION

SEC. 4. No person, whether acting under color of law or otherwise, shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 3, or (b) interfere or attempt to interfere with any right or privilege secured by section 3, or (c) intimidate, threaten, or coerce any person with a purpose of interfering with any right or privilege secured by section 3, or (d) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 3, or (e) incite or aid or abet any person to do any of the foregoing.

CIVIL ACTION FOR PREVENTIVE RELIEF

SEC. 5. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 4, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted (1) by the person aggrieved, or (2) by the Attorney General for or in the name of the United States if he certifies that he has received a written complaint from the person aggrieved and that in his judgment (i) the person aggrieved is unable to initiate and maintain appropriate legal proceedings and

(ii) the purposes of this Act will be materially furthered by the filing of an action.

(b) In any action commenced pursuant to this Act by the person aggrieved, he shall if he prevails, be allowed a reasonable attorney's fee as part of the costs.

(c) A person shall be deemed unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person is unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or when there is reason to believe that the institution of such litigation by him would jeopardize the employment or economic standing of, or might result in injury or economic damage to, such person, his family, or his property.

(d) In case of any complaint received by the Attorney General alleging a violation of section 4 in any jurisdiction where State or local laws or regulations appear to him to forbid the act or practice involved, the Attorney General shall notify the appropriate State and local officials and, upon request, afford them a reasonable time to act under such State or local laws or regulations before he institutes an action. Compliance with the foregoing sentence shall not be required if the Attorney General shall file with the court a certificate that the delay consequent upon such compliance in the particular case would adversely affect the interests of the United States, or that, in the particular case, compliance would be fruitless.

(e) In any case of a complaint received by the Attorney General, including a case within the scope of subsection (d), the Attorney General shall, before instituting an action, utilize the services of any Federal agency or instrumentality which may be available to attempt to secure compliance with section 4 by voluntary procedures, if in his judgment such procedures are likely to be effective in the circumstances.

JURISDICTION

SEC. 6. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this Act and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) This Act shall not preclude any individual or any State or local agency from pursuing any remedy that may be available under any Federal or State law, including any State statute or ordinance requiring nondiscrimination in public establishments or accommodations.

[S. 1732, 88th Cong., 1st sess.]

AMENDMENTS (in the nature of a substitute) Intended to be proposed by Mr. DIRKSEN to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, viz: Strike out all after the enacting clause and insert the following:

That this Act may be cited as the "Public Accommodations Conciliation Act of 1963".

TITLE I—PUBLIC SERVICES AND ACCOMMODATIONS PROVIDED BY PRIVATE ESTABLISHMENTS

SEC. 101. (a) The Congress hereby finds and declares that, except with respect to services and accommodations provided by public utilities and common carriers, the denial to any person, because of race, color, religion, or national origin, of free and full access to the public services and accommodations provided by private establishments, when done within the discretion of the owners and operators thereof and not under compulsion of State and local laws, is legal and consonant with the right of private property, but nevertheless is not in keeping with the concept and spirit of equality of rights, privileges, and opportunity.

(b) The Congress hereby applauds the owners and operators of private establishments providing public services and accommodations who have never instituted, or who have abandoned, practices which discriminate against persons because of race, color, religion, or national origin, and urges that the owners and operators of private establishments providing public services and accommodations who still pursue such discriminatory practices to discontinue them.

SEC. 102. Any person or group of persons who, because of race, color, religion, or national origin, are denied full equality of access to the public services and accommodations provided by any private establishment may file a complaint with the Community Relations Service established by title II of this Act. For purposes of this title, the public services and accommodations provided by private establishments include, but are not limited to, those services and accommodations provided by any privately owned and operated hotel, motel, restaurant, theater, sports arena, stadium, amusement hall, lunch counter, snackbar, or club (other than a private club which caters only to members and their guests).

SEC. 103. (a) Each complaint filed under section 102 shall be in writing, shall be under oath, and shall recite in reasonable detail the facts and circumstances concerning the discriminatory practices causing the denial of full equality of access which is the subject of such complaint.

(b) The Service is authorized to make a full investigation of any complaint filed under section 102 and shall hold such hearings with respect thereto as may be necessary. The Service shall conduct all hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint.

SEC. 104. If the Service finds as a result of its investigation of any complaint filed under section 102 that any person or group of persons are, because of race, color, religion, or national origin, being denied full equality of access to any public service or accommodation provided by any private establishment, the Service shall endeavor to bring about a discontinuance of the discriminatory practices causing such denial.

TITLE II—ESTABLISHMENT OF COMMUNITY RELATIONS SERVICE

SEC. 201. There is hereby established a Community Relations Service (hereinafter referred to as the "Service"), which shall be headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall receive compensation at a rate of $20,000 per year. The Director is authorized to appoint such additional officers and employees as he deems necessary to carry out the purposes of this title.

SEC. 202. (a) It shall be the function of the Service to provide conciliation assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce. The Service may offer its services in cases of such disputes, disagreements, or difficulties whenever in its judgment peaceful relations among the citizens of the community involved are threatened thereby, and it may offer its services either upon its own motion or upon the request of an appropriate local official or other interested person.

(b) It shall also be the function of the Service, whenever it finds that discriminatory practices exist as a general custom throughout a community which deny to any person or group of persons, because of race, color, religion, or national origin, the full equality of access to any public services and accommodations described in section 102 of this Act, to provide conciliation assistance in an endeavor to bring about communitywide agreements for the discontinuance of such discriminatory practices.

SEC. 203. (a) The Service shall, whenever possible in performing its functions under this title, seek and utilize the cooperation of the appropriate State or local agencies and may seek and utilize the cooperation of any nonpublic agency which it believes may be helpful.

(b) The activities of all officers and employees of the Service in providing conciliation assistance under this title shall be conducted in confidence and without publicity, and the Service shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held. No officer or employee of the Service shall engage in the performance of investigative or prosecuting functions for any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service.

SEC. 204. Subject to the provisions of sections 103(b) and 203(b), the Director shall, on or before January 31 of each year, submit to the Congress a report of the activities of the Service during the preceding fiscal year. Such report shall also contain information with respect to the internal administration of the Service and may contain recommendations for legislation necessary for improvements in such internal administration. Such report may also contain recom-

mendations of the Service for training or retraining programs to increase the employment opportunities for individuals whose skills make it difficult for them to secure and retain satisfactory employment on a full-time basis.

SEC. 205. There are authorized to be appropriated such sums as may be necessary to enable the Service to carry out its functions under this title and title I of this Act.

Amend the title so as to read: "A bill to establish a Community Relations Service to assist in securing full access by all persons, without regard to race, color, religion, or national origin, to the public services and accommodations provided by private establishments, and to provide conciliation assistance to communities in resolving certain disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin."

[S. 1732, 88th Cong., 1st sess.]

AMENDMENTS Intended to be proposed by Mr. GOLDWATER to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, viz:

On page 7, line 21, after the comma, insert the following: "or that any labor organization has engaged or there are reasonable grounds to believe that any labor organization is about to engage in any act or practice in violation of the rights guaranteed in section 101 of the Labor-Management Reporting and Disclosure Act of 1959,".

On page 9, following section 6, add the following new section:

"BARGAINING RIGHTS OF LABOR ORGANIZATIONS WITH EXCLUSIONARY MEMBERSHIP POLICIES

"SEC. 7. Section 9(a) of the National Labor Relations Act, as amended, is amended by inserting before the period at the end thereof a colon, and the following: '*Provided further*, That no labor organization which does not admit to membership all of the employees it seeks to represent in a unit appropriate for that purpose, on the same terms and conditions generally and uniformly applicable to and with the same rights and privileges generally and uniformly accorded to all members thereof, shall be the exclusive representative of employees in such unit for the purpose of collective bargaining within the meaning of this section. Nothing in the foregoing sentence shall be construed to prevent a labor organization from denying membership to any person on the ground that such person is a member of the Communist Party or of an organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods'."

[S. 1732, 88th Cong., 1st sess.]

AMENDMENT Intended to be proposed by Mr. KEATING to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, viz:

On page 7, line 7, between lines 3 and 4, insert the following new subsection:

(c) The enumeration of any public establishment listed in clause (1), (2), or (3) of subsection (a) shall not be construed to exclude the application of such subsection to any other public establishment not listed in such clause which is similar to such enumerated establishment.

[S. 1732, 88th Cong., 1st sess.]

AMENDMENTS Intended to be proposed by Mr. KEATING to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, viz:

On page 7, line 7, immediately after "(a)", insert the following: "directly or indirectly publish, circulate, issue, display, post, or mail any notice, advertise-

ment, or written or printed communication, to the effect that any of the goods, services, facilities, privileges, advantages, or accommodations of any public establishment to which the provisions of section 3 apply shall be refused, withheld from, or denied to any person on account of race, color, religion, or national origin, or (b)".

Redesignate "(b)", "(c)", "(d)", and "(e)" in section 4 as "(c)", "(d)", "(e)", and "(f)", respectively.

[S. 1732, 88th Cong., 1st sess.]

AMENDMENTS Intended to be proposed by Mr. KEATING to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, viz:

On page 7, between lines 16 and 17, insert the following new section:

"DISCRIMINATION UNDER COLOR OF LAW PROHIBITED

"SEC. 5. No person acting under color of any law, statute, ordinance, regulation, custom, or usage shall in the operation of any public establishment, including but not limited to, any hotel, motel, or other public place engaged in furnishing lodging to transients, guests, or any motion picture house, theater, sports arena, stadium, exhibition hall, or other public place of amusement or entertainment, or any retail shop, department store, market, drugstore, gasoline station, or other public place which keeps goods for sale, or any restaurant, lunchroom, lunch counter, soda fountain, or other public place engaged in selling food for consumption on the premises, or any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire, shall directly or indirectly publish, circulate, issue, display, post, or mail any notice, advertisement, or written or printed communication to the effect that any of the goods, services, facilities, privileges, advantages, or accommodations of such public establishment shall be refused, withheld from, or denied to any person on account of race, color, religion, or national origin, or withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, or interfere or attempt to interfere, or intimidate, threaten, or coerce any person with a purpose of interfering with, or punish or attempt to punish any person, or incite or aid or abet any person, to segregate or otherwise discriminate against customers on account of their race, color, religion, or national origin."

Redesignate sections 5 and 6 as sections 6 and 7 respectively.

On page 7, line 21, insert after the comma the words "or section 5".

On page 8, line 20, insert after the number "4", the words "or section 5".

On page 9, line 12, insert after the number "4", the words "or section 5".

(The department and agency comments follow:)

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, July 29, 1963.

B-104297.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: We refer again to your letter of June 26, 1963, in which you asked for our comments on S. 1732.

S. 1732, introduced as part of the President's civil rights program, aims at preventing racial and religious discrimination in public accommodations in or affecting interstate commerce. The bill authorizes civil actions for preventive relief by the aggrieved parties, or by the Attorney General in the name of the United States, and also, prior to the institution of such actions, provides for procedures to seek voluntary compliance with the nondiscrimination prohibitions of section IV.

S. 1732, if enacted, would not directly affect the functions and operations of the General Accounting Office and we have no objection to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, July 29, 1963.

B-104297.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: In your letter of June 27, 1963, you asked for our comment on the amendments to S. 1732 (in the nature of a substitute), introduced by Senator Dirksen on June 26, 1963. The proposed amendments would substitute for the public accommodations bill contained in S. 1732 as originally introduced provisions relating to and establishing a Community Relations Service similar to that proposed in title IV of S. 1731, the administration's package bill on civil rights.

This proposal would not directly affect the functions and operations of our Office, and we have no objection to its favorable consideration by your committee. We suggest that there be considered the inclusion of the words "subject to civil service and classification laws" after the word "appoint" at the end of line 8, page 4 of the bill.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, July 29, 1963.

B-104297.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: We refer again to your letter of July 17, 1963, in which you asked for our comment on the amendment to S. 1732 introduced by Senator Goldwater on July 16, 1963.

This proposal represents that part of the President's civil rights program relating to discrimination in places of public accommodations. Senator Goldwater's amendment would permit injunctive relief against a labor union which engages in or is about to engage in violation of the rights guaranteed in section 101 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411. The amendment would also add a new section 7 to S. 1732 whose effect would be to deny exclusive bargaining power to a labor union which maintains exclusionary membership policies.

These amendments, if enacted, would not affect the functions and operations of our Office, and we have no objection to their favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 8, 1963.

B-104297.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: In your letter of July 23, 1963, you requested our comment on an amendment (No. 135) to S. 1732, intended to be proposed by Senator Keating.

The proposed amendment would insert in section 4 of S. 1732 a provision which would prohibit the direct or indirect publishing, circulation, display of any notice, advertisement, or written or printed communication to the effect that any of the goods, services, facilities, privileges, advantages, or accommodations of any public establishment to which the provisions of section 3 of the bill apply shall be refused, withheld from, or denied to any person on account of race, color, religion, or national origin.

The proposed amendment would not affect the functions and operations of the General Accounting Office, and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 8, 1963.

B-104297.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: In your letter of July 25, 1963, you requested our comment on an amendment (No. 136) to S. 1732, intended to be proposed by Senator Keating.

The proposed amendment would add to section 3 of S. 1732 a new subsection (c) which would make it clear that the enumeration of any public establishment in subsection (a) of section 3 shall not be construed to exclude its application to other similar establishments not listed.

The proposed amendment would not affect the functions and operations of the General Accounting Office, and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, August 8, 1963.

B-104297.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: In your letter of July 23, 1963, you requested our comment on an amendment (No. 134) to S. 1732, intended to be proposed by Senator Keating.

The proposed amendment would add a new section 5 prohibiting the publishing, circulation, display, or mailing of notices, advertisements, or communications representing that certain goods, services, facilities, privileges, advantages, or accommodations offered or held out to the public for sale, use, rent, or hire, shall be refused, withheld from, or denied to any person on account of race, color, religion, or national origin by any person acting under color of any law, statute, ordinance, regulation, custom, or usage. The bill would further prohibit any person so acting from committing certain specified acts in denial of such goods, services, or facilities to any customers on account of their race, color, religion, or national origin.

The proposed amendment would not affect the functions and operations of the General Accounting Office, and we have no objections to its favorable consideration by your committee.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., July 10, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U. S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of Defense with respect to S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

Executive Order 9981, issued by President Truman on July 26, 1948, declared it to be a policy of the President that there should be equality of treatment and opportunity for all persons in the armed services without regard of race, color, religion, or national origin. The Department of Defense took steps to assure compliance with Executive Order 9981, and it is the policy of the Department of Defense to provide equality of treatment and opportunity for all members of the Armed Forces. In furtherance of efforts in this area, the Department is currently studying means for adopting recommendations of the President's Committee on Equal Opportunity in the Armed Forces. While the military departments have established a fine record over the past 15 years, these recommendations are designed to further improve existing programs. One of the major items included in the report of this committee concerns problems encountered as a result of offbase discrimination.

Off-base discrimination against minority groups within the Armed Forces generates a serious morale problem for the military. In consideration of the purpose and the mission of the military establishment, it is neither feasible, expedient, nor justifiable to assign personnel to duty stations on the basis of race, color, or national origin. Consequently, servicemen belonging to minority groups have been forced to accept a set of standards, and have been denied privileges enjoyed by other military personnel in those areas where local custom supports discriminatory practices.

It is understood that the establishments covered by S. 1732 are those which serve the general public, including hotels, motels, restaurants, lunch counters, theaters and other places of amusement, department and other retail stores, drugstores, gasoline stations, and the like. Military personnel, like other members of the American public, must rely upon the availability of public accommodations when traveling to new duty stations, when living in a civilian community adjacent to their duty station, or when on temporary duty in connection with military maneuvers. Unlike most civilians, military personnel are required to move their families upon completion of a 3- to 4-year tour of duty. As a matter of military necessity, the serviceman moves when and where ordered. When servicemen, who are members of a minority group, encounter discriminatory practices in the course of a move, or upon arrival at their new duty station, they are required to assume additional problems which constitute an unnecessary and unjustifiable burden. The morale and discipline problems caused by such inequities can only have an adverse effect on military operations.

The Department of Defense fully concurs in the purposes of S. 1732 and supports its enactment as a needed supplement to its own existing policies. This legislation would assure minority groups within the Armed Forces the same equality of treatment during periods of travel, and during off-duty time that is now being afforded onbase.

The Bureau of the Budget advises that there is no objection to the presentation of this report for the consideration of the committee and that the enactment of S. 1732 would be in accord wih the program of the President.

Sincerely,

JOHN T. MCNAUGHTON.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
August 9, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your recent requests for reports on S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce and a proposed amendment, in the nature of a substitute, by Senator Dirksen together with S. 1217 and S. 1622 dealing with the same topic.

Thoughtful persons are aware that the patterns of racial discrimination imposed upon the colored tenth of our population have had debilitating effects upon those who have endured them. Many have been caught in the cycle of poverty and hopelessness reflected in the often-quoted statistics on school dropouts, welfare rolls, health standards, juvenile delinquency, and unemployment.

The President, with the wholehearted support of myself and the Department of Health, Education, and Welfare, seeks now to dedicate the Nation to the elimination of the more flagrant forms of discrimination practiced against the

Negro. At the same time the President has urged substantial increases in funds for basic adult education, welfare work training, vocational education, youth and manpower training to assist all of our citizens with limited educational and cultural attainments to break out of the round of inadequate skills, unemployment, and indifference. The Department of Health, Education, and Welfare will assume major responsibility for this enhanced educational effort under legislation now pending before this Congress. We welcome the challenge which these programs will create for us.

For the Negro who takes advantage of fresh opportunities to augment his education and skills to meet the requirements of today's industry, the knowledge that racial barriers are being removed from public accommodations, education, employment, housing, and in numerous other areas of our daily life will provide him with strong motivation for success. Full opportunity will spark ambition. An earnest ongoing effort to eliminate all forms of racial discrimination by both public and private action is an inseparable part of the proposed program to combat the illiteracy and inadequate skills of a substantial fraction of our populace. If we can do these things simultaneously, the momentum of our efforts will be rewarded by a more secure America where every man will be measured by his own worth.

For these reasons, therefore, the Department of Health, Education, and Welfare urges enactment of S. 1732. This bill is a part of the omnibus civil rights program proposed by the President and places the enforcement powers of the Federal Government squarely behind the eradication of discrimination in public accommodations. The suggested amendment of Senator Dirksen would be a substitute for the administration's bill and we do not support it. S. 1217, proposed by Senator Javits and S. 1622, by Senator Hart, lack numerous significant features of S. 1732. We defer to the views of the Department of Labor on the amendment to S. 1732, introduced by Senator Goldwater.

We are advised by the Bureau of the Budget that there is no objection to the presentation of this report from the standpoint of the administration's program, and that enactment of S. 1732 would be in accord with the President's program.

Sincerely,

ANTHONY J. CELEBREZZE,
Secretary.

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, August 7, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further response to your request for our views on amendments "Intended to be proposed by Mr. Goldwater to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce."

The first of the proposed amendments would, in our opinion, constitute an irrelevant addition to S. 1732. It, in effect, amends section 101 of the Labor-Management Reporting and Disclosure Act of 1959, and deals with matters which are inappropriate for inclusion in this public accommodations proposal, as well as legally incongruous with its stated purpose.

S. 1732 concerns the right of access to public accommodations particularly as they relate to interstate travel and commerce. On the other hand, section 101 of the Labor-Management Reporting and Disclosure Act pertains to the internal affairs of labor unions. Section 101 does establish certain rights for union members, and it also prohibits certain discriminations in disciplinary and other matters. However, none of these rights and safeguards under section 101 are germane in any way to the right of being served in public establishments.

The proposed amendment seeks to revive an approach which the Congress considered but rejected when it enacted the Labor-Management Reporting and Disclosure Act in 1959. As originally proposed in the Senate, the Secretary of Labor was empowered to enforce the provisions of title I. As the bill was finally passed, however, private actions were substituted to remedy all violations of this title, with several exceptions. Approximately 275 private actions have been instituted under the title in the less than 4 years the Labor-Management Reporting and Disclosure Act has been in existence, thus indicating the extent to which union members have exercised their rights.

Another point for consideration is that many title I rights under the act are also title IV duties on labor organizations and are protected through civil actions of the Secretary of Labor. Since the enactment of the act, the Secretary has initiated 95 actions to enforce these rights. Taking into account this close relationship between title I and title IV, we believe that a further division of responsibility in civil litigation between the Departments of Labor and Justice would lead to confusion in the act's administration and be detrimental to its basic objectives.

We are in basic agreement with the objective of the proposed new section to S. 1732 entitled "Bargaining Rights of Labor Organizations With Exclusionary Membership Policies." However, a recent ruling by an NLRB hearing examiner (*Hughes Tool Co.* (Case No. 23–CB–429)) indicates that this amendment may simply be declaratory of existing law.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Yours sincerely,

W. WILLARD WIRTZ,
Secretary of Labor.

DEPARTMENT OF STATE,
Washington, D.C., July 12, 1963.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: Your letters of June 26 and 27, 1963, enclosed for the comment of the Department of State a copy of the bill S. 1732, the Interstate Public Accommodations Act of 1963, and a copy of the amendments in the nature of a substitute intended to be proposed by Senator Dirksen to S. 1732.

The Department's views on this matter were presented by the Secretary of State during his testimony before your committee on July 10 and we have no further comments on the foreign policy implications of this legislation and the reasons why we must attack the problems of discrimination. The Department of State defers to the views of other agencies primarily concerned with respect to the detailed questions of this legislation and its enforcement; we are, as the Secretary pointed out, concerned with the underlying purpose of the proposals and the adverse effects of the present situation.

The Bureau of the Budget advises that there is no objection to the submission of this report and that enactment of S. 1732 would be in accord with the administration's program.

Sincerely yours,

FREDERICK G. DUTTON,
Assistant Secretary.

FEDERAL AVIATION AGENCY,
Washington, D.C., July 19, 1963.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request of June 27, 1963, for the views of this Agency with respect to S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

You also asked for our views on S. 1217 and S. 1622, other public accommodations bills. This report constitutes our response to all three requests.

I am obviously aware of the fundamental issues which prompted the introduction of S. 1732. Both as a member of this administration and as an American citizen I am greatly concerned that all our fellow citizens, and particularly those who travel in interstate commerce, will be treated with dignity in selecting public accommodations.

However, I assume that your request for my comments relates specifically to my responsibilities under the Federal Aviation Act of 1958, to encourage and foster the development of air commerce. Pursuant to that responsibility, I strongly recommend enactment of S. 1732.

The movement of the air traveler from point to point provides only one of the services he needs as he moves in air commerce. Additionally, and at the very least, he needs food and lodging. He usually has a variety of other needs. For most travelers those needs are met in a fashion designed to afford comfort and

convenience. But if restaurants and hotels are not available to the air traveler, if they are available only at an inconvenience, or if they are unattractive or otherwise undesirable, he is not getting the services he needs and should be able to expect. The natural consequence is that he is reluctant to travel and does so only when necessity outweighs the convenience and other unpleasantness involved. So that this reluctance may be overcome, the same facilities which are already available to most air travelers must be made available to all of them. The same high-quality, convenient, and pleasant accommodations that most of us insist on in the usual course of traveling must be made available to all who would travel. This is essential if air commerce is to reach its fullest development.

In sum, it is my belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations.

The Bureau of the Budget has advised that there is no objection to the submission of this report and enactment of S. 1732 would be in accord with the program of the President.

Sincerely,

N. E. HALABY, *Administrator.*

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., July 26, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of June 26, 1963, requested the views of the General Services Administration on S. 1732, 88th Congress, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

The purpose of the proposed legislation is stated in the title of the bill. It would, with respect to all persons traveling interstate, prohibit discrimination or segregation based on race, color, religion, or national origin in certain public establishments.

We wish to point out in this connection that, in fiscal year 1964, it is estimated the civilian agencies of the Federal Government will spend approximately $348,231,710 for passenger travel within the continental United States. It is our firm conviction that all Federal employees traveling interstate on Government business should be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of certain public establishments, as would be provided by the proposed legislation.

The General Services Administration strongly endorses the objective of S. 1732 and urges early enactment of the bill.

The enactment of the proposed legislation would not affect the budgetary requirements of this agency.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee and that the enactment of S. 1732 would be in accord with the program of the President.

Sincerely yours,

BERNARD L. BOUTIN, *Administrator.*

INTERSTATE COMMERCE COMMISSION,
Washington, D.C., July 9, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN MAGNUSON: Your letter of June 27, 1963, addressed to the Chairman of the Commission, and requesting comments on a bill, S. 1732, introduced by Senator Mansfield (for himself and 45 other Senators), to eliminate discrimination in public accommodations affecting interstate commerce, and on amendments (in the nature of a substitute) to S. 1732 intended to be proposed by Senator Dirksen, has been referred to our Committee on Legislation. After consideration by that Committee, I am authorized to submit the following comments in its behalf:

I

S. 1732, as introduced, would establish the right of all persons, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of public establishments serving interstate travelers or substantially affecting interstate travel or the interstate movement of goods in commerce. While the term "public establishments" is not fully defined, among the establishments explicitly covered by the bill are hotels, motels, restaurants, theaters, and other places of amusement; retail and department stores, drugstores, lunchrooms, lunch counters, gasoline stations, and the like. Bona fide private clubs are not included.

Any deprivation of or interference with the right to use the public facilities covered by the proposed measure is specifically prohibited, and aggrieved persons are granted the right to sue for an injunction or other preventive relief. In addition, the bill would authorize the Attorney General to bring a civil suit for preventive relief when, in his judgment, the person aggrieved is unable to initiate and maintain appropriate legal proceedings and the purposes of the bill will be materially furthered by the filing of such an action.

The term "public establishments" as used in the bill as introduced is broad in scope, and it is not clear to what extent S. 1732 is intended to apply to common carriers and other persons subject to the Interstate Commerce Act and related statutes administered by this Commission. Insofar as the proposed measure may be construed to apply to such carriers and other persons, it should be noted that it is now unlawful under section 3(1) of the act "for any common carrier subject to this part [part I] * * * to make, give, or cause any undue or unreasonable preference or advantage to any particular person * * * or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." While this provision relates to rail carriers, there are similar provisions in the other parts of the act applicable to motor or water common carriers. These provisions have been interpreted in a series of decisions by the Federal courts and this Commission as prohibiting the segregation by such carriers of passengers traveling on interstate trains or buses, or using related terminal facilities. *Mitchell* v. *United States*, 313 U.S. 80 (1941); *Henderson* v. *United States*, 339 U.S. 816 (1950); *Boynton* v. *Virginia*, 364 U.S. 454 (1960); *United States* v. *Lassiter*, 203 F. Supp. 20, aff'd per curiam 371 U.S. 10 (1962); *Lewis* v. *The Greyhound Corp.*, 199 F. Supp. 210 (1961); *National Assn. for A.O.C.P.* v. *St. Louis-S.F. Ry. Co.*, 297 I.C.C. 335 (1955); *Keys* v. *Carolina Coach Co.*, 64 M.C.C. (1955); and *Discrimination—Interstate M. Carriers of Passengers*, 86 M.C.C. 743 (1961).

In the last cited proceeding, this Commission, upon petition of the Attorney General of the United States, promulgated a number of general regulations designed to implement further the provisions of section 216(d) of the act with respect to the nonsegregated use of motor buses and related facilities operated and utilized in the interstate common carrier transportation of passengers. The lawfulness of the regulations thus issued was upheld by the courts in the *State of Georgia* v. *United States*, 201 F. Supp. 813 aff'd per curiam, 371 U.S. 9 (1962); and the Attorney General has since reported that all railroad stations and bus terminals have been desegregated. In view of these decisions, the racial segregation of passengers using interstate transportation or terminal facilities by common carriers subject to the Interstate Commerce Act is clearly established as a violation of that act. In the words of the Supreme Court: "The question is no longer open; it is foreclosed as a litigable issue." *Baily* v. *Patterson*, 369 U.S. 31, 33.

To the extent, therefore, that S. 1732 might be construed as prohibiting discrimination or segregation by common carriers subject to the Interstate Commerce Act, its enactment would permit the accomplishment of the same substantive result as that reached by this Commission and the courts in the aforementioned cases. Insofar as its prohibitions would apply to persons other than common carriers subject to our jurisdiction under the Interstate Commerce Act and related statutes, its enactment would not appear to affect directly the jurisdiction or functions of this Commission or to impair our administration of the laws entrusted to us. In either case, however, the bill's passage into law, under the circumstances here disclosed, is, in our view, a matter of broad

congressional policy. Accordingly, we make no recommendation either for or against S. 1732 as introduced.

II

The amendments (in the nature of a substitute) to S. 1732 intended to be introduced by Senator Dirksen would declare "legal and consonant with the right of private property, but nevertheless * * * not in keeping with the concept and spirit of equality * * *" the denial to any person, because of race, color, religion, or national origin, of free and full access to the public services and accommodations provided by private establishments, except public utilities and common carriers, when done within the discretion of the owners and operators thereof and not under compulsion of State and local laws. The substitute proposal would create a Community Relations Service to assist in securing the full and nondiscriminatory access by all persons to the public services and accommodations of private establishments, and to provide conciliation assistance to communities in resolving certain disputes, disagreements, or difficulties based on race, color, or national origin.

As the proposed amendments are expressly made inapplicable to the services and accommodations provided by public utilities and common carriers, their passage into law would not affect the prohibitions now embraced in the Interstate Commerce Act relating to racial discrimination or segregation by common carriers subject to the jurisdiction of this Commission. Accordingly, their enactment also is, in our view, a matter which the Congress must decide on the basis of broad policy considerations.

Respectfully submitted.

ABE MCGREGOR GOFF,
Acting Chairman, Committee on Legislation.
ABE MCGREGOR GOFF.
RUPERT L. MURPHY.

INTERSTATE COMMERCE COMMISSION,
Washington, D.C., July 24, 1963.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN MAGNUSON: Your letter of July 17, 1963, addressed to the Chairman of the Commission, and requesting comments on amendments intended to be proposed by Senator Goldwater, to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, has been referred to our Committee on Legislation. After consideration by that committee, I am authorized to submit the following comments in its behalf:

In our letter of July 9, 1963, concerning S. 1732 and certain amendments (in the nature of a substitute) intended to be introduced by Senator Dirksen, we expressed the view that enactment of either the original or the proposed substitute bill would not directly affect the substantial functions or jurisdiction of this Commission and constitutes a matter which Congress itself must decide on the basis of broad policy considerations. The amendments intended to be proposed by Senator Goldwater relate exclusively to labor organizations and have as their fundamental purpose the extension of such organizations of full and equal membership rights and privileges to all of the employees they seek to represent in a unit appropriate for that purpose. Such amendments would not modify or affect the provisions of the Interstate Commerce Act, discussed in our prior letter, relating to racial discrimination or segregation by common carriers subject to the jurisdiction of this Commission, and their passage into law also is, in our view, a matter of broad congressional policy in respect of which we take no position.

Respectfully submitted.

LAURENCE K. WALRATH,
Chairman, Committee on Legislation.
ABE MCGREGOR GOFF.
RUPERT L. MURPHY.

INTERSTATE COMMERCE COMMISSION,
Washington, D.C., July 31, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN MAGNUSON: Your letters of July 23 and July 25, 1963, addressed to the Chairman of the Commission, and requesting comments on amendments Nos. 134, 135, and 136, intended to be proposed by Senator Keating to the bill (S. 1732) to eliminate discrimination in public accommodations affecting interstate commerce, have been referred to our Committee on Legislation. After consideration by that committee, I am authorized to submit the following comments in its behalf:

The amendments intended to be introduced by Senator Keating would prohibit the direct or indirect publication, circulation, issuance, display, or mailing of any notice, advertisement, or written or printed communication, to the effect that any of the goods, services, facilities, privileges, advantages, or accommodations of any public establishment subject to section 3 of S. 1732 shall be refused to or withheld from any person on account of race, color, religion, or national origin. In addition, such amendments would in substance preclude all persons from engaging in the discriminatory practices otherwise forbidden by S. 1732, as so amended, under color of any law, statute, ordinance, regulation, custom, or usage.

In our previous comments upon S. 1732 and certain amendments thereto intended to be introduced by Senators Dirksen and Goldwater, we expressed the view that enactment of that legislation with or without such amendments would not affect the substantial functions or jurisdiction of this Commission and represents a matter which Congress itself must decide on the basis of broad policy considerations. The amendments intended to be proposed by Senator Keating, likewise, would have no material effect upon the provisions of the Interstate Commerce Act relative to racial discrimination or segregation by common carriers subject to our jurisdiction, discussed in our prior letters, and we therefore take no position for or against their passage into law.

Respectfully submitted.

LAURENCE K. WALRATH,
Chairman, Committee on Legislation.
ABE MCGREGOR GOFF.
RUPERT L. MURPHY.

U.S. INFORMATION AGENCY,
Washington, July 24, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: This will reply to your letters of June 27, 1963, requesting Agency comments on S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce, and the proposed amendment thereto by Senator Dirksen.

The U.S. Information Agency is in favor of the enactment of the proposed legislation. We leave it to those more learned and experienced in such matters to discuss the detailed provisions of the bill. We cannot help but believe, however, that barriers to equal rights and opportunities for all in this Nation must be broken down and that the proposed bill is another step in the fulfillment of the American dream.

In the everyday task of portraying the American scene to foreign audiences, the Agency has had the difficult task of counteracting the detrimental effects of civil rights violations. We cannot make good news out of bad practice. Nor can we cover up the fact that we have important unfinished business in this country. What we have done and will continue to do, however, is to place our problems and difficulties in proper and truthful perspective, indicating the continuing progress we are making. Our Agency's real success in this area ultimately depends upon what we do domestically. For this reason the enactment of the proposed legislation would be a concrete act by the Government to redress existing inequities.

I believe that as the barriers to equal rights and opportunities for all in our Nation are broken down, the fact that the United States is a multiracial society will prove one of our greatest assets in the contest of ideologies.

I do not suggest that S. 1732 should be enacted solely because it would enhance the U.S. image abroad though it would clearly have that effect. We should attack the problem of segregation because it is right that we do so. To do otherwise, whatever the oversea reaction might be, would violate the very essence of what our country stands for.

The Bureau of the Budget advises that it has no objection to the submission of this report and the enactment of S. 1732 would be in accord with the program of the President.

Sincerely,

EDWARD R. MURROW, *Director.*

The CHAIRMAN. The ranking minority member of the committee, the distinguished Senator from New Hampshire, Senator Cotton, has a brief statement to read and then we will hear from our first witness, the Attorney General of the United States, Robert F. Kennedy.

As a statement of procedure, the witness will read his prepared statement without interruption. Then the chairman will call on the members of the committee, alternating sides, for questions.

The Senator from New Hampshire has a statement he would like to insert at this point.

STATEMENT OF HON. NORRIS COTTON, U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator COTTON. Mr. Chairman, I thank you for the privilege of making a preliminary statement on behalf of myself and the four other members of the minority on the committee: Senators Morton, Scott, Prouty, and Beall.

Mr. Chairman, the Republican members of this committee are a small band—only 5 out of 17 Senators—and our power to affect the course of this legislation is thus limited. However, two of the five are cosponsors of S. 1732, the bill before us, and cosponsors of S. 1731, the administration's omnibus Civil Rights Act of 1963. All of us who were Members of the Senate at the time voted for the Civil Rights Act of 1957 and the Civil Rights Act of 1960, as did all Republicans in the Senate.

We are fully aware of the overwhelming national interest in the problem of civil rights and racial discrimination, and we understand the administration's desire to get this bill (S. 1732) out of committee so that the Senate as a whole may work its will upon it.

Difficult legal and constitutional questions may face us, and I am not attempting to indicate the position of any individual when the committee votes, either on the bill or on amendments. However, I am authorized to pledge every member of the Republican minority to full cooperation in expediting the work of the committee on this bill. We believe the committee's deliberations must be marked by intensive effort so that meaningful recommendations can be made to the entire Senate as soon as possible.

The CHAIRMAN. Thank you Senator Cotton. We will be glad to hear from the Attorney General of the United States, Mr. Kennedy.

STATEMENT OF HON. ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

Mr. KENNEDY. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, for generations, Americans have prided themselves on being a people with demo-

cratic ideals—a people who pay no attention to a man's race, creed, or color. This very phrase has become a truism. But it is a truism with a fundamental defect: it has not been true.

It was the British historian, Lord Acton, who wrote that:

> Laws should be adapted to those who have the heaviest stake in the country, for whom misgovernment means—
>
> not stinted luxury and mortified pride—
>
> but want and pain, and degradation and risk to their own lives and to their children's souls.

As Americans, I don't see how any of us can fail to agree with that statement, and surely the citizens who have the greatest need for laws, who suffer want and pain and degradation, are the American Negroes.

That is why I am here today to testify in support of the Interstate Public Accommodations Act of 1963, a part of the civil rights legislation proposed by the President on June 19.

What the President has proposed in this bill is a law which will eliminate one of the most embittering forms of racial discrimination: the denial of free access to places of public accommodation—restaurants, stores, hotels, lunch counters, and other establishments of service or amusement—to a large number of our fellow citizens whose skin is not white.

The law will set no precedent in the field of governmental regulation, nor will it unjustly infringe on the rights of any individual.

The only right it will deny is the right to discriminate—to embarrass and humiliate millions of our citizens in the pursuit of their daily lives.

The places of business covered by this law are public in a very real sense: they are not private homes or clubs. They deal with the general public. They invite and in fact compete for public patronage.

Plainly, when a customer is turned away from such a place because of the color of his skin, it imposes a badge of inferiority on that citizen which he has every right to resent.

And in addition to the insult, consider the physical and financial inconvenience suffered by Negroes through such discrimination.

A white person, traveling in a part of the country where discrimination is customary, can make reservations in advance or stop for food and lodging where and when he will.

For the Negro it is not so simple. If he makes reservations without first determining whether or not the establishment will accept people of his race, he may well find on his arrival that the reservation will not be honored—or that it will somewhow have been mislaid. His alternative is to subject himself and his family to the humiliation of rejection at one establishment after another—until, as likely as not, he is forced to accept accommodation of inferior quality, far removed from his route of travel.

White people of whatever kind—prostitutes, narcotics pushers, Communists, or bank robbers—are welcome at establishments which will not admit certain of our Federal judges, ambassadors, and countless members of our Armed Forces.

Human indignity, moreover, is not the only cost of this kind of discrimination. Quite apart from the moral damage it does, our whole economy suffers from it. Discrimination by retail stores which deal

in goods obtained through interstate commerce puts an artificial restriction on the market and interferes with the natural flow of merchandise. A prevailing pattern of discrimination in a community discourages the influx of new business, impairs the mobility of industry and prevents the most economic allocation of our national resources.

If Congress can, and does, control the service of oleomargarine in every restaurant in the Nation, surely it can insure our nonwhite citizens access to those restaurants.

If Congress can control the labeling of every bottle of aspirin in every drug store, surely it is no deprivation of anyone's liberty to permit Negroes to shop and to eat there.

Nearly all, if not all Federal and State regulations can be said to represent "encroachments on personal liberty and private property."

The Government regulates the businessman in his dealings with the public, the employer in his dealings with the employee, the stockbroker in his dealings with customers, and the wholesaler in his dealings with retailers. I could continue at great length, for this is only a small part of the catalog.

For the record, Mr. Chairman, I would like to submit the following representative list of Federal statutes based on the commerce clause which regulates private business and property:

Anti-Rebate Act (railroads)
Atomic Energy Act
Automobile Information Disclosure Act
Boiler Inspection Acts (railroads)
Clayton Act
Communications Act
Fair Labor Standards Act
False Branding and Marketing Act
Federal Coal Mine Safety Act
Federal Explosives Act
Federal Food, Drug, and Cosmetic Act
Federal Firearms Act
Federal Hazardous Substances Labeling Act
Federal Insecticide, Fungicide, and Rodenticide Act
Federal Power Act
Federal Trade Commission Act
Federal Water Pollution Control Act
Fur Products Labeling Act
Gambling Devices Act of 1962
Hot-Oil Act
Interstate Commerce Act
Investment Company Act of 1940
Labor Management Reporting and Disclosure Act of 1959
Livestock Contagious Disease Act
Meat Inspection Acts
Narcotics Manufacturing Act of 1960
Natural Gas Act
Plant Quarantine Act
Poultry Products Inspection Act
Securities Exchange Act of 1934
Sherman Act
Tobacco Inspection Act
Trust Indenture Act of 1939
U.S. Cotton Standards Act
U.S. Grain Standards Act
Work Hours Act of 1962

Those are all under the commerce clause, Mr. Chairman.

And locally, private property rights are subject to zoning laws, licensing regulations, and health restrictions. Some 30 States pres-

ently have public accommodation laws forbidding racial discrimination.

It seems highly significant to me that the greatest opposition to the supposed "interference with private rights" in this bill comes from the very States which have in the past decreed segregation by law.

Mr. Chairman, I have a list here of some of those acts.

The CHAIRMAN. We will put those in the record in full.

Mr. KENNEDY. Could I give a few examples?

The CHAIRMAN. Yes, then we will put them in the record.

Mr. KENNEDY. In Birmingham, Ala.: The city code forbids any restaurants to serve whites and Negroes in the same room unless they are—

separated by a solid partition extending from the floor upward to a distance of 7 feet or higher, and unless a separate entrance from the street is provided for each compartment.

In Durham, N.C.: The city code requires separate rooms for Negroes and whites in any public eating place which serves both races.

The partition between such rooms shall be constructed of wood, plaster, or brick, or like material, and shall reach from the floor to the ceiling.

Violations are punished by fines of $10 and each day represents a new violation.

In Greenwood, S.C.: The city code makes it unlawful for any person operating a cafe, restaurant, or drinking fountain to serve colored people and white people with the same dishes and glasses.

In Atlanta, Ga.: The city code requires barbers to post signs indicating whether they serve whites, Negroes, or both. Negro barbers are forbidden to serve white women or girls.

In Louisiana, code 317:

Negro and white families, housing in same dwelling house prohibited; penalty; separation of the races no defense.

Those are just some examples, Mr. Chairman.

The CHAIRMAN. We will put in the record in full at this point the others, the State or local laws compelling segregation in public accommodations, submitted to us by the Attorney General.

Mr. KENNEDY. Thank you, Mr. Chairman.

(The list follows:)

STATE OR LOCAL LAWS COMPELLING RACIAL SEGREGATION IN PUBLIC ACCOMMODATIONS

A number of cities and States requires racial segregation in public accommodations by law. Here are some examples, followed by a list of the State laws requiring such segregation.

Birmingham, Ala.: The city code forbids any restaurant to serve whites and Negroes in the same room unless they are "separated by a solid partition extending from the floor upward to a distance of 7 feet or higher, and unless a separate entrance from the street is provided for each compartment."

Durham, N.C.: The city code requires separate rooms for Negroes and whites in any public eating place which serves both races. "The partition between such rooms shall be constructed of wood, plaster, or brick or like material, and shall reach from floor to the ceiling." Violations are punishable by fines of $10 and each day represents a new violation.

Greenwood, S.C.: The city code makes it unlawful for any person operating a cafe, restaurant, or drinking fountain to serve colored people and white people with the same dishes and glasses.

Oklahoma: A State law requires the telephone company to provide separate telephone booths for each race at the request of a particular locality.

Texas, Tennessee, Oklahoma: A State law requires that coal mine operators must provide separate bath and locker facilities for Negroes.

Arkansas: State law requires that race tracks must provide segregated seating.

Louisiana, South Carolina: Both of these States have specific laws requiring separate entrances and seating at circuses.

Atlanta, Ga.: The city code requires barbers to post signs indicating whether they serve whites, Negroes, or both, and Negro barbers are forbidden to serve white women or girls.

Texas: State law forbids boxing or wrestling contacts between whites and Negroes and violations are punishable by fines ranging up to $200.

STATE SEGREGATION STATUTES

Arkansas: Statute 84-2724: Track establishments required to segregate races.

84-2725: Damages not recoverable for ejecting those refusing to sit in designated places.

84-2726: Penalty for noncompliance.

Georgia: 84-1603. Qualification of licensees; applications made to whom. Requiring segregated billiard rooms.

84-1604: Application for license; affidavit; bond; fees; forfeiture. (Same requirement.)

Louisiana: Louisiana revised statutes:

R.S. 4:5, section 9791: Circuses and tent exhibitions—segregation of races.

Section 9792: Penalty (for violation of sec. 9791).

R.S. 4:5, Section 5: Separate ticket offices and entrances for white and colored races; penalty.

L.R.S., section 451. Interracial activities involving personal and social contacts prohibited. (Involving any dancing, social functions, entertainments, athletic training, games, sports of contests and other such activities involving personal and social contacts).

L.R.S. section 452. Separate seating and facilities at any entertainment or athletic contests, where the public is invited or may attend.

Section 453. Races prohibited from using the others seating and facilities.

Section 454. Penalty.

Section 317: Negro and white families, housing in same dwelling house prohibited; penalty; separation of the races no defense; application of section. ("* * * It shall not be a defense that the buildings are provided with partitions, or separate entrances, or other features of separation between the races * * *")

Mississippi: Statute 2046.5: Business customers, patrons or clients—right to choose—penalty for violation. (Authorizes refusal to sell to, wait upon or serve any person that the owner, manager, or employee of such public place of business does not desire to sell to.)

Statute 4065.3: Compliance with the principles of segregation of the races. (Public officials required to prohibit integration of the white and Negro races in public facilities or accommodations.)

Oklahoma: Title 17, Oklahoma Statute 135: Separate telephone booths for white and colored patrons.

Title 45, Oklahoma Statutes 231. Bathhouses required at mines—separate baths and lockers for Negroes—towels, soap, and locker.

South Carolina: Circuses: separation—May 19, 1962, Code of Laws of South Carolina. Tent shows to maintain separate entrances for races.

Tennessee: 62-715: Segregation of races permitted (in public accommodations.)

58-1021: Separate washrooms for whites and blacks.

Texas: Texas Civil Statutes, articles 5920: Bath facilities (in coal mines).

Virginia: Code 18.1-356 (1960 Com. Supp.): Public halls and public places. (Makes it a crime for operators or sponsors of public halls, theaters, opera houses, motion pictures, or any place of public entertainment or public assemblage to fail to separate the races.)

Mr. KENNEDY. Surely it is no greater an infringement to compel nondiscrimination than it has been to compel discrimination.

So I think it only fair, Mr. Chairman, to declare that this bill does not seriously or significantly interfere with private property rights, nor does it extend any principle of Federal regulation. Therefore, the argument that it does should be rejected as a smokescreen. The real issue is whether Congress should or should not ban racial discrimination in places open to the public.

As always, in determining whether or not to adopt a Government regulation, we must give weight to a consideration of the right that will be lost—even in cases like this one, where the right in question is so plainly a right to commit wrong.

On one side of the scale of justice, then, we have the right of privately owned public service enterprises to insult large sections of their public by refusing to serve them, for no other reason than the arbitrary and immoral logic of bigotry.

On the other side, we have the need for this country to live up to its ideals.

Surely, in the balancing, there can be no question on which side the scales must fall.

As John Adams said, "The eternal and immutable laws of justice and morality are paramount to all human legislation."

I believe that the Federal Government has a clear responsibility to help put a stop to discrimination. The administration has, from the beginning, recognized that responsibility, and in the past two and a half years we have attempted to fulfill it through channels of voluntary cooperation.

We have assisted in reopening communication between Negro and white leaders. We have mediated disputes. We have urged local governments, officials, lawyers, businessmen, union officials, the clergy, educators, and other leaders of opinion to recognize the gravity of the situation and the need for prompt action at the local level.

A great deal has been and is being accomplished through these means—but not enough.

The President has called for legislation to move the problem of discrimination in public accommodations "out of the streets and into the courts," and this bill is the legislation we believe will do so.

S. 1732 would establish the right of all persons to the full and equal enjoyment of the service facilities of places of public accommodation without discrimination on account of race, color, religion, or national origin, if these places serve interstate travelers or affect the interstate movement of goods in commerce.

The establishments covered include hotels, motels, restaurants, lunch counters, theaters and other places of amusement, department stores and other retail stores, drug stores, gasoline stations, and the like. However, the establishment must be one that serves the general public. Private clubs are not covered.

Section 4 of the bill would prohibit denial of, or interference with, the right to use public accommodations established in the preceding sections. This includes denials by the establishment itself and interference by third parties.

Section 5 would grant to the aggrieved person the right to sue in Federal court for preventive relief against the denial or interference.

It also would permit the Attorney General to sue in the name of the United States when in his judgment the aggrieved person is

unable to bring suit, and the purposes of the act will be materially furthered by such a suit.

Before bringing a suit under this act, the Attorney General ordinarily would permit State or local authorities to act if there is an applicable public accommodations law in the locality. If there is no local law, he would employ the services of available Federal agencies to secure voluntary compliance.

The constitutional authority of Congress to enact this law is derived from the commerce clause and the 14th amendment, but our primary reliance is on the commerce clause.

The list of public accommodations covered—hotels and motels, retail stores, restaurants, theaters, and motion picture houses demonstrates that each has a direct and intimate relation to the movement of persons and goods across State lines, and in the words of the late Justice Jackson:

> If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. (*United States* v. *Women's Sportswear Ass'n*, 336 U.S. 460, 464 (1949).)

It seems to me beyond question that every provision in this bill is a legitimate exercise of Congress' authority over interstate commerce.

In addition to the commerce clause, we rely on Congress' power under the 14th amendment, to prohibit the denial of equal protection of the laws to any person. The 14th amendment also provides that Congress may enforce this provision of appropriate legislation.

We recognize that in 1883 the Supreme Court held in the *Civil Rights Cases* (109 U.S. 3), Congress did not have power under the 14th amendment to prohibit discrimination in privately owned places of public accommodation, and that Congress power under that amendment is only over discrimination accomplished by the action of a State.

But in 80 years, much of the force of that decision has disappeared. State regulation of private business has increased. State relationships with business have become more varied and complex, and views of what action may be attributed to the State have changed.

There are a number of recent cases in which the Federal courts have held that private decisions to discriminate may be attributed to the State for purposes of the 14th amendment. Consequently, if the Supreme Court were now asked to pass upon the constitutionality of a public accommodations law based on the 14th amendment, it might well uphold the law.

However, the 1883 decision has not been overruled and remains the law of the land. It is for this reason that we rely primarily on the commerce clause.

Some Congressmen, who seek objectives similar to those of this bill, would place sole reliance on the 14th amendment. There are others who strongly oppose any reliance on the 14th amendment.

We recognize that there is some merit in both positions. However, we feel it is absolutely clear that Congress has the power to end discrimination in places of public accommodation under the provisions of the commerce clause. Should it ultimately be decided that Congress can regulate these businesses under the 14th amendment, the fact that the bill describes them in terms of their impact on interstate commerce, would not diminish Congress' power.

Virtually all people in the public accommodations business will know if they are covered by this bill.

Lodgings are covered if they are public and the lodgings are transient.

Places of amusement are covered if they customarily present entertainment which moves in interstate commerce.

Restaurants and retail stores are covered if a substantial part of their business is with interstate travelers; or if a substantial part of their wares has moved in interstate commerce; or if their activities substantially affect interstate commerce; or if they are in integral part of another business covered by any of these other provisions.

The significant question in these definitions is, What is meant by "substantial" or "substantially"? While the meaning of those words cannot be reduced to mathematical precision, our intention is that they mean something more than minimal. These terms have been used as standards in a number of statutes and have received judicial interpretation. So in the great majority of cases, coverage will be plain.

We intentionally did not make the size of a business the criterion for coverage because we believe that discrimination by many small establishments imposes a cumulative burden on interstate commerce. It may be that Congress will want a sharper definition and, if so, we would be glad to work with this committee. But if this is done, I believe it should be to sharpen definitions rather than to create loopholes or water down the bill.

The recent events in Birmingham, Jackson, Savannah, Danville, and nearby Cambridge are vivid evidence that this bill is needed.

There has been a good deal of talk decrying the Negro demonstrations. I say that any discussion of this problem which dwells solely on the demonstrations and not on the causes of those demonstrations is not going to solve anything.

This is the lesson of history. There still are workers and their children alive today in mining communities all through the Appalachian area and in industrial centers all over the country who remember the time before the Wagner Act, the wage and hour laws and adequate mine safety and factory inspection acts. In those days, men and women were striving to form unions or to attract legislative attention to their condition. Their meetings were suppressed. Their demonstrations were put down. Their pickets were arrested.

Repression on one side often produced violence on the other. The Haymarket Square riot of 1886, the violence of the Little Steel strike of 1938 and hundreds of similar incidents, large and small, are tragic cases in point.

But we learned from them and concentrated our attention upon the substantive evils that gave rise to the outbreaks. That is what the Interstate Public Accommodations Act of 1963 attempts to do—to concentrate upon the evils which have caused the recent demonstrations.

With the adoption of the 13th, 14th, and 15th amendments, the American Negro was freed from slavery and made a citizen in full standing—on paper, at least.

But for most of the past hundred years we have imposed the duties of citizenship on the Negro without allowing him to enjoy the benefits.

We have demanded that he obey the same laws as white men, pay the same taxes, fight and die in the same wars. Yet in nearly every part of the country, he remains the victim of humiliation and deprivation no white citizen would tolerate.

All thinking Americans have grown increasingly aware that discrimination must stop—not only because it is legally insupportable, economically wasteful and socially destructive, but above all because it is morally wrong.

Mr. Chairman, there are three tests for this bill.

1. Is there a need to end discrimination in places of public accommodation?

No one who has confronted the problems and difficulties in the swiftly moving civil rights struggle could say that there is not a need. What we are talking about is not a sop to end disorder in the streets, but the urgent need to prove, to millions of our fellow citizens the very premise of American democracy—that equal rights and equal opportunity are inherent by birth in this land, and are not based on color, race or creed, or religion.

2. Does Congress have authority to ban discrimination in places of public accommodation? Without question it does.

3. Is action by the Federal Government necessary?

We believe emphatically that it is. It would be far better if problems like this were handled by the State and local authorities, but in many areas where even so basic a right as voting is still frequently denied to Negroes, there is no hope in the near future that State and local authorities will act to eliminate this kind of discrimination.

We believe therefore that the Federal Government has no moral choice but to take the initiative. How can we say, to a Negro in Jackson:

"When a war comes you will be an American citizen, but in the meantime you're a citizen of Mississippi and we can't help you."

How, by any moral standard, can we tell our Negro citizens:

"Our forefathers brought your forefathers over here against their will, and we are going to make you pay for it."

Yet isn't that just what the argument boils down to?

The United States is dominated by white people, politically and economically. The question is whether we, in this position of dominance, are going to have not the charity but the wisdom to stop penalizing our fellow citizens whose only fault or sin is that they were born.

That, Mr. Chairman, is why Congress should enact this bill, and should do it in this session.

The CHAIRMAN. Thank you very much, Mr. Kennedy.

The chairman will proceed with questioning, as he pointed out in his opening statement. I think the only fair way to do this would be to alternate the questions.

I will ask first the Senator from Rhode Island if he wishes to interrogate the Attorney General.

Senator PASTORE. First of all, Mr. Attorney General, I agree wholeheartedly with your statement. This comes as no surprise to you, I would suppose. I commend you for a simply stated but very effective statement on this point of human dignity.

My question is just one: Has your Department made a brief of those instances since 1883 that lend themselves to the interpretation of the Court at that time to distinguish between that decision and what has transpired in the meantime to make this new law constitutional and proper?

Mr. KENNEDY. We have no brief on that. We can prepare one, Senator.

I would say that there are a number of my colleagues who feel that if this act was based just on the 14th amendment we might very well have some difficulty on its constitutionality.

We base this on the commerce clause which I think makes it clearly constitutional. In my personal judgment, basing it on the 14th amendment would also be constitutional.

We can prepare for you a memorandum as to the arguments for and against the constitutionality based on the 14th amendment.

I think, however, that under the commerce clause, the bill is clearly constitutional. I don't think anybody is contending that it is not.

Senator PASTORE. If you will recall, we did precisely that in discussing the communications corporation, the private communications corporation that had to do with the satellite.

But now, addressing myself to the distinguished chairman, may we have that memorandum?

The CHAIRMAN. Yes. I hope the Attorney General's Office will give us a brief, if they have one, or can help us with a brief. We have also asked several very eminent constitutional lawyers and teachers of constitutional law to prepare briefs, if they wish, and to testify on this point.

Mr. KENNEDY. Could I ask a question, Mr. Chairman?

Is that on our bill, and does it also cover the bill that has been introduced by Senators Cooper and Dodd?

The CHAIRMAN. Just the bill that is here, the so-called accommodations bill.

Mr. KENNEDY. I don't believe anyone contends that this would be unconstitutional on the commerce clause. I think that there is argument about the 14th amendment basis—going back to the 1883 Supreme Court decision, and the fact that this is not State action—that therefore Congress would not have the right under the 14th amendment to pass any legislation dealing with it.

So the major question in this whole field, as I think is agreed by everybody, is the question of whether this is constitutional under the 14th amendment.

The CHAIRMAN. If you will specifically brief that point we will be very appreciative.

At this point—we speak all the time about the 14th amendment and the interstate commerce clause. I think it would be well to put in the record at this point the provisions of the Constitution that we are speaking about.

(The provisions of the Constitution of the United States referred to follow:)

ARTICLE I. Section 8. The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

ARTICLE XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Senator PASTORE. The reason why I raised the question, Mr. Attorney General, is that in your presentation this morning you have said that in decision after decision, since 1883, the Court has somewhat veered away in logic because of the development or the vicissitudes of time.

I thought it would be proper for the record if those instances were stated out in your brief.

Mr. KENNEDY. That's fine. And then, of course, the added point is that the country has changed so much. There is so much more mobility and travel and shipment of goods now than there was 75 years ago.

Senator PASTORE. If we can document that in the record it will have much more effect.

Mr. KENNEDY. I will be glad to.

Senator PASTORE. Thank you.

The CHAIRMAN. Senator Cotton.

Senator COTTON. Mr. Attorney General, I join my colleague, the able Senator from Rhode Island, in sincerely commending you for an exceedingly able and penetrating statement, much of which—perhaps most of which—all fairminded men must agree with.

Out of consideration of my colleagues who are awaiting their turn, I would only like to ask you a few general questions; and they are matters that troubled me and, I think, may trouble others.

Referring to the question just asked you by the Senator from Rhode Island—and I hope this is a fair question; its purpose is not to lead you into any particular line that might be damaging, but is a sincere inquiry:

If in your mind, and according to the advice of your legal advisers, if you were quite confident that the courts would now hold the 14th amendment as applicable to these cases, would you be pressing a bill which is based, at least in part and perhaps in major part, on the interstate commerce clause of the Constitution?

Mr. KENNEDY. Senator, I think that there is an injustice that needs to be remedied. We have to find the tools with which to remedy that injustice.

There are perhaps three provisions of the Constitution that might be applicable: the 13th amendment, the 14th amendment, and the commerce clause.

There was some legislation that was passed earlier based on the 13th and 14th amendments, particularly on the 14th amendment, which is almost identical with the legislation that we are offering, and legislation has also been recommended by other Members of the Senate and House of Representatives based solely on the 14th amendment.

The Supreme Court heard arguments on the earlier legislation and

ruled that it was unconstitutional. That is the law of the land at the present time.

I think that we come into Congress, we go to the Senate and the House of Representatives with an extra burden if we are advocating a bill which the Supreme Court has specifically declared is unconstitutional.

If it is determined that everybody who was in favor of this bill in Congress was all clear in his own mind that the 1883 decision would be overruled by the Supreme Court and was no longer the law of the land, then I would be glad to base it on the 14th amendment. I think that there are many who have legitimate questions in their minds.

There cannot be any legitimate question about the commerce clause. That is clearly constitutional. We need to obtain a remedy. The commerce clause will obtain a remedy and there won't be a problem about the constitutionality.

I happen to feel that if this law were predicated on the 14th amendment, it would be declared constitutional by the Supreme Court. But I would say that there are many of my colleagues in the Department of Justice, and others, who have a very, very serious question about it.

For instance, the Solicitor General feels that it makes far, far more sense to base this on the commerce clause than on the 14th amendment. There are others who feel the same way.

So if we want to remedy an injustice and do it in a meaningful way, it seems to me that the best course is to base the law on both the 14th amendment and the commerce clause.

I think we are going to have enough difficulty and trouble with this bill as it is. I think it is absolutely essential that it get passed. I think we are putting an extra burden, an extra handicap, on it if we try to pass a law based just on the 14th amendment when, based on that, the Supreme Court has declared similar legislation unconstitutional.

I think we open ourselves to all kinds of difficult arguments. And I have seen those who oppose any legislation in this field, Senator, argue that we are trying to overrule the Supreme Court.

The CHAIRMAN. May I put in the record at this point the 1875 law that was passed on by the Court? I think it is very pertinent to this discussion.

(The document referred to follows:)

[18 Stat. 335]

FORTY-THIRD CONGRESS, SESS. II, CH. 99, 108, 114. 1875

CHAP. 114—AN ACT TO PROTECT ALL CITIZENS IN THEIR CIVIL AND LEGAL RIGHTS. (MARCH 1, 1875)

Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore, *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to

the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizens, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, that all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, that a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the territorial, district, or circuit courts of the United States wherever the defendant may be found, without regard to the other party; and the district attorneys, marshals, and deputy marshals of the United States, and commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States, or territorial court, as by law has cognizance of the offense, except in respect of the right of action accruing to the person aggrieved; and such district attorneys shall cause such proceedings to be prosecuted to their termination as in other cases: *Provided*, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person, whether by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined ont less than one thousand nor more than five thousand dollars: *And provided further*, That a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution respectively.

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

SEC. 5. That all cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court.

(Approved March 1, 1875.)

Mr. KENNEDY. In connection with that decision of 1875——

Senator THURMOND. Mr. Chairman, would you mind putting in the decision of the Supreme Court also?

The CHAIRMAN. Yes. We will follow with the Supreme Court decision. It is very pertinent at this point.

CIVIL RIGHTS CASES.

UNITED STATES *v.* STANLEY.

ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

UNITED STATES *v.* RYAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

UNITED STATES *v.* NICHOLS.

ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

UNITED STATES *v.* SINGLETON.

ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ROBINSON & Wife *v.* MEMPHIS AND CHARLESTON RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Submitted October Term, 1882.—Decided October 15th, 1883.

Civil Rights—Constitution—District of Columbia—Inns—Places of Amusement—Public Conveyances—Slavery—Territories.

1. The 1st and 2d sections of the Civil Rights Act passed March 1st, 1875, are unconstitutional enactments as applied to the several States, not being authorized either by the XIIIth or XIVth Amendments of the Constitution.
2. The XIVth Amendment is prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it is not *direct* legislation on the matters respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but is *corrective* legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts.
3. The XIIIth Amendment relates only to slavery and involuntary servitude (which it abolishes); and although, by its reflex action, it establishes universal freedom in the United States, and Congress may probably pass laws directly enforcing its provisions; yet such legislative power extends only to the subject of slavery and its incidents; and the denial of equal accommodations in inns, public conveyances and places of public amusement (which is forbidden by the sections in question), imposes no badge of slavery or involuntary servitude upon the party, but at most, infringes rights which are protected from State aggression by the XIVth Amendment.
4. Whether the accommodations and privileges sought to be protected by the 1st and 2d sections of the Civil Rights Act, are, or are not, rights constitutionally demandable; and if they are, in what form they are to be protected, is not now decided.
5. Nor is it decided whether the law as it stands is operative in the Territories and District of Columbia: the decision only relating to its validity as applied to the States.
6. Nor is it decided whether Congress, under the commercial power, may or may not pass a law securing to all persons equal accommodations on lines of public conveyance between two or more States.

These cases were all founded on the first and second sections of the Act of Congress, known as the Civil Rights Act, passed March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights." 18 Stat. 335. Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one on information, the other

an indictment, for denying to individuals the privileges and accommodations of a theatre, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco; and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House in New York, "said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." The case of Robinson and wife against the Memphis & Charleston R.R. Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recover the penalty of five hundred dollars given by the second section of the act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits, under a charge of the court to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the act of Congress; and the principal point made by the exceptions was, that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's *bona fide* reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company. The case was brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton, came up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the act referred to; and the case of Ryan, on a writ of error to the judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

The Stanley, Ryan, Nichols, and Singleton cases were submitted together by the solicitor general at the last term of court, on the 7th day of November, 1882. There were no appearances and no briefs filed for the defendants.

The Robinson case was submitted on the briefs at the last term, on the 20th day of March, 1883.

Mr. Solicitor General Phillips for the United States.

After considering some objections to the forms of proceedings in the different cases, the counsel reviewed the following decisions of the court upon the Thirteenth and Fourteenth Amendments to the Constitution and on points cognate thereto, viz: *The Slaughter-House Cases* 16 Wall. 36; *Bradwell* v. *The State*, 16 Wall. 130; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Minor* v. *Happersett*, 21 Wall. 162; *Walker* v. *Sauvinet*, 92 U.S. 90; *United States* v. *Reese*, 92 U.S. 214; *Kennard* v. *Louisiana*, 92 U.S. 480; *United States* v. *Cruikshank*, 92 U.S. 542; *Munn* v. *Illinois*, 94 U.S. 113; *Chicago B. & C.R.R. Co.* v. *Iowa*, 94 U.S. 155; *Blyew* v. *United States*, 13 Wall. 581; *Railroad Co.* v. *Brown*, 17 Wall. 445; *Hall* v. *De Cuir*, 95 U.S. 485; *Strauder* v. *West Virginia*, 100 U.S. 303; *Ex parte Virginia*, 100 U.S. 339; *Missouri* v. *Lewis*, 101 U.S. 22; *Neal* v. *Delaware*, 103 U.S. 370.

Upon the whole these cases decide that,

1. The Thirteenth Amendment forbids all sorts of involuntary personal servitude except penal, as to all sorts of men, the word servitude taking some color from the historical fact that the United States were then engaged in dealing with African slavery, as well as from the signification of the Fourteenth and Fifteenth Amendments, which must be construed as *advancing* constitutional rights previously existing.

2. The Fourteenth Amendment expresses prohibitions (and consequently implies corresponding positive immunities), *limiting State action only*, including in such action, however, action by all State agencies, executive, legislative, and judicial, of whatever degree.

3. The Fourteenth Amendment warrants legislation by Congress punishing violations of the immunities thereby secured when committed by agents of States in discharge of ministerial functions.

The right violated by Nichols, which is of the same class as that violated by Stanley and by Hamilton, is the right of locomotion, which Blackstone makes an element of personal liberty. Blackstone's Commentaries, Book I., ch. 1.

In violating this right, Nichols did not act in an exclusively private capacity, but in one devoted to a public use, and so affected with a public, *i.e.*, a State,

interest. This phrase will be recognized as taken from the *Elevator Cases* in 94 U.S., already cited.

Restraint upon the right of locomotion was a well-known feature of the slavery abolished by the Thirteenth Amendment. A first requisite of the right to appropriate the use of another man was to become the master of his natural power of motion, and, by a mayhem therein of the common law to require the whole community to be on the alert to restrain that power. That this is not exaggeration is shown by the language of the court in *Eaton* v. *Vaughn*, 9 Missouri, 734.

Granting that by *involuntary servitude*, as prohibited in the Thirteenth Amendment, is intended some *institution*, viz., custom, etc., of that sort, and not primarily mere scattered trespasses against liberty committed by private persons, yet, considering what must be the social tendency in at least large parts of the country, it is "appropriate legislation" against such an institution to forbid any action by private persons which in the light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi public occupations, to create an *institution*.

Therefore, the above act of 1875, in prohibiting persons from violating the rights of other persons to the full and equal enjoyment of the accommodations of inns and public conveyances, for any reason turning merely upon the race or color of the latter, partakes of the specific character of certain contemporaneous solemn and effective action by the United States to which it was a sequel—and is constitutional.

Mr. William M. Randolph for Robinson and wife, plaintiffs in error.

Where the Constitution guarantees a right, Congress is empowered to pass the legislation appropriate to give effect to that right. *Prigg* v. *Pennsylvania*, 16 Peters, 539 *Ableman* v. *Booth*, 21 How. 506; *United States* v. *Reese*, 92 U.S. 214.

Whether Mr. Robinson's rights were created by the Constitution, or only guaranteed by it, in either event the act of Congress, so far as it protects them, is within the Constitution. *Pensacola Telegraph Co.* v. *Western Union Tel. Co.*, 96 U.S. 1; *The Passenger Cases*, 7 Howard, 283; *Crandall* v. *Nevada*, 6 Wall. 35.

In *Munn* v. *Illinois*, 94 U.S. 113, the following propositions were affirmed:

"Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property."

"It has, in the exercise of these powers, been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc."

"When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use."

Undoubtedly, if Congress could legislate on the subject at all, its legislation by the act of 1st March, 1875, was within the principles thus announced.

The penalty denounced by the statute is incurred by denying to any citizen "the full enjoyment of any of the accommodations, advantages, facilities, or privileges" enumerated in the first section, and it is wholly immaterial whether the citizen whose rights are denied him belongs to one race or class or another, or is of one complexion or another. And again, the penalty follows every denial of the full enjoyment of any of the accommodations, advantages, facilities or privileges, except and unless the denial was "*for reasons by law* applicable to citizens of every race and color, and regardless of any previous condition of servitude."

Mr. William Y. C. Humes and *Mr. David Posten* for the Memphis and Charleston Railroad Co., defendants in error.

Mr. Justice Bradley delivered the opinion of the court. After stating the facts in the above language he continued:

It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand.

The sections of the law referred to provide as follows:

"Sec. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and

color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part.

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa*. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished Senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to

render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *United States* v. *Cruikshank*, 92 U.S. 542; *Virginia* v. *Rives*, 100 U.S. 313; and *Ex parte Virginia*, 100 U.S. 339.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected: and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789, 1 Stat. 85, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of State courts whenever they should sustain the validity of a State statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a State law was passed impairing the obligation of a contract, and the State tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a State law; and under the broad provisions of the act of March 3d, 1875, ch. 137, 18 Stat. 470, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that, or any other law, it must appear as well by allegation, as proof at the trial, that the Constitution had been violated by the action of the State legislature. Some obnoxious State law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against *State laws* impairing the obligation of contracts.

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises: but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislature and to supersede them. It is absured to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may

therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

We have not overlooked the fact that the fourth section of the act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In Ex parte *Virginia*, 100 U.S. 339, it was held that an indictment against a State officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute book of the State actually laid down any such rule of disqualification, or not, the State, through its officer, enforced such a rule: and it is against such State action, through its officers and agents, that the last clause

of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering.

These sections, in the objectionable features before referred to, are different also from the law ordinarily called the "Civil Rights Bill," originally passed April 9th, 1866, 14 Stat. 27, ch. 31, and re-enacted with some modifications in sections 16, 17, 18, of the Enforcement Act, passed May 31st, 1870, 16 Stat. 140, ch. 114. That law, as re-enacted, after declaring that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding, proceeds to enact, that any person who, under color of any law, statute, ordinance, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any rights secured or protected by the preceding section (above quoted), or to different punishment, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the act. This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. In the Revised Statutes, it is true, a very important clause, to wit, the words "any law, statute, ordinance, regulation or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to State laws, by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory: thus preserving the corrective character of the legislation. Rev. St. §§ 1977, 1978, 1979, 5510. The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under the color of pretence that it had been rendered void or invalid by a State law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority, in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual: an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress wth power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, and among the several States, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *United States* v. *Harris*, 106 U.S. 629), it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of States. And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the

amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States: and upon this assumption it is claimed, that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges and immunities of citizens which cannot rightfully be abridged by state laws under the Fourteenth Amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another were servitudes, or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the Fourteenth, no less than to the Thirteenth Amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?

It may be that by the Black Code (as it was called), in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal right as a citizen, and amenable to the prohibitions of the Fourteenth Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, pur-

chase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and scope of the Thirteenth and Fourteenth amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not to distinction of races, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment. It would be running the slavery argument into the ground

to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Thirteenth and Fifteenth Amendments.

On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.

This conclusion disposes of the cases now under consideration. In the cases of the *United States* v. *Michael Ryan*, and of *Richard A. Robinson and Wife* v. *The Memphis & Charleston Railroad Company*, the judgments must be affirmed. In the other cases, the answer to be given will be that the first and second sections of the act of Congress of March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly. *And it is so ordered.*

Mr. JUSTICE HARLAN dissenting.

The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. "It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul." Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. By this I do not mean that the determination of these cases should have been materially controlled by considerations of mere expediencey or policy. I mean only, in this form, to express an earnest conviction that the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.

The purpose of the first section of the act of Congress of March 1, 1875, was to prevent *race* discrimination in respect of the accommodations and facilities of inns, public conveyances, and places of public amusement. It does not assume to define the general conditions and limitations under which inns, public conveyances, and places of public amusement may be conducted, but only declares that such conditions and limitations, whatever they may be, shall not be applied so as to work a discrimination solely because of race, color, or previous condition of servitude. The second section provides a penalty against any one denying, or aiding or inciting the denial, to any citizen, of that equality of right given by the first section, except for reasons by law applicable to citizens of every race or color and regardless of any previous condition of servitude.

There seems to be no substantial difference between my brethren and myself as to the purpose of Congress; for, they say that the essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. The effect of the statute, the court says, is, that colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusements as are enjoyed by white persons; and *vice versa*.

The court adjudges, I think erroneously, that Congress is without power, under either the Thirteenth or Fourteenth Amendment, to establish such regulations, and that the first and second sections of the statute are, in all their parts, unconstitutional and void.

Whether the legislative department of the government has transcended the limits of its constitutional powers, "is at all times," said this court in *Fletcher v. Peck*, 6 Cr. 128, "a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. . . . The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." More recently in *Sinking Fund Cases*, 99 U. S. 718, we said: "It is our duty when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States, but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Before considering the language and scope of these amendments it will be proper to recall the relations subsisting, prior to their adoption, between the national government and the institution of slavery, as indicated by the provisions of the Constitution, the legislation of Congress, and the decisions of this court. In this mode we may obtain keys with which to open the mind of the people, and discover the thought intended to be expressed.

In section 2, of article IV. of the Constitution it was provided that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." Under the authority of this clause Congress passed the Fugitive Slave Law of 1793, establishing a mode for the recovery of fugitive slaves, and prescribing a penalty against any person who should knowingly and willingly obstruct or hinder the master, his agent, or attorney, in seizing, arresting, and recovering the fugitive, or who should rescue the fugitive from him, or who should harbor or conceal the slave after notice that he was a fugitive.

In *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539, this court had occasion to define the powers and duties of Congress in reference to fugitives from labor. Speaking by MR. JUSTICE STORY it laid down these propositions:

That a clause of the Constitution conferring a right should not be so construed as to make it shadowy, or unsubstantial, or leave the citizen without a remedial power adequate for its protection, when another construction equally accordant with the words and the sense in which they were used, would enforce and protect the right granted;

That Congress is not restricted to legislation for the execution of its expressly granted powers; but, for the protection of rights guaranteed by the Constitution, may employ such means, not prohibited, as are necessary and proper, or such as are appropriate, to attain the ends proposed:

That the Constitution recognized the master's right of property in his fugitive slave, and, as incidental thereto, the right of seizing and recovering him, regardless of any State law, or regulation, or local custom whatsoever; and,

That the right of the master to have his slave, thus escaping, delivered up on claim, being guaranteed by the Constitution, the fair implication was that the national government was clothed with appropriate authority and functions to enforce it.

The court said: "The fundamental principle, applicable to all cases of this sort, would seem to be that when the end is required the means are given, and

when the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionary to whom it is entrusted." Again: "It would be a strange anomaly and forced construction to suppose that the national government meant to rely for the due fulfilment of its own proper duties, and the rights which it intended to secure, upon State legislation, and not upon that of the Union. *A fortiori*, it would be more objectionable to suppose that a power which was to be the same throughout the Union, should be confided to State sovereignty which could not rightfully act beyond its own territorial limits."

The act of 1793 was, upon these grounds, adjudged to be a constitutional exercise of the powers of Congress.

It is to be observed from the report of Prigg's case that Pennsylvania, by her attorney-general, pressed the argument that the obligation to surrender fugitive slaves was on the States and for the States, subject to the restriction that they should not pass laws or establish regulations liberating such fugitives; that the Constitution did not take from the States the right to determine the status of all persons within their respective jurisdictions; that it was for the State in which the alleged fugitive was found to determine, through her courts or in such modes as she prescribed, whether the person arrested was, in fact, a freeman or a fugitive slave; that the sole power of the general government in the premises was, by judicial instrumentality, to restrain and correct, not to forbid and prevent in the absence of hostile State action; and that, for the general government to assume primary authority to legislate on the subject of fugitive slaves, to the exclusion of the States, would be a dangerous encroachment on State sovereignty. But to such suggestions this court turned a deaf ear, and adjudged that primary legislation by Congress to enforce the master's right was authorized by the Constitution.

We next come to the Fugitive Slave Act of 1850, the constitutionality of which rested, as did that of 1793, solely upon the implied power of Congress to enforce the master's right. The provisions of that act were far in advance of previous legislation. They placed at the disposal of the master seeking to recover his fugitive slave, substantially the whole power of the nation. It invested commissioners, appointed under the act, with power to summon the *posse comitatus* for the enforcement of its provisions, and commanded all good citizens to assist in its prompt and efficient execution whenever their services were required as part of the *posse comitatus*. Without going into the details of that act, it is sufficient to say that Congress omitted from it nothing which the utmost ingenuity could suggest as essential to the successful enforcement of the master's claim to recover his fugitive slave. And this court, in *Ableman* v. *Booth*, 21 How. 506, adjudged it to be "in all of its provisions fully authorized by the Constitution of the United States."

The only other case, prior to the adoption of the recent amendments, to which reference will be made, is that of *Dred Scott*, v. *Sanford*, 19 How. 399. That case was instituted in a circuit court of the United States by Dred Scott, claiming to be a citizen of Missouri, the defendant being a citizen of another State. Its object was to assert the title of himself and family to freedom. The defendant pleaded in abatement that Scott—being of African descent, whose ancestors, of pure African blood, were brought into this country and sold as slaves—was not a *citizen*. The only matter in issue, said the court, was whether the descendants of slaves thus imported and sold, when they should be emancipated, or who were born of parents who had become free before their birth, are citizens of a State in the sense in which the word "citizen" is used in the Constitution of the United States.

In determining that question the court instituted an inquiry as to who were citizens of the several States at the adoption of the Constitution, and who, at that time, were recognized as the people whose rights and liberties had been violated by the British government. The result was a declaration, by this court, speaking by Chief Justice Taney, that the legislation and histories of the times, and the language used in the Declaration of Independence, showed "that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that instrument;" that "they had for more than a century before been regarded as beings of an inferior race, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit;" that he was "bought and

sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it;" and, that "this opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without for a moment doubting the correctness of this opinion."

The judgment of the court was that the words "people of the United States" and "citizens" meant the same thing, both describing "the political body who, according to our republican institutions, form the sovereignty and hold the power and conduct the government through their representatives;" that "they are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a constituent member of this sovereignty;" but, that the class of persons described in the plea in abatement did not compose a portion of this people, were not "included, and were not intended to be included, under the word 'citizens' in the Constitution;" that, therefore, they could "claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States;" that, "on the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."

Such were the relations which formerly existed between the government, whether national or state, and the descendants, whether free or in bondage, of those of African blood, who had been imported into this country and sold as slaves.

The first section of the Thirteenth Amendment provides that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Its second section declares that "Congress shall have power to enforce this article by appropriate legislation." This amendment was followed by the Civil Rights Act of April 9, 1866, which, among other things, provided that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." 14 Stat. 27. The power of Congress, in this mode, to elevate the enfranchised race to national citizenship, was maintained by the supporters of the act of 1866 to be as full and complete as its power, by general statute, to make the children, being of full age, of persons naturalized in this country, citizens of the United States without going through the process of naturalization. The act of 1866, in this respect, was also likened to that of 1843, in which Congress declared "that the Stockbridge tribe of Indians, and each and every one of them, shall be deemed to be and are hereby declared to be, citizens of the United States to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens, and shall in all respects be subject to the laws of the United States." If the act of 1866 was valid in conferring national citizenship upon all embraced by its terms, then the colored race, enfranchised by the Thirteenth Amendment, became citizens of the United States prior to the adoption of the Fourteenth Amendment. But, in the view which I take of the present case, it is not necessary to examine this question.

The terms of the Thirteenth Amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States. No race, as such, can be excluded from the benefits or rights thereby conferred. Yet, it is historically true that that amendment was suggested by the condition, in this country, of that race which had been declared by this court, to have had—according to the opinion entertained by the most civilized portion of the white race, the time of the adoption of the Constitution—"no rights which the white man was bound to respect," none of the privileges or immunities secured by that instrument to citizens of the United States. It had reference, in a peculiar sense, to a people which (although the larger part of them were in slavery) had been invited by an act of Congress to aid in saving from overthrow a government which, theretofore, by all of its departments, had treated them as an inferior race, with no legal rights or privileges except such as the white race might choose to grant them.

These are the circumstances under which the Thirteenth Amendment was proposed for adoption. They are now recalled only that we may better understand what was in the minds of the people when that amendment was considered,

and what were the mischiefs to be remedied and the grievances to be redressed by its adoption.

We have seen that the power of Congress, by legislation, to enforce the master's right to have his slave delivered up on claim was *implied* from the recognition of that right in the national Constitution. But the power conferred by the Thirteenth Amendment does not rest upon implication or inference. Those who framed it were not ignorant of the discussion, covering many years of our country's history, as to the constitutional power of Congress to enact the Fugitive Slave Laws of 1793 and 1850. When, therefore, it was determined, by a change in the fundamental law, to uproot the institution of slavery wherever it existed in the land, and to establish universal freedom, there was a fixed purpose to place the authority of Congress in the premises beyond the possibility of a doubt. Therefore, *ex industria*, power to enforce the Thirteenth Amendment, by appropriate legislation, was expressly granted. Legislation for that purpose, my brethren concede, may be direct and primary. But to what specific ends may it be directed? This court has uniformly held that the national government has the power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the Constitution. *United States* v. *Reese*, 92 U.S. 214; *Strauder* v. *West Virginia*, 100 U.S. 303. That doctrine ought not now to be abandoned when the inquiry is not as to an implied power to protect the master's rights, but what may Congress, under powers expressly granted, do for the protection of freedom and the rights necessarily inhering in a state of freedom.

The Thirteenth Amendment, it is conceded, did something more than to prohibit slavery as an *institution*, resting upon distinctions of race, and upheld by positive law. My brethren admit that it established and decreed universal *civil freedom* throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man from owning another as property? Was it the purpose of the nation simply to destroy the institution, and then remit the race, theretofore held in bondage, to the several States for such protection, in their civil rights, necessarily growing out of freedom, as those States, in their discretion, might choose to provide? Were the States against whose protest the institution was destroyed, to be left free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which by universal concession, inhere in a state of freedom? Had the Thirteenth Amendment stopped with the sweeping declaration, in its first section, against the existence of slavery and involuntary servitude, except for crime, Congress would have had the power, by implication, according to the doctrines of *Prigg* v. *Commonwealth of Pennsylvania*, repeated in *Strauder* v. *West Virginia*, to protect the freedom established, and consequently, to secure the enjoyment of such civil rights as were fundamental in freedom. That it can exert its authority to that extent is made clear, and was intended to be made clear, by the express grant of power contained in the second section of the Amendment.

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the foundation of the Civil Rights Act of 1866. Whether that act was authorized by the Thirteenth Amendment alone, without the support which it subsequently received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, my brethren do not consider it necessary to inquire. But I submit, with all respect to them, that is constitutionality is conclusively shown by their opinion. They admit, as I have said, that the Thirteenth Amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that Congress, by the act of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens; that under the Thirteenth Amendment, Congress has to do with slavery and its incidents; and that legislation, so far as necessary or proper to eradicate all

forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not. These propositions being conceded, it is impossible, as it seems to me, to question the constitutional validity of the Civil Rights Act of 1866. I do not contend that the Thirteenth Amendment invests Congress with authority, by legislation, to define and regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several States. But I hold that since slavery, as the court has repeatedly declared, *Slaughter-house Cases*, 16 Wall. 36; *Strauder v. West Virginia*, 100 U.S. 303, was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and, also, upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State.

To test the correctness of this position, let us suppose that, prior to the adoption of the Fourteenth Amendment, a State had passed a statute denying to freemen of African descent, resident within its limits, the same right which was accorded to white persons, of making and enforcing contracts, and of inheriting, purchasing, leasing, selling and conveying property; or a statute subjecting colored people to severer punishment for particular offenses than was prescribed for white persons, or excluding that race from the benefit of the laws exempting homesteads from execution. Recall the legislation of 1865-6 in some of the States, of which this court, in the *Slaughter-House Cases*, said, that it imposed upon the colored race onerous disabilities and burdens; curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; forbade them to appear in the towns in any other character than menial servants; required them to reside on and cultivate the soil, without the right to purchase or own it; excluded them from many occupations of gain; and denied them the privilege of giving testimony in the courts where a white man was a party. 16 Wall. 57. Can there be any doubt that all such enactments might have been reached by direct legislation upon the part of Congress under its express power to enforce the Thirteenth Amendment? Would any court have hesitated to declare that such legislation imposed badges of servitude in conflict with the civil freedom ordained by that amendment? That it would have been also in conflict with the Fourteenth Amendment, because inconsistent with the fundamental rights of American citizenship, does not prove that it would have been consistent with the Thirteenth Amendment.

What has been said is sufficient to show that the power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent, at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race.

It remains now to inquire what are the legal rights of colored persons in respect of the accommodations, privileges and facilities of public conveyances, inns and places of public amusement?

First, as to public conveyances on land and water. In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, this court, speaking by Mr. Justice Nelson, said that a common carrier is "in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." To the same effect is *Munn v. Illinois*, 94 U.S. 113. In *Olcott v. Supervisors*, 16 Wall 678, it was ruled that railroads are public highways, established by authority of the State for the public use; that they are none the less public highways, because controlled and owned by private corporations; that it is a part of the function of government to make and maintain highways for the convenience of the public; that no matter who is the agent, or what is the agency, the function performed is *that of the State;* that although the owners may be private companies, they may be compelled to permit the public to use these works in the manner in which they can be used; that, upon these grounds alone, have the courts sustained the investiture of railroad corporations with the State's right of eminent domain, or

the right of municipal corporations, under legislative authority, to assess, levy and collect taxes to aid in the construction of railroads. So in *Township of Queensbury* v. *Culver*, 19 Wall. 83, it was said that a municipal subscription of railroad stock was in aid of the construction and maintenance of a public highway, and for the promotion of a public use. Again, in *Township of Pine Grove* v. *Talcott*, 19 Wall. 666: "Though the corporation [railroad] was private, its work was public, as much so as if it were to be constructed by the State." To the like effect are numerous adjudications in this and the State courts with which the profession is familiar. The Supreme Judicial Court of Massachusetts in *Inhabitants of Worcester* v. *The Western R.R. Corporation*, 4 Met. 564, said in reference to a railroad:

"The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement. . . . It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public." In *Erie, Etc., R.R. Co.* v. *Casey*, 26 Penn. St. 287, the court, referring to an act repealing the charter of a railroad, and under which the State took possession of the road, said: "It is a public highway, solemnly devoted to public use. When the lands were taken it was for such use, or they could not have been taken at all. . . . Railroads established upon land taken by the right of eminent domain by authority of the commonwealth, created by her laws as thoroughfares for commerce, are her highways. No corporation has property in them, though it may have franchises annexed to and exercisable within them."

In many courts it has been held that because of the public interest in such a corporation the land of a railroad company cannot be levied on and sold under execution by a creditor. The sum of the adjudged cases is that a railroad corporation is a governmental agency, created primarily for public purposes, and subject to be controlled for the public benefit. Upon this ground the State, when unfettered by contract, may regulate, in its discretion, the rates of fares of passengers and freight. And upon this ground, too, the State may regulate the entire management of railroads in all matters affecting the convenience and safety of the public; as, for example, by regulating speed, compelling stops of prescribed length at stations, and prohibiting discriminations and favoritism. If the corporation neglect or refuse to discharge its duties to the public, it may be coerced to do so by appropriate proceedings in the name or in behalf of the State.

Such being the relations these corporations hold to the public, it would seem that the right of a colored person to use an improved public highway, upon the terms accorded to freemen of other races, is as fundamental, in the state of freedom established in this country, as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom. "Personal liberty consists," says Blackstone, "in the power of locomotion, of changing situation, or removing one's person to whatever places one's own inclination may direct, without restraint, unless by due course of law." But of what value is this right of locomotion, if it may be clogged by such burdens as Congress intended by the act of 1875 to remove? They are burdens which lay at the very foundation of the institution of slavery as it once existed. They are not to be sustained, except upon the assumption that there is, in this land of universal liberty, a class which may still be discriminated against, even in respect of rights of a character so necessary and supreme, that, deprived of their enjoyment in common with others, a freeman is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence; and all this solely because they belong to a particular race which the nation has liberated. The Thirteenth Amendment alone obliterated the race line, so far as all rights fundamental in a state of freedom are concerned.

Second, as to inns. The same general observations which have been made as to railroads are applicable to inns. The word "inn" has a technical legal signification. It means, in the act of 1875, just what it meant at common law. A mere private boarding-house is not an inn, nor is its keeper subject to the responsibilities, or entitled to the privileges of a common innkeeper. "To constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all travellers or wayfarers who might choose to accept the same, being of good character or conduct." Redfield on Carriers, etc., § 575. Says Judge Story:

"An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants. An innkeeper is bound to take in all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence. * * * If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor. . . . They (carriers of passengers) are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest." Story on Bailments, §§ 475–6.

In *Rex* v. *Ivens*, 7 Carrington & Payne, 213, 32 E. C. L. 495, the court, speaking by Mr. Justice Coleridge, said:

"An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come to my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers and supplying them with what they want."

These authorities are sufficient to show that a keeper of an inn is in the exercise of a quasi public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person.

Third. As to places of public amusement. It may be argued that the managers of such places have no duties to perform with which the public are, in any legal sense, concerned, or with which the public have any right to interfere; and, that the exclusion of a black man from a place of public amusement, on acount of his race, or the denial to him, on that ground, of equal accommodations at such places, violates no legal right for the vindication of which he may invoke the aid of the courts. My answer is, that places of public amusement, within the meaning of the act of 1875, are such as are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public to establish a place of public amusement, imports, in law, equality of right, at such places, among all the members of that public. This must be so, unless it be—which I deny—that the common muncipal government of all the people may, in the exertion of its powers, conferred for the benefit of all, discriminate or authorize discrimination against a particular race, solely because of its former condition of servitude.

I also submit, whether it can be said—in view of the doctrines of this court as announced in *Munn* v. *State of Illinois*, 94 U.S. 113, and reaffirmed in *Peik* v. *Chicago & N.W. Railway Co.*, 94 U.S. 164—that the management of places of public amusement is a purely private matter, with which government has no rightful concern In the Munn case the question was whether the State of Illinois could fix, by law, the maximum of charges for the storage of grain in certain warehouses in that State—the *private property of individual citizens.* After quoting a remark attributed Lord Chief Justice Hale, to the effect that when private property is "affected with a public interest it ceases to be *juris privati only*," the court says:

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."

The doctrines of *Munn* v. *Illinois* have never been modified by this court, and I am justified, upon the authority of that case in saying that places of public amusement, conducted under the authority of the law, are clothed with a public interest, because used in a manner to make them of public consequence and to affect the community at large. The law may therefore regulate, to some extent, the mode in which they shall be conducted, and, consequently, the public have

rights in respect of such places, which may be vindicated by the law. It is consequently not a matter purely of private concern.

Congress has not, in these matters, entered the domain of State control and supervision. It does not, as I have said, assume to prescribe the general conditions and limitations under which inns, public conveyances, and places of public amusement, shall be conducted, or managed. It simply declares, in effect, that since the nation has established universal freedom in this country, for all time, there shall be no discrimination, based merely upon race or color, in respect of the accommodations and advantages of public conveyances, inns, and places of public amusement.

I am of the opinion that such discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment; and, consequently, without reference to its enlarged power under the Fourtheenth Amendment, the act of March 1, 1875, is not, in my judgment, repugnant to the Constitution.

It remains now to consider these cases with reference to the power Congress has possessed since the adoption of the Fourteenth Amendment. Much that has been said as to the power of Congress under the Thirteenth Amendment is applicable to this branch of the discussion, and will not be repeated.

Before the adoption of the recent amendments, it had become, as we have seen, the established doctrine of this court that negroes, whose ancestors had been imported and sold as slaves, could not become citizens of a State, or even of the United States, with the rights and privileges guaranteed to citizens by the national Constitution; further, that one might have all the rights and privileges of a citizen of a State without being a citizen in the sense in which that word was used in the national Constitution, and without being entitled to the privileges and immunities of citizens of the several States. Still, further, between the adoption of the Thirteenth Amendment and the proposal by Congress of the Fourteenth Amendment, on June 16, 1866, the statute books of several of the States, as we have seen, had become loaded down with enactments which, under the guise of Apprentice, Vagrant, and Contract regulations, sought to keep the colored race in a condition, practically, of servitude. It was openly announced that whatever might be the rights which persons of that race had, as freemen, under the guarantees of the national Constitution, they could not become citizens of a State, with the privileges belonging to citizens, except by the consent of such State; consequently, that their civil rights, as citizens of the State, depended entirely upon State legislation. To meet this new peril to the black race, that the purposes of the nation might not be doubted or defeated, and by way of further enlargement of the power of Congress, the Fourteenth Amendment was proposed for adoption.

Remembering that this court, in the *Slaughterhouse Cases*, declared that the one pervading purpose found in all the recent amendments, lying at the foundation of each, and without which none of them would have been suggested—was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him"—that each amendment was addressed primarily to the grievances of that race—let us proceed to consider the language of the Fourteenth Amendment.

Its first and fifth sections are in these words:

"SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * * *

"SEC. 5. That Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It was adjudged in *Strauder* v. *West Virginia*, 100 U.S. 303, and *Ex parte Virginia*, 100 U.S. 339, and my brethren concede, that positive rights and privileges were intended to be secured, and are in fact secured, by the Fourteenth Amendment.

But when, under what circumstances, and to what extent, may Congress, by means of legislation, exert its power to enforce the provisions of this amendment? The theory of the opinion of the majority of the court—the foundation

upon which their reasoning seems to rest—is, that the general government cannot, in advance of hostile State laws or hostile State proceedings, actively interfere for the protection of any of the rights, privileges, and immunities secured by the Fourteenth Amendment. It is said that such rights, privileges, and immunities are secured by way of *prohibition* against State laws and State proceedings affecting such rights and privileges, and by power given to Congress to legislate for the purpose of carrying *such prohibition* into effect; also, that congressional legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.

In illustration of its position, the court refers to the clause of the Constitution forbidding the passage by a State of any law impairing the obligation of contracts. That clause does not, I submit, furnish a proper illustration of the scope and effect of the fifth section of the Fourteenth Amendment. No express power is given Congress to enforce, by primary direct legislation, the prohibition upon State laws impairing the obligation of contracts. Authority is, indeed, conferred to enact all necessary and proper laws for carrying into execution the enumerated powers of Congress and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof. And, as heretofore shown, there is also, by necessary implication, power in Congress, by legislation, to protect a right derived from the national Constitution. But a prohibition upon a State is not a *power* in *Congress* or *in the national government*. It is simply a *denial* of *power* to the *State*. And the only mode in which the inhibition upon State laws impairing the obligation of contracts can be enforced, is, indirectly, through the courts, in suits where the parties raise some question as to the constitutional validity of such laws. The judicial power of the United States extends to such suits for the reason that they are suits arising under the Constitution. The Fourteenth Amendment presents the first instance in our history of the investiture of Congress with affirmative powers, by *legislation*, to *enforce* an express prohibition upon the States. It is not said that the judicial power of the nation may be exerted for the enforcement of that amendment. No enlargement of the judicial power was required, for it is clear that had the fifth section of the Fourteenth Amendment been entirely omitted, the judiciary could have stricken down all State laws and nullified all State proceedings in hostility to rights and privileges secured or recognized by that amendment. The power given is, in terms, by congressional *legislation*, to enforce the provisions of the amendment.

The assumption that this amendment consists wholly of prohibitions upon State laws and State proceedings in hostility to its provisions, is unauthorized by its language. The first clause of the first section—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside"—is of a distinctly affirmative character. In its application to the colored race, previously liberated, it created and granted, as well citizenship of the United States, as citizenship of the State in which they respectively resided. It introduced all of that race, whose ancestors had been imported and sold as slaves, at once, into the political community known as the "People of the United States." They became, instantly, citizens of the United States, *and* of their respective States. Further, they were brought, by this supreme act of the nation, within the direct operation of that provision of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. 4, § 2.

The citizenship thus acquired, by that race, in virtue of an affirmation grant from the nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce "the *provisions* of *this article*" of amendment; not simply those of a prohibitive character, but the provisions—*all* of the provisions—affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action. If any right was created by that amendment, the grant of power, through appropriate legislation, to enforce its provisions, authorizes Congress, by means of legislation, operating throughout the entire Union, to guard, secure, and protect that right.

It is, therefore, an essential inquiry what, if any, right, privilege or immunity was given, by the nation, to colored persons, when they were made citi-

zens of the State in which they reside? Did the constitutional grant of State citizenship to that race, of its own force, invest them with any rights, privileges and immunities whatever? That they became entitled, upon the adoption of the Fourteenth Amendment, "to all privileges and immunities of citizens in the several States," within the meaning of section 2 of article 4 of the Constitution, no one, I suppose, will for a moment question. What are the privileges and immunities to which, by that clause of the Constitution, they became entitled? To this it may be answered, generally, upon the authority of the adjudged cases, that they are those which are fundamental in citizenship in a free republican government, such as are "common to the citizens in the latter States under their constitutions and laws by virtue of their being citizens." Of that provision it has been said, with the approval of this court, that no other one in the Constitution has tended so strongly to constitute the citizens of the United States one people. *Ward* v. *Maryland*, 12 Wall. 418; *Corfield* v. *Coryell*, 4 Wash. C.C. 372; *Paul* v. *Virginia*, 8 Wall. 169; *Slaughter-house Cases*, 16 id. 36.

Although this court has wisely forborne any attempt, by a comprehensive definition, to indicate all of the privileges and immunities to which the citizen of a State is entitled, of right, when within the jurisdiction of other States, I hazard nothing, in view of former adjudications, in saying that no State can sustain her denial to colored citizens of other States, while within her limits, of privileges or immunities, fundamental in republican citizenship, upon the ground that she accords such privileges and immunities only to her white citizens and withholds them from her colored citizens. The colored citizens of other States, within the jurisdiction of that State, could claim, in virtue of section 2 of article 4 of the Constitution, every privilege and immunity which that State secures to her white citizens. Otherwise, it would be in the power of any State, by discriminating class legislation against its own citizens of a particular race or color, to withhold from citizens of other States, belonging to that proscribed race, when within her limits, privileges and immunities of the character regarded by all courts as fundamental in citizenship; and that, too, when the constitutional guaranty is that the citizens of each State shall be entitled to "all privileges and immunities of citizens of the several States." No State may, by discrimination against a portion of its own citizens of a particular race, in respect of privileges and immunities fundamental in citizenship, impair the constitutional right of citizens of other States, of whatever race, to enjoy in that State all such privileges and immunities as are there accorded to her most favored citizens. A colored citizen of Ohio or Indiana, while in the jurisdiction of Tennessee, is entitled to enjoy any privilege or immunity, fundamental in citizenship, which is given to citizens of the white race in the latter State. It is not to be supposed that any one will controvert this proposition.

But what was secured to colored citizens of the United States—as between them and their respective States—by the national grant to them of State citizenship? With what rights, privileges, or immunities did this grant invest them? There is one, if there be no other—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State. That, surely, is their constitutional privilege when within the jurisdiction of other States. And such must be their constitutional right, in their own State, unless the recent amendments be splendid baubles, thrown out to delude those who deserved fair and generous treatment at the hands of the nation. Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude. In *United States* v. *Cruikshank*, 92 U.S. 542, it was said at page 555, that the rights of life and personal liberty are natural rights of man, and that "the equality of the rights of citizens is a principle of republicanism." And in *Ex parte Virginia*, 100 U.S. 334, the emphatic language of this court is that "one great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States." So, in *Strauder* v. *West Virginia*, 100 U.S. 306, the court, alluding to the Fourteenth Amendment, said: "This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy." Again, in *Neal* v. *Delaware*, 103 U.S. 386, it was ruled that this amendment was designed, primarily, "to secure to

the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons."

The language of this court with reference to the Fifteenth Amendment, adds to the force of this view. In *United States* v. *Cruikshank*, it was said: "In *United States* v. *Reese*, 92 U.S. 214, we held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been."

Here, in language at once clear and forcible, is stated the principle for which I contend. It can scarcely be claimed that exemption from race discrimination, in respect to civil rights, against those to whom State citizenship was granted by the nation, is any less, for the colored race, a new constitutional right, derived from and secured by the national Constitution, than is exemption from such discrimination in the exercise of the elective franchise. It cannot be that the latter is an attribute of national citizenship, while the other is not essential in national citizenship, or fundamental in State citizenship.

If, then, exemption from discrimination, in respect of civil rights, is a new constitutional right, secured by the grant of State citizenship to colored citizens of the United States—and I do not see how this can now be questioned—why may not the nation, by means of its own legislation of a primary direct character, guard, protect and enforce that right? It is a right and privilege which the nation conferred. It did not come from the States in which those colored citizens reside. It has been the established doctrine of this court during all its history, accepted as essential to the national supremacy, that Congress, in the absence of a positive delegation of power to the State legislatures, may, by its own legislation, enforce and protect any right derived from or created by the national Constitution. It was so declared in *Prigg* v. *Commonwealth of Pennsylvania*. It was reiterated in *United States* v. *Reese*, 92 U.S. 214, where the court said that "rights and immunities created by and dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress, in the legitimate exercise of its discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected." It was distinctly reaffirmed in *Strauder* v. *West Virginia*, 100 U.S. 310, where we said that "a right or immunity created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress." How then can it be claimed in view of the declarations of this court in former cases, that exemption of colored citizens, within their States, from race discrimination, in respect of the civil rights of citizens, is not an immunity created or derived from the national Constitution?

This court has always given a broad and liberal construction to the Constitution, so as to enable Congress, by legislation, to enforce rights secured by that instrument. The legislation which Congress may enact, in execution of its power to enforce the provisions of this amendment, is such as may be appropriate to protect the right granted. The word appropriate was undoubtedly used with reference to its meaning, as established by repeated decisions of this court. Under given circumstances, that which the court characterizes as corrective legislation might be deemed by Congress appropriate and entirely sufficient. Under other circumstances primary direct legislation may be required. But it is for Congress, not the judiciary, to say what legislation is appropriate—that is—best adapted to the end to be attained. The judiciary may not, with safety to our institutions, enter the domain of legislative discretion, and dictate the means which Congress shall employ in the exercise of its granted powers. That would be sheer usurpation of the functions of a co-ordinate department, which, if often repeated, and permanently acquiesced in, would work a radical change in our system of government. In *United States* v. *Fisher*, 2 Cr. 358, the court said that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." "The sound construction of the Constitution," said Chief Justice Marshall, "must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried

into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wh. 421.

Must these rules of construction be now abandoned? Are the powers of the national legislature to be restrained in proportion as the rights and privileges, derived from the nation, are valuable? Are constitutional provisions, enacted to secure the dearest rights of freemen and citizens, to be subjected to that rule of construction, applicable to private instruments, which requires that the words to be interpreted must be taken most strongly against those who employ them? Or, shall it be remembered that "a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature—for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty—necessarily requires that every interpretation of its powers should have a constant reference to these objects? No interpretation of the words in which those powers are granted can be a sound one, which narrows down their ordinary import so as to defeat those objects." 1 Story Const. § 422.

The opinion of the court, as I have said, proceeds upon the ground that the power of Congress to legislate for the protection of the rights and privileges secured by the Fourteenth Amendment cannot be brought into activity except with the view, and as it may become necessary, to correct and annul State laws and State proceedings in hostility to such rights and privileges. In the absence of State laws or State action adverse to such rights and privileges, the nation may not actively interfere for their protection and security, even against corporations and individuals exercising public or quasi public functions. Such I understand to be the position of my brethren. If the grant to colored citizens of the United States of citizenship in their respective States, imports exemption from race discrimination, in their States, in respect of such civil rights as belong to citizenship, then, to hold that the amendment remits that right to the States for their protection, primarily, and stays the hands of the nation, until it is assailed by State laws or State proceedings, is to adjudge that the amendment, so far from enlarging the powers of Congress—as we have heretofore said it did—not only curtails them, but reverses the policy which the general government has pursued from its very organization. Such an interpretation of the amendment is a denial to Congress of the power, by appropriate legislation, to enforce one of its provisions. In view of the circumstances under which the recent amendments were incorporated into the Constitution, and especially in view of the peculiar character of the new rights they created and secured, it ought not to be presumed that the general government has abdicated its authority, by national legislation, direct and primary in its character, to guard and protect privileges and immunities secured by that instrument. Such an interpretation of the Constitution ought not to be accepted if it be possible to avoid it. Its acceptance would lead to this anomalous result: that whereas, prior to the amendments, Congress, with the sanction of this court, passed the most stringent laws—operating directly and primarily upon States and their officers and agents, as well as upon individuals—in vindication of slavery and the right of the master, it may not now, by legislation of a like primary and direct character, guard, protect, and secure the freedom established, and the most essential right of the citizenship granted, by the constitutional amendments. With all respect for the opinion of others, I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves. If fugitive slave laws, providing modes and prescribing penalties, whereby the master could seize and recover his fugitive slave, were legitimate exertions of an implied power to protect and enforce a right recognized by the Constitution, why shall the hands of Congress be tied, so that—under an express power, by appropriate legislation, to enforce a constitutional provision granting citizenship—it may not, by means of direct legislation, bring the whole power of this nation to bear upon States and their officers, and upon such individuals and corporations exercising public functions as assume to abridge, impair, or deny rights confessedly secured by the supreme law of the land?

It does not seem to me that the fact that, by the second clause of the first section of the Fourteenth Amendment, the States are expressly prohibited from making or enforcing laws abridging the privileges and immunities of citizens of the United States, furnishes any sufficient reason for holding or maintaining that the amendment was intended to deny Congress the power, by general, primary, and direct legislation, of protecting citizens of the several States, being also citizens of the United States, against all discrimination, in respect of their rights as citizens, which is founded on race, color, or previous condition of servitude.

Such an interpretation of the amendment is plainly repugnant to its fifth section, conferring upon Congress power, by appropriate legislation, to enforce not merely the provisions containing prohibitions upon the States, but all of the provisions of the amendment, including the provisions, express and implied, in the first clause of the first section of the article granting citizenship. This alone is sufficient for holding that Congress is not restricted to the enactment of laws adopted to counteract and redress the operation of State legislation, or the action of State officers, of the character prohibited by the amendment. It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section, to clothe Congress with power and authority to meet that danger. If the rights intended to be secured by the act of 1875 are such as belong to the citizen, in common or equally with other citizens in the same State, then it is not to be denied that such legislation is peculiarly appropriate to the end which Congress is authorized to accomplish, viz., to protect the citizen, in respect of such rights, against discrimination on account of his race. Recurring to the specific prohibition in the Fourteenth Amendment upon the making or enforcing of State laws abridging the privileges of citizens of the United States, I remark that if, as held in the *Slaughterhouse Cases*, the privileges here referred to were those which belonged to citizenship of the United States, as distinguished from those belonging to State citizenship, it was impossible for any State prior to the adoption of that amendment to have enforced laws of that character. The judiciary could have annulled all such legislation under the provision that the Constitution shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. The States were already under an implied prohibition not to abridge any privilege or immunity belonging to citizens of the United States as such. Consequently, the prohibition upon State laws in hostility to rights belonging to citizens of the United States, was intended—in view of the introduction into the body of citizens of a race formerly denied the essential rights of citizenship—only as an express limitation on the powers of the States, and was not intended to diminish, in the slightest degree, the authority which the nation has always exercised, of protecting, by means of its own direct legislation, rights created or secured by the Constitution. Any purpose to diminish the national authority in respect of privileges derived from the nation is distinctly negatived by the express grant of power, by legislation, to enforce every provision of the amendment, including that which, by the grant of citizenship in the State, secures exemption from race discrimination in respect of the civil rights of citizens.

It is said that any interpretation of the Fourteenth Amendment different from that adopted by the majority of the court, would imply that Congress had authority to enact a municipal code for all the States, covering every matter affecting the life, liberty, and property of the citizens of the several States. Not so. Prior to the adoption of that amendment the constitutions of the several States, without perhaps an exception, secured all *persons* against deprivation of life, liberty, or property, otherwise than by due process of law, and, in some form, recognized the right of all *persons* to the equal protection of the laws. Those rights, therefore, existed before that amendment was proposed or adopted, and were not created by it. If, by reason of that fact, it be assumed that protection in these rights of persons still rests primarily with the States, and that Congress may not interfere except to enforce, by means of corrective legislation, the prohibitions upon State laws or State proceedings inconsistent with those rights, it does not at all follow, that privileges which have been *granted by the nation*, may not be protected by primary legislation upon the part of Congress. The personal rights and immunities recognized in the prohibitive clauses of the amendment were, prior to its adoption, under the protection, primarily, of the States, while rights, created by or derived from the United States, have always been, and,

in the nature of things, should always be, primarily, under the protection of the general government. Exemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government, is, as we have seen, a new right, created by the nation, with express power in Congress, by legislation, to enforce the constitutional provision from which it is derived. If, in some sense, such race discrimination is, within the letter of the last clause of the first section, a denial of that equal protection of the laws which is secured against State denial to all persons, whether citizens or not, it cannot be possible that a mere prohibition upon such State denial, or a prohibition upon State laws abridging the privileges and immunities of citizens of the United States, takes from the nation the power which it has uniformly exercised of protecting, by direct primary legislation, those privileges and immunities which existed under the Constitution before the adoption of the Fourteenth Amendment, or have been created by that amendment in behalf of those thereby made *citizens* of their respective States.

This construction does not in any degree intrench upon the just rights of the States in the control of their domestic affairs. It simply recognizes the enlarged powers conferred by the recent amendments upon the general government. In the view which I take of those amendments, the States possess the same authority which they have always had to define and regulate the civil rights which their own people, in virtue of State citizenship, may enjoy within their respective limits; except that its exercise is now subject to the expressly granted power of Congress, by legislation, to enforce the provisions of such amendments—a power which necessarily carries with it authority, by national legislation, to protect and secure the privileges and immunities which are created by or are derived from those amendments. That exemption of citizens from discrimination based on race or color, in respect of civil rights, is one of those privileges or immunities, can no longer be deemed an open question in this court.

It was said of the case of *Dred Scott* v. *Sandford*, that this court, there overruled the action of two generations, virtually inserted a new clause in the Constitution, changed its character, and made a new departure in the workings of the federal government. I may be permitted to say that if the recent amendments are so construed that Congress may not, in its own discretion, and independently of the action or non-action of the States, provide, by legislation of a direct character, for the security of rights created by the national Constitution; if it be adjudged that the obligation to protect the fundamental privileges and immunities granted by the Fourteenth Amendment to citizens residing in the several States, rests primarily, not on the nation, but on the States; if it be further adjudged that individuals and corporations, exercising public functions, or wielding power under public authority, may, without liability to direct primary legislation on the part of Congress, make the race of citizens the ground for denying them that equality of civil rights which the Constitution ordains as a principle of republican citizenship; then, not only the foundations upon which the national supremacy has always securely rested will be materially disturbed, but we shall enter upon an era of constitutional law, when the rights of freedom and American citizenship cannot receive from the nation that efficient protection which heretofore was unhesitantly accorded to slavery and the rights of the master.

But if it were conceded that the power of Congress could not be brought into activity until the rights specified in the act of 1875 had been abridged or denied by some State law or State action, I maintain that the decision of the court is erroneous. There has been adverse State action within the Fourteenth Amendment as heretofore interpreted by this court. I allude to *Ex parte Virginia, supra*. It appears, in that case, that one Cole, judge of a county court, was charged with the duty, by the laws of Virginia, of selecting grand and petit jurors. The law of the State did not authorize or permit him, in making such selections, to discriminate against colored citizens because of their race. But he was indicted in the Federal court, under the act of 1875, for making such discriminations. The attorney-general of Virginia contended before us, that the State had done its duty, and had not authorized or directed that county judge to do what he was charged with having done; that the State had not denied to the colored race the equal protection of the laws; and that consequently the act of Cole must de deemed his individual act, in contravention of the will of the State. Plausible as this argument was, it failed to convince this court, and after saying that the Fourteenth Amendment had reference to the political body denominated a State, "by whatever instruments or in whatever modes that action may be taken," and

that a State acts by its legislative, executive, and judicial authorities, and can act in no other way, we proceeded:

"The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts under the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it. But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State, in the denial of the rights which were intended to be secured." *Ex parte Virginia*, 100 U.S. 346–7.

In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. It seems to me that, within the principle settled in *Ex parte Virginia*, a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States.

But the court says that Congress did not, in the act of 1866, assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community. I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has no concern. I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to the law for his conduct in that regard; for no legal right of a citizen is violated by the refusal of others to maintain merely social relations with him, even upon grounds of race. What I affirm is that no State, nor the officers of any State, nor any corporation or individual wielding power under State authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens, in those rights, because of their race, or because they once labored under the disabilities of slavery imposed upon them as a race. The rights which Congress, by the act of 1875, endeavored to secure and protect are legal, not social rights. The right, for instance, of a colored citizen to use the accommodations of a public highway, upon the same terms as are permitted to white citizens, is no more a social right than his right, under the law, to use the public streets of a city or a town, or a turnpike road, or a public market, or a post office, or his right to sit in a public building with others, or whatever race, for the purpose of hearing the political questions of the day discussed. Scarcely a day passes without our seeing in this court-room citizens of the white and black races sitting side by side, watching the progress of our business. It would never occur to any one that the presence of a colored citizen in a court-house, or court-room, was an invasion of the social rights of white persons who may frequent such places. And yet, such a suggestion would be quite as sound in law—I say it with all respect—as is the suggestion that the claim of a colored citizen to use, upon the same terms as is permitted to white citizens, the accommodations of public highways, or public inns, or places of public amusement, established under the license of the law, is an invasion of the social rights of the white race.

The court, in its opinion, reserves the question whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to

another. I beg to suggest that that precise question was substantially presented here in the only one of these cases relating to railroads—*Robinson and Wife* v. *Memphis & Charleston Railroad Company*. In that case it appears that Mrs. Robinson, a citizen of Mississippi, purchased a railroad ticket entitling her to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia. Might not the act of 1875 be maintained in that case, as applicable at least to commerce between the States, notwithstanding it does not, upon its face, profess to have been passed in pursuance of the power of Congress to regulate commerce? Has it ever been held that the judiciary should overturn a statute, because the legislative department did not accurately recite therein the particular provision of the Constitution authorizing its enactment? We have often enforced municipal bonds in aid of railroad subscriptions, where they failed to recite the statute authorizing their issue, but recited one which did not sustain their validity. The inquiry in such cases has been, was there, in any statute, authority for the execution of the bonds? Upon this branch of the case, it may be remarked that the State of Louisiana, in 1869, passed a statute giving to passengers, without regard to race or color, equality of right in the accommodations of railroad and street cars, steamboats or other water crafts, stage coaches, omnibuses, or other vehicles. But in *Hall* v. *De Cuir*, 95 U. S. 487, that act was pronounced unconstitutional so far as it related to commerce between the States, this court saying that "if the public good requires such legislation it must come from Congress, and not from the States." I suggest, that it may become a pertinent inquiry whether Congress may, in the exertion of its power to regulate commerce among the States, enforce among passengers on public conveyances, equality of right, without regard to race, color or previous condition of servitude, if it be true—which I do not admit—that such legislation would be an interference by government with the social rights of the people.

My brethren say, that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. It was not deemed enough "to help the feeble up, but to support him after." The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. At every step, in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, "for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot." To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

For the reasons stated I feel constrained to withhold my assent to the opinion of the court.

Mr. KENNEDY. In that 1883 decision the Supreme Court specifically stated that this kind of legislation might very well have been passed under the commerce clause; they said they were not passing on that question, but just on the question of the 14th amendment. That is another point that I think should be considered.

Senator LAUSCHE. When did the Supreme Court cite that?

Mr. KENNEDY. 1883.

Senator LAUSCHE. In that decision?

Mr. KENNEDY. Yes.

Would you like the quote on that?

Senator LAUSCHE. No.

The CHAIRMAN. They were listed as *Civil Rights Cases* at that time.

Senator Cotton?

Senator COTTON. Now to get back to your response, Mr. Attorney General, if I understand it correctly, you are saying—and I personally think with justification—that in view of the fact that you are seeking a very definite objective here, which you consider an essential objective, and in view of the fact that those who oppose any means of reaching that objective would say, whether you based it on the 14th amendment or the interstate commerce clause, that you should have gone the other way. You are anticipating that objection and meeting it by basing it on both and, in a sense, dropping it in our lap on both of them.

Mr. KENNEDY. That is correct, Senator.

Senator COTTON. Wouldn't you feel that there are, however, some complications in the matter of interpretation and enforcement under the interstate commerce clause that would not be present if—I say "if"—the 14th amendment method were available?

Mr. KENNEDY. I do not, but I would be glad to discuss that with you.

Senator COTTON. For instance, the word "substantial," "substantially affecting interstate commerce": without seeking to ask you to give a standard opinion on it—though I think, subject to the chairman's ruling, a memorandum on it at this point might be very appropriate—I would like to ask you your interpretation as, in a sense, the author of this bill, of the word "substantial," and whether it divides those affected by this bill, should it become law, into classes such as those engaged in small establishments that presumably affect the flow of interstate commerce in a rather minor or even minute degree, and those engaged in large establishments that could clearly be said to really substantially affect interstate commerce?

Mr. KENNEDY. Could I answer the second part of your question first?

Senator COTTON. Certainly.

Mr. KENNEDY. I think, Senator, that under the 14th amendment you get into some of the same difficulties. I think that there is some question in the minds of Congress—the House of Representatives and the Senate—as to whether they want to cover the smallest of establishments. It is not a question of whether they are covered, but whether they would actually want to cover them.

We talk about Mrs. Murphy's tavern, or Mrs. Murphy's roominghouse, and she lives in the roominghouse; would you actually want to cover that?

I think you have that same kind of problem of coverage, whether you put the statute under the 14th amendment or under the commerce clause. You don't get away from that problem by putting it under the 14th amendment. So the same basic problem, the same hesitation that you have about covering all establishments exists under the 14th amendment as it does under the commerce clause.

That is the first point.

Then on the question of what the definition of "substantial" is, there is no exact mathematical definition of "substantial." It means more than minimal. But I would say that this kind of standard is frequently used in legislation that has been passed by Congress.

For instance, what does due process of law mean, or what does restraint of trade mean, or what does monopolization mean, or what does substantial lessening of competition mean? These are all words from statutes that have been passed by Congress. Or what does equal protection of the law mean? They are all rather general.

I bring to your attention the National Labor Relations Act, which was passed under the commerce clause, and the Supreme Court decision of *Santa Cruz* v. *the Labor Board*. Speaking through Chief Justice Hughes—I will not read a lot of decisions to you, but if I could read this; it is pertinent to the point.

Senator COTTON. I would be happy to have you read it.

I would ask the chairman if he would be willing that you should supplement it, if you choose, by adding at this point any further decisions or memorandums on this question.

Mr. KENNEDY. Thank you. That would be very helpful.

The CHAIRMAN. Without objection it is so ordered.

Mr. KENNEDY (reading):

> Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. The critical words of the provision of the National Labor Relations Act in dealing with the described labor practices are "affecting commerce," as defined in section 2(6). It is plain that the provision cannot be applied to a mere reference to percentages and the fact that the petitioner's sales in interstate and foreign commerce amounted to 37 percent, and not more than 50 percent of its production cannot be deemed controlling. The question that must be faced under the act among particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of Federal cognizance through provisions looking to the peaceable adjustment of labor disputes.

These terms, Senator, are used frequently in legislation and in the Constitution and in decisions based on the commerce clause that have been handed down.

Senator COTTON. I would like to ask you a rather frank and candid question—go ahead.

Mr. KENNEDY. I was going to say, if you feel, Senator, as I said in my statement, if you feel that you wanted to come up with something that was defined more mathematically, we would be glad to work with this committee on that matter.

Senator COTTON. You're anticipating the question I was about to ask you.

Of course, the rumors that go around, particularly among those of us who are very properly in doubt about what goes on in the councils of the administration, may not be accurate. It is my understanding that at some point those drafting this legislation considered employ-

ing some kind of a definite standard, such as those establishments doing $150,000 worth of work a year, something of that kind, in order to clarify and, presumably, to reduce the opportunity for multitudinous appeals to courts and interpretations.

Would you care to comment on that, and if that is considered and it was determined not to present it, would you care to give us the reasons?

Mr. KENNEDY. That was considered, Senator; rather early in the operation, but it was considered. Then we got into a discussion about a cutoff. What we have to keep in mind is what we are trying to do is deal with discrimination. The question is, can you discriminate when you run a small establishment but not if you run a larger establishment? That doesn't make a great deal of sense.

On the other hand, we didn't want to interfere with somebody's social life. I don't think the Congress has the authority under the Constitution, or in any other way, to pass any laws that deal with one's social relationships.

If a lady ran a roominghouse, she lived there, and she started taking in two or three boarders, wouldn't that almost be a social affair rather than a roominghouse or motel or hotel? We wanted to cut off those kinds of things.

And it is quite clear from the discussion and from the bill that we don't intend to cover them. We think that when you use the word "substantial" they are not covered. We rejected putting in any mathematical definition because we thought it was difficult to arrive at, without, at the same time, implying that a small person can discriminate and a larger person cannot. We thought that by leaving in the word "substantial" it was clear to 99.9 percent of the people whether they were covered or not.

If a person is a small person, and wants to discriminate—that is what we have come down to—he must actively want to discriminate. If he doesn't know whether he is covered, he has to take it to the court and ultimately the worst that can possibly happen to him is that he must stop discriminating. We don't think that is a terribly heavy burden.

So that is why we left it in general terms.

Senator COTTON. What you are saying is, if a lunch counter, a small lunch counter that can't serve more than five or six patrons at the same time, does discriminate, and an injunctive process is resorted to and they are under an order to cease, that if they are going to rely on this word "substantial," they have to go to the expense and trouble to go to the court and perhaps several courts before they either get their position justified or condemned?

Mr. KENNEDY. Yes.

I say first they have to decide that they want to discriminate. The owner of that particular restaurant or drug counter, whatever it might be, decides: "I want to discriminate." And then he has to determine whether he can discriminate; he has to have a court decision.

Senator COTTON. To make this bill clean cut, and to have it extend to every establishment of the class covered, you have to leave out the words "substantially affected," and by doing that you would clearly—perhaps justifiably—be stretching the interstate commerce clause a little further than it has thus far been stretched, even though it has

been stretched a long way, such as in wages and hours and other things. Most of those use the word "substantial."

Mr. KENNEDY. No, that is not correct.

Senator COTTON. Is it in wages and hours?

Mr. KENNEDY. No, I don't believe so.

Senator COTTON. Is it used in any other of the laws that Congress has passed based on the interstate commerce clause?

Mr. KENNEDY. It is used in a number of decisions, and I believe it is used in the Clayton Act.

Senator COTTON. Then may I ask this, and I don't want to take too long: Why didn't you leave the word "substantial" out, so that the person who runs a small lunch counter would know, without any question of doubt, that they are affected by this if they are dealing with the public and holding themselves out to serve the public, whether they serve 5 people, 25, or 2,500?

Mr. KENNEDY. I think you could take out "substantial" and we would not be opposed to that.

I had felt, Senator, that there was some feeling in Congress and across the land that the smallest establishments should be excluded, and we want to make it quite clear that we did not intend to affect the personal relationships, the social relationships, that an individual might have. If he ran a very small establishment, and it didn't have any effect on interstate commerce, then we didn't want to cover him. That is the purpose of the bill.

I think those who have a question about whether they are or are not covered have the same kind of problems in much of the legislation that has been passed by Congress, and, until it is clarified by the courts, it might not be completely clear to them. But as I say, well over 99.9 percent are going to know whether they are covered. The ones who are in the questionable area are going to have to be people who want to discriminate.

I think that is what we have to keep in mind. I don't think it imposes a heavy burden on people.

Senator COTTON. This is an extremely sensitive subject, perhaps more so than many of those covered by other statutes. It seems to me that you can't have it both ways. I say "you." We can't have this both ways. We either should draw the line somewhere if, as you have just said, you didn't want to have it reach into every very small establishment——

The CHAIRMAN. He didn't say that.

Senator COTTON. I understood you to say that you thought perhaps why you didn't put the word "substantial" in is because you thought there were some some small establishments that perhaps——

Mr. KENNEDY. Did not affect commerce, and it came down to almost a social, personal operation.

Senator COTTON. On the other hand, if you're going to have the law clean cut, and no question about it, and, as you have previously said, that discrimination is discrimination whether it is in a little establishment or a big one, wouldn't you think "substantial" ought to come out?

Mr. KENNEDY. I think we can leave "substantial" in, Senator. Even if you take it out, you will have the same problem about it, whether it affects interstate commerce. Does my small establishment affect interstate commerce? Does it substantially affect interstate com-

merce, or does it affect interstate commerce at all? I think you have those kinds of problems.

You have those kinds of problems in many bills that are passed on by this committee, because you cannot ever get a mathematical line. It is very difficult unless you specifically want to write it in.

Senator COTTON. I read in some column the other day—I forgot which one it was—that a lunch counter that bought its mustard from another State would clearly be under this bill. What would you say about that? A hotdog stand that bought mustard from another State?

Mr. KENNEDY. I think you could tell just looking at the bill. Under section 3(a)(3), "any lunch room——"

The CHAIRMAN. Page 5, lines 19 and 20.

Mr. KENNEDY. If your hotdog stand furnished its "goods, services, facilities, privileges, advantages, or accommodations * * *" to interstate travelers, it would be covered. If "a substantial portion of any goods held out to the public by any such place or establishment * * * has moved in interstate commerce * * *" it would be covered. So I think that you could know pretty quickly if you ran a hotdog stand.

Senator COTTON. Two other points I would like to touch on: At the bottom of page 5 and the top of page 6 of the bill, it says, "* * * any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire, if * * *" and then there are a series of definitions.

I'm rather interested in some interpretation of that section of the bill on your part, or someone else's later. Would this bill apply to barbershops?

Mr. KENNEDY. Again it is going to depend a little bit on the barbershop, Senator, on whether the goods or services or facilities are provided to a substantial degree to interstate travelers.

If a barbershop was in, for instance, a bus terminal or hotel, a part of a hotel, it would be covered. If it was in a railroad terminal it would be covered. So I think it depends somewhat on the barbershop.

Senator COTTON. Almost any customer is liable to have a haircut somewhere and then go on home.

Mr. KENNEDY. That's correct.

But it says the goods, services, or facilities are provided to a substantial degree to interstate travelers. I think the fact that you have an individual who occasionally had his haircut in a particular——

Senator COTTON. Would a barbershop near a State line be in a different category in your opinion that a barbershop that was not in the terminal but is in the interior of a city?

Mr. KENNEDY. And was frequented by people traveling interstate?

Senator COTTON. I'm just posing this example. A barbershop is near the State line and would be more likely to be frequented by people from another State or traveling to another State, at least by more people than a barbershop that is in the interior of a State.

Mr. KENNEDY. I think that again, all you have to do is look at the bill, Senator, and you see that if services are provided to a substantial degree to interstate travelers, that barbershop would be covered.

Senator COTTON. Do you think that if this bill were passed in this form that barbers would really know whether they were covered or not, or have any reasonable certainty as to whether they were covered?

Mr. KENNEDY. Yes; yes, I do.

And then if they have a problem and they don't want to serve Negroes, they can find out pretty quickly whether they are covered or not.

Senator COTTON. By being brought to court? By being enjoined?

Mr. KENNEDY. Yes. They can have a court decision as to whether they are covered by this bill. That happens frequently. There is no criminal penalty.

Senator COTTON. If they can have an order to get the court decision.

Mr. KENNEDY. If they can't do that, then they will have to serve Negroes as well as white people.

Senator COTTON. Would your same summary of observations apply to beauty parlors? Would they come under it or would you make the same answer?

Mr. KENNEDY. My same statement would apply.

Senator COTTON. How about beer parlors and saloons?

Mr. KENNEDY. What?

Senator COTTON. Beer parlors and saloons? Saloons is an old-fashioned term.

Mr. KENNEDY. Yes.

Senator COTTON. Cocktail bars? You mean your same general statement would apply to them? Or would they definitely——

Mr. KENNEDY. I think they would definitely be covered.

Senator COTTON. Laundries and drycleaning establishments?

Mr. KENNEDY. I don't believe that they would be covered, except under very unusual circumstances. Again if you had a laundry in a hotel, as part of an establishment, a laundry that was part of a railroad station of some kind——

Senator COTTON. You think unless the laundry was connected with a hotel or terminal of some sort, it would not be covered?

Mr. KENNEDY. I don't know of any laundries that discriminate. Perhaps they do.

Senator COTTON. How about bowlings alleys and pool halls?

Mr. KENNEDY. My judgment is they would not be covered under the definition of the bill, and I go to the definition again.

Senator COTTON. Would this bill in your opinion apply to provisional services such as funeral parlors and funeral directors?

Mr. KENNEDY. On the basis that the coffin comes in interstate?

Senator COTTON. I think undoubtedly——

The CHAIRMAN. It is not a place of public accommodation.

Senator COTTON. Any member of this committee, if he should pass on suddenly, I think probably the chances are they would embalm us and send us home and we would be in interstate commerce, wouldn't we?

Senator PROUTY. Getting back to the subject of haircuts, Mr. Attorney General, I wonder if it would make any difference whether a man has a crewcut or a duck-tail?

Mr. KENNEDY. I think you could answer that as well as I could, Senator.

Senator COTTON. I think it is unfair for me to yield anyway. I am almost through.

The CHAIRMAN. Yes. So that every member of the committee will have equal opportunity, we will have to yield. The chairman has butted in once in a while, but that is his prerogative.

Senator COTTON. It would not apply in your opinion to any kind of professional services, either funeral directors or doctors or dentists or lawyers or any profession?

Mr. KENNEDY. It would not.

Senator COTTON. Just one other matter that I would like to raise. It seems to me rather important. And then I am all done.

If you are to approach this problem under the interstate commerce clause, and on the basis of its effect on interstate commerce and dealing with establishments that substantially affect interstate commerce, did you and the framers of the legislation, those who considered these approaches, did you consider the question of meeting this, of going the whole way and—at the same time that you seek under this clause to destroy discrimination in dealing with the public—to also put a bar on discrimination in employment, in other words, FEPC?

Mr. KENNEDY. I think that the President covered that in his message, Senator. I believe that is before another committee. I believe they are having hearings on it, or at least it is reported out in the House.

Senator COTTON. The recommendations about retraining——

Mr. KENNEDY. Also specifically FEPC. Specifically. It is specifically mentioned in the President's message.

Senator COTTON. So that that bill will be pressed through another committee?

Mr. KENNEDY. That is correct.

Senator COTTON. However, you are in this committee because we are the Committee on Commerce, and because this bill is involving the commerce clause?

Mr. KENNEDY. That is correct.

Senator COTTON. And for no other reason.

Why did you save this vitally important part of the approach under the interstate commerce clause for some other committee?

Mr. KENNEDY. You mean the FEPC?

Senator COTTON. Not necessarily FEPC. I mean a restriction against discrimination in employment.

Mr. KENNEDY. I think that that traditionally has been in the Labor and Education Committee. I think that they have held hearings on it before.

The President in his message said that he supports now, and as he has supported in the past, the enactment of that bill. But I think it traditionally has been in another committee and that is where it is at the present time.

I might say that there is another part of this bill that is in the Judiciary Committee. So I think the Members of Congress themselves are the ones who decide where these bills go, Senator.

Senator COTTON. I would like to make this observation, and then I am all done, Mr. Chairman.

It would seem to me that for a committee to report a bill barring discrimination in dealing and serving the public under the interstate commerce clause, without considering this other feature is in a sense reporting a bobtailed bill and is in a sense simply sending in a rack on which to hang the real vital parts of the program.

I think one of the best things that the President said, one of those with which I heartily concur—is that it does not benefit a Negro much

to be served in a restaurant unless he has a job and some cash in his pocket.

I have a feeling that underlying the demonstrations—I come from a section of the country where I can't pose as an expert on what may be the motives and the feelings of the Negro, but I have been in Washington 17 years—and perhaps the most vital thing that disturbs the Negro today is exactly what disturbs you and me, if not now, it did some years ago, and that is the matter of a job.

It has been my observation that in the main Negroes can be janitors and can be scrubwomen, can be streetcleaners and collectors of garbage, but when it comes time for them to be given an opportunity at skilled occupations, although they are getting into them to some extent, spinners at the loom and the expert trades and on the way up, that there is one of the real discriminations.

What would be your opinion? Do you feel that this committee would be reporting a whole bill if it simply sought to reach out to the service establishments in this country on the question of serving the patrons and left completely out of it that they can't discriminate against customers but they can discriminate in hiring employees?

Mr. KENNEDY. Senator, I think that this whole problem—and I think you have put your finger on it—the whole Nation's problem, the problem for the United States, is far more complex than just making sure that everybody can stop at the Hilton Hotel if they want to stop there.

If you don't have enough money to pay for your children's lunch, it doesn't do you any good to be able to stop at a first-class hotel. So I think that there is no question that one of the matters to be faced up to by the United States and by Congress and by all of the Government is what are we going to do as far as our unemployed and the unemployment rate among Negroes is far, far higher than it is amongst white people.

The unemployment rate, for instance, in Chicago among Negroes is about 18.5 percent, and amongst white people it is about 5.5 percent.

Amongst Negro families, head of families, it is one out of every four.

The problem is not just in FEPC. There is an FEPC law which covers two-thirds of the United States at the present time. Most of our States, a majority of our States, by far, have FEPC laws. That is not putting the Negro to work in Harlem, New York, or New Jersey, or Chicago, or Los Angeles. They are unemployed. So this is not just a question of FEPC; it is a question of education. It is a question of vocational training. It is a question of school dropouts.

We have a million young people who are out of school and out of work, who dropped out of school. If the trend continues as it is at the present time, we are going to have 7.5 million young people who will be out of school and out of work over the period of the next 10 years. We have to find 30,000 new jobs in the United States every week for the next 10 years. That is a major problem.

So we go back to the question of whether we are going to get our economy going full blast; whether we are going to have full employment. All of these things are basic to this problem.

The passage of this bill is not going to make this problem go away. But the passage of this bill will remove a daily insult to Negroes—the fact that because you are colored you can't go into an establishment,

you can't go into a hotel, you can't go into a drugstore and sit down at the counter, just because you happen to be a Negro.

A Communist can go there and sit down but because you happen to be a Negro you can't. That is a daily insult. That is why this provision is so very important. I think if we get all the rest of this legislation enacted but not this provision, we haven't got our job done. I think we will pay for it for many, many years if this bill is not passed. That is why this legislation is so vital. It will help answer the problem. That is why.

This problem will be with us for a relatively short time. I think a relatively short period, but it will be with us for 2, 3, 4, or 5 years, until we have our economy working to a maximum, until everybody can get a job. The reason Negroes can't get jobs in some areas is not because of discrimination against them, but because they have a lack of education, lack of training.

So we have to do all of this, this entire operation. It has to be attacked across the board, not just in Congress but at the local level, by States, local communities, by clergy, by lawyers, by people in business, and by labor unions.

That is what we are attempting to do. But this legislation is an integral part of that problem.

Senator COTTON. There are institutions—I know of some—that serve the public, and would be affected by this bill in serving the public, that also have a policy of not hiring Negroes who wait upon the public. Shouldn't they be included in this bill to be consistent?

Mr. KENNEDY. Senator, if it is felt—and I am sure that that would be helpful—if it is felt that this committee would like to include that, it will certainly receive the support of the administration.

I would like to get the bill enacted. I think it has had a good deal of difficulty so far, and we have only just started. So I am hopeful that we get it enacted. Anything that you can add to make sure it gets passed will be helpful. As you know, we need Republican support in this bill. If we don't have 22 or 25 Republican Senators who support this bill, we are not going to get it passed. If you can get them to go along by adding employment to it, we would support it very heartily.

Senator COTTON. This is a problem that transcends politics.

Mr. KENNEDY. I agree.

Senator COTTON. Believe it or not, even Republicans are citizens and have some sense of responsibility.

I certainly for one am not going to try to face the constitutional issues from a partisan standpoint. I am interested in your last observation. You consider this particular provision as the keystone of all of the proposals that have come up on the question of civil rights? The most important?

Mr. KENNEDY. It is difficult to say the most important. For instance, we are concerned with voting, Senator. There is hardly anything that is more important than voting. An individual denied the right to register and vote because he is a Negro—we have that going on frequently. There are 200 counties in the United States where less than 15 percent of the Negroes are registered to vote. That is essential. The field of education is essential. So much of this problem stems from the fact that a Negro does not have the opportunity to get an equal education. So that bill, I think, is essential.

I think that it is imperative that we have this provision of the bill passed. I think that if we don't get it passed, then we are going to have a good deal more difficulties in the United States. But I think all this legislation is important, and it is difficult to say one provision is more important.

Senator COTTON. Do you feel that to pass stringent bills on voting rights, on integration in schools, and not to pass this particular provision——

Mr. KENNEDY. That we are not getting the job done.

Senator COTTON (continuing). Would not be very effective?

Mr. KENNEDY. We would not be getting the job done.

Senator COTTON. I thank you.

Mr. KENNEDY. Thank you, Senator.

Senator COTTON. You understand, please, these questions were not asked to pick flaws in the bill.

Mr. KENNEDY. Absolutely. I think those are the points that people raise, Senator, and it is absolutely essential that we bring them out, so I appreciate it very much.

The CHAIRMAN. I want to say that the chairman will entertain any amendments to this bill, or add some other features to this problem, but we do have committee procedures in the Senate.

All of these bills take advantage of the interstate commerce clause; many of them come out of other committees.

This happens to be one here. The Labor Committee, I suppose, has several bills pertaining to your point. If we want to add them here, I don't see any harm done. I don't want to water down the bill. I would like to strengthen the bill, if any member of the committee would like to do that.

The Senator from Oklahoma.

Senator MONRONEY. Thank you, Mr. Chairman.

Mr. Attorney General, I think most of the members of this committee are sincerely in agreement with your strong plea for the elimination of discrimination. I think most of them would like to have legislation that could achieve this end instantly and totally. But many of us are worried about the use of the interstate commerce clause will have on matters which have been for more than 170 years thought to be within the realm of local control under our dual system of State and Federal Government, based on the doctrine that those powers which were not specifically granted to the Federal Government by the Constitution are reserved to the States.

Is the test whether the line of business has a substantial effect on interstate commerce? Lodgings are covered, if they are public, and transients are served. Does that mean that all lodging houses under your theory of the effect on interstate commerce would be under Federal regulation, regardless of whether the transients that were using the lodgings were intrastate or interstate?

Mr. KENNEDY. That is correct. If it is a lodging, a motel, that opens its doors to the general public, invites the general public, then it would be covered.

Senator MONRONEY. In other words, the business of running a lodging house therefore puts you in interstate commerce?

Mr. KENNEDY. Yes.

Senator MONRONEY. Every lodging house that accepts transients would be under the definition of this bill in interstate commerce?

Mr. KENNEDY. Not under the definition of this bill. It is clear from Court decisions that they would be covered by the commerce clause.

Senator MONRONEY. With regard to any other line of activity, whether it be a restaurant or amusement place, or other retail store, the store's individual trade would have nothing whatever to do with whether it is in local commerce or interstate commerce?

In other words, the trade that the store has, the desire of the operator of the store to be local or to be in interstate commerce, has no effect under your interpretation, as you give it before this committee, of what interstate commerce has become?

Mr. KENNEDY. Let me say, when you say "my interpretation," I don't think that is important to you, Senator.

Senator MONRONEY. I mean the interpretation——

Mr. KENNEDY. The interpretation of the Supreme Court, and legislation that has been passed by the Congress of the United States, shows quite clearly those establishments are covered. For instance, if you run a store, at the present time you have to pay—in most stores—$1.25 minimum wage. If you run a restaurant, if you serve oleomargarine, you can't have it as a square; you have to have it as a triangle, and a little sign that says, "This is oleomargarine," even if the oleomargarine comes from within the State.

I just say if Congress can pass on the color of oleomargarine to protect, I suppose, the customers, it can certainly protect the customers who don't happen to be white.

Senator MONRONEY. I am thinking about the protection of 175 years of the Constitution, which is of vital importance, the same as the elimination of discrimination is of vital importance.

It would seem to me that someplace in our system of Government the determination by, as local business, as to whether it wishes to be local or whether it wishes to be interstate, should have some bearing on the powers of the Federal Government. It has in the past.

I know what you are talking about. On the minimum wage question I felt that the million dollar test was wrong, because I did not feel that a single store operating in a single State, even though it had $1,000,001 worth of business in commerce, automatically made that business interstate in nature. I felt that the individual entrepreneur had the right to decide whether he wanted to be interstate or be local.

If we pass this bill, even though the end we seek is good, I wonder how far we are stretching the Constitution. This is not an oleomargarine matter, and I don't think that example is a precedent for the giant step I think we would be taking by interjecting Government powers into our local businesses.

Mr. KENNEDY. The point I would make, Senator, is that we are not going beyond any principle of the use of the commerce clause that has not already been clearly established, which has been passed on this Congress, and which has been ruled on by the courts. We are not stretching the commerce clause. We are not adding anything to the commerce clause. This is just like laws that have been passed by the Senate of the United States and the House of Representatives, and passed on by the courts of the United States.

I read into the record a list of bills that have been passed in this field under the commerce clause.

The second point is whether you have a situation that needs to be remedied, and where action needs to be taken, and whether action needs to be taken at the Federal level. Action is essential, Senator, at the Federal level at the present time.

Based on past court decisions and based on legislation that has been passed by Congress, Congress has the authority to remedy the situation.

So that is why we are hoping this bill would be passed.

Senator MONRONEY. I grant you that I can see ample evidence under all the historic interpretations of the interstate commerce clause that the Hilton hotel chain is in interstate commerce, that your national food stores are in interstate commerce, that your variety stores which have lunch counters are in interstate commerce. Many motels which are national in their operations are in interstate commerce. I raise no question about that. I think it is true. I think Congress does have the right to regulate those businesses under the commerce clause, because they operate in many States.

But I find it rather difficult to stretch the clause to cover an eating place simply because some of its meat moves from one State into another; or because the vegetables they serve come from Florida; or the oranges come from California.

I feel that the entrepreneur should be able to choose whether he wishes to engage in interstate commerce. If he does choose to engage in interstate commerce then he would be under Federal regulation.

What I would like to have, without taking more time, is an answer to this question:

Historically, the commerce clause has been interpreted to give Congress the power to regulate businesses which operate across State lines. What percentage of businesses operating across State lines, such as hotels, motels, amusement places, and eating places, do you think would have to be regulated by the Federal Government in order to bring voluntary compliance by small businesses at the local level?

In other words, if your principal hotels open up, if your principal restaurants and lunch counters open up, you are going to have pretty quick compliance, voluntarily, I think, by those businesses that do not come within what many of us think is the application of the interstate commerce clause.

Mr. KENNEDY. Let me say first, Senator, you already covered many of the establishments by other legislation you mentioned passed under the commerce clause. For example, drugstores are covered in innumerable ways under the commerce clause.

Senator MONRONEY. By the Pure Food and Drug Act.

Mr. KENNEDY. You passed a law dealing with that. Restaurants are covered. The restaurants you are describing are covered in innumerable ways under the commerce clause.

So we are not adding types of establishments that have never been covered before. I think that is the first thing to keep in mind. We are not suddenly going off and adding any group that has not been covered before.

And I assume that all the previous legislation had to go through this committee and through the Congress——

The CHAIRMAN. About 16 of these acts that you mentioned went through this committee.

Mr. KENNEDY. All of these establishments are already covered in some way under the commerce clause, and have been passed on and ruled constitutional by the courts.

What we are suggesting is something that is clearly constitutional and already passed on by Congress. I think that is clear.

If you run a store and all your goods come in from interstate, you can't decide, "I don't want to be covered by the commerce clause; I don't want to pay the minimum wage; I don't want to label my aspirin; I don't want to put a mark on my oleomargarine." You are either covered or not. That is the way Congress has acted. It is not for the individual to decide whether he is covered by any law or not.

Senator MONRONEY. An individual would choose I would think the type of operation he is going to run. These various laws that have Federal authority were passed under the Pure Food and Drug Act, and financial acts, and many things like that.

If you deal with the close, intimate relationships of a business as to whether it will be in interstate commerce or not, the regulation on the type of sale of a particular item——

Mr. KENNEDY. It has to be, Senator; otherwise it wouldn't be covered. It has to be.

Senator MONRONEY. I don't believe they are covered under the commerce clause.

Mr. KENNEDY. Yes, sir.

Senator MONRONEY. They are covered under the specific movement of specific things in commerce.

Mr. KENNEDY. That is all under the commerce clause, Senator.

Senator MONRONEY. So every line of business, then, in the United States, would be subject to the interstate commerce clause under your concept of the authority Congress has under the commerce clause.

Mr. KENNEDY. It is not under my concept.

Senator MONRONEY. Under the court concept?

Mr. KENNEDY. I don't think every establishment is. We put specific definitions into this bill. Those which are covered by those definitions are covered. Others who don't fall under those definitions are not covered.

Senator MONRONEY. My question to you is: You feel that it is necessary to have 100-percent compliance on antidiscrimination through effective Federal action, rather than perhaps compliance by 60 or 70 percent of the firms that are truly interstate in their operation and sales and management?

Mr. KENNEDY. You mean putting in a cutoff line?

Senator MONRONEY. I'm just asking, if you have the authority under the interstate commerce clause, to regulate Hilton and motel chains and variety stores that operate in many States which I think you clearly have the authority to do, using the pure gage of whether they are in interstate commerce or not, and if this act applies to them, what percent of compliance by these businesses would be necessary to bring in voluntarily the purely local operators?

Do you have to have 100 percent?

Mr. KENNEDY. I wouldn't have any figures.

What I am saying is that there is precedent for passing this kind of legislation. With these precedents and with the great need that

exists, the legislation should be as inclusive as possible, as long as it doesn't affect a personal or social relationship.

I think that we have the authority, based on bills that have been passed by Congress, and on Supreme Court decisions.

The need is there. So therefore I think it follows that we should have the law.

Senator MONRONEY. I strongly doubt that we can stretch the Interstate Commerce Clause that far. I recognize that we can cover those that are interstate in their chosen operations, and therefore I feel that 50- or 60-percent compliance by those firms will bring about voluntary compliance on the part of the intrastate operators.

Mr. KENNEDY. Could I just say, Senator, as a practical matter, that I think you would cause all sorts of heartaches and difficulties for people in business in the United States if somebody who runs a particular hotel is required in some of these communities to serve customers on a desegregated basis, while others can segregate.

The great problem we have in many of the communities where we have attempted to obtain voluntary compliance is the fact that a restaurant owner or a store owner will say, "I am glad to do it, but you have got to get this other man to do it."

I would say that in cities in the United States which are having major difficulty at the present time, where demonstrations have gotten out of hand in the last 2 weeks, the problem is due to one restaurant chain owner who refuses to desegregate. Theaters say, "We will desegregate if the hotels will." The hotels say, "We will if the theaters and restaurants will," and the restaurants have all said that they will; except this one man; and the other restaurants refuse to go along unless he goes along.

If you start excluding some of these organizations or establishments, and including others, you are going to create an awful lot of trouble and difficulty in areas of the country——

Senator MONRONEY. The Sheraton Hotel in Oklahoma City abolished discrimination; and later on, only a few weeks ago, all the major hotels have come in, and eating places as well.

You find this: when discrimination is abolished voluntarily I think you get much farther than you do when it is done by law.

Mr. KENNEDY. Absolutely.

Senator MONRONEY. Action by a few of the larger and more qualified leaders has the greatest impact on bringing the smaller operators in voluntarily. I want to preserve what I feel to be the historic limitation on how far the Federal Government can go in the regulation of business that heretofore has been largely in the State field of action.

Mr. KENNEDY. The one theme of the business groups with which we have been meeting over the period of the last 5 or 6 weeks, particularly, has been that if one does it the others have to go along; that we can't do it by ourselves.

I would hope perhaps to get an opportunity to give you some of that specific information, so that you can see what a burden it is going to be if there is that kind of a limitation, what a burden it is going to be on some of these people.

Senator MONRONEY. Under your summary of the court's actions, there would hardly be any field of business in any State that is

exempt from Federal regulation under the interstate commerce clause.

Mr. KENNEDY. No, I didn't say that, Senator. That is not my point. Excuse me.

Senator MONRONEY. I am trying to get it straight. I am not trying to misinterpret you. If the court decisions and all the precedents that you have mentioned are, or have been construed to mean that a business, no matter how intrastate in its nature, comes under the interstate commerce clause, then we can legislate for other businesses in other fields in addition to the discrimination legislation that is asked for here.

Mr. KENNEDY. If the establishment is covered by the commerce clause, then you can regulate; that is correct.

Senator MONRONEY. The court and the precedents of legislation that you cite here would broaden the interpretation, as to Federal legislation, of the commerce clause?

Mr. KENNEDY. Would what?

Senator MONRONEY. Would broaden the scope——

Mr. KENNEDY. You wouldn't broaden it over what you have at the present time.

Senator MONRONEY. That is all, Mr. Chairman.

Mr. KENNEDY. I would be glad to prepare a memorandum on that for you.

Senator MONRONEY. I would appreciate it very much, on whether this does expand the police powers of the Federal Government beyond that which we have already.

Mr. KENNEDY. Thank you, Senator.

The CHAIRMAN. I think we ought to get this in perspective.

Congress doesn't determine what is under the interstate commerce clause. The Constitution and court decisions determine that. Since it is regulatory in nature in passing any one of these bills, Congress can determine how far it wants to use the interstate commerce clause, how far down it wants to go, what it wants to cover, what it doesn't want to cover. This has been the case in all of these bills that come under the umbrella of the interstate commerce clause.

We can't pass a bill saying what is under interstate commerce, because the Constitution provides that; that would require a constiutional amendment. We are talking about how far you want to go or what you want to do in a particular field with a bill, or a number of bills. Whether a business is in interstate commerce or not is a question of the interpretation of the Constitution and of the courts' rules in these matters.

We can limit how far we want to go in a certain field in interstate commerce. We have done it in the labeling acts. We have limited it to a commodity in the Fur Labeling Act, and the Hazardous Labeling Act. We could have, under the interstate commerce clause, included a great number of other things, but we limited it. We took advantage of the clause.

The Fair Labor Standards Act is limited to employment, wages, and the minimum wage, not necessarily to regulations on conditions.

The interstate commerce clause of the Constitution is established. Congress can take advantage of it if they choose to pass laws, but they can limit those laws as they have done in those just mentioned,

or, if they wish, by amendment. But it has nothing to do with the broad determination of interstate commerce. That is in the Constitution.

Congress can limit the extent of this particular legislation in any bill they want. It still doesn't eliminate the fact that under the interstate commerce clause you can legally do these things if you wish.

I don't think anyone here can say what type of business is in interstate commerce. That depends on the interpretation by the courts of the Constitution, which is written and has been there for a long, long time.

The Senator from Kentucky.

Senator LAUSCHE. Mr. Chairman, I am glad that the Chairman brought up this question because it is my belief that we cannot, in this hearing, make final the constitutional provision that either allows or disallows the adoption of the bill.

It still remains within the power of the Supreme Court to say we approve of this bill under the provisions of the 14th amendment, the 13th amendment, or the commerce clause, or we disapprove it on all three. Regardless of what we say the Supreme Court still has the final word to declare which provision of the Constitution allows or disallows this legislation. And I think that is what the chairman has just stated, and I am in complete agreement with him.

The CHAIRMAN. Thank you.

The Senator from Kentucky.

Senator MORTON. Thank you, Mr. Chairman.

Mr. Attorney General, I wonder if you don't feel some degree of nostalgia as you sit in this particular chair?

Mr. KENNEDY. I do, Senator.

Senator MORTON. I remember a few years ago, when I was backstopping witnesses from the State Department, you were sitting at a table here. Little did I think then that the situation would be as it is now. I congratulate you and I am happy to be here, I must say.

Mr. KENNEDY. Congratulations to you, Senator.

Senator MORTON. There were a good many bills introduced on this whole problem in this Congress, beginning with the opening days of Congress, in both the House and the Senate.

I know there were conferences held at the White House to which the Republican leadership was invited, beginning several weeks ago. It has been reported to me by both Congressman Halleck and Senator Kuchel, who attended these conferences, the point was there made that a substantial amount of legislation had been introduced, much of it bipartisan, much of it sponsored by the members of the minority party in the Congress, and it was stated that these bills would be studied and that assurance, they felt, had been given to them.

On last Wednesday you testified before the House that you had not yet had an opportunity to go into this legislation. Have you or members of your staff since?

Mr. KENNEDY. Senator, I think there is some misunderstanding. There are 165, as I believe the chairman said, and Congressman McCulloch said, there are 165 bills that had been introduced. I have not read 165 bills. I was asked about a specific bill Congressman Lindsay had introduced. I am not familiar with his bill spe-

cifically. I am familiar with the points and principles and I am prepared to discuss the points and principles of any of these bills because those were taken into consideration when we were considering our own legislation. I suspect that somebody at the Department of Justice has read—maybe not one person has read every bill—but all of the bills that have been introduced here in Congress by Republicans and Democrats have been read in the Department.

I happened to have read the bills from the distinguished Senator from Kentucky, Senator Cooper, and Senator Dodd's bill. But I have not read every bill that has been introduced on this subject.

I think I am familiar with and I am in a position to discuss the principles involved in those bills, as I was before the other committee.

Senator MORTON. I didn't mean to imply that you should have read them all because many of them are duplicates, because of the rule on the House side you cannot have cosponsorship. I want to clarify the point that these bills have been given deliberation.

Mr. KENNEDY. They have. And I have met with Congressmen McCulloch and I have met with Congressman Halleck, and I have met with others in connection with legislation that has been suggested.

The CHAIRMAN. I might say for the record, if the Senator from Kentucky will permit me, that we have three or four bills in this committee, the most significant of which are S. 1217 and S. 1622. S. 1622 has practically the same objective as this bill, introduced by Senators Hart, Humphrey, Clark, Douglas, Long of Missouri, and Williams of New Jersey. And S. 1217 was sponsored by Senators Javits, Beall, Case, Fong, Keating, Kuchel, and Scott. So both parties participated in introduction of similar bills

And there are some others, too.

Senator MORTON. Mr. Attorney General, Senator Cotton developed the point that I was going to discuss on the question of choice between using the approach that the administration has taken and the approach of the 14th amendment, which was taken in the Dodd-Cooper bill. So I won't belabor that point.

Let me ask one brief question.

In your opinion, whatever we pass, whether it is based on the commerce clause, the 14th amendment, or a combination thereof, will it not in some cases ultimately find its way to the Supreme Court?

Mr. KENNEDY. Let me say it is very possible. I don't think, quite candidly, that there is any problem or question about the constitutionality under the commerce clause. If somebody is going to try to bring a case before the Supreme Court in connection with the constitutionality, I don't think that really——

Senator MORTON. Perhaps they will bring it on the word "substantial."

Mr. KENNEDY. Whether the Supreme Court would hear that, I don't know. It would depend on the particular case. I just don't know.

Senator MORTON. As you point out, I think in 1883 the Supreme Court made a decision and that is the law of the land. In a bill which had as its purpose some of the purposes of this bill, and which rested on the 14th amendment. I think that we are going to have litigation in this matter in courts regardless of which road we

travel. I hope that the committee will not preclude in its deliberations, as we proceed with this, an approach to it which may not be in the jurisdiction of this committee, an approach to it which is other than just the commerce clause.

Mr. KENNEDY. Senator, could I make a correction? We do not put it just on the commerce clause. We put it on the commerce clause and the 14th amendment.

Senator MORTON. I appreciate that.

Mr. KENNEDY. As I have said here, I believe that the Supreme Court would find this legislation constitutional if it were passed under the 14th amendment. But I do say that I can recognize the position of the other side, people who could legitimately make the argument and make the point that it would be unconstitutional. And I think, as I said, that we take on this extra burden when the Supreme Court has specifically stated that similar legislation is unconstitutional under the 14th amendment. I would point out to you the 14th amendment says there has to be action by the State. That is where the difficulty is. I am not sure that it wouldn't be better, if you are going to put it under something other than the commerce clause, to put it under the 13th amendment rather than the 14th amendment.

I think that the 13th amendment might very well be stronger than the 14th amendment. Under the 14th amendment, what you have to do is get down to action by the States.

For instance, I think Senator Cooper and Senator Dodd, in one of these bills, said there has been to be licensing, that is, if you license an establishment and the establishment then on its own discriminates, that is action by the State. That is pushing it quite far. You have to have action by the State under the 14th amendment. It is not just individual action. It has to be action by the State. You can make an argument, for example, that all the State did was give a business a liquor license. They didn't tell them that they should go ahead and discriminate. The argument would be that it was not action by the State to permit them to discriminate. And then what if the State abolished licensing? If a State that doesn't want to abide by this law says we will not have licensing any more, then what do you do? Then this law is out. Even under the 14th amendment it is out.

If Congress would pass it under the 14th amendment, I would be delighted. But, as I say, I think you will run into these kinds of difficulties and legitimate problems, basing it just on the 14th amendment. I do not think you will lose anything by putting it under the commerce clause as well as the 14th amendment. That is my only argument. I am not saying you should put it just under the commerce clause.

I agree with what Senator Cooper, Senator Dodd and you said on television last night about the 14th amendment. I don't have any argument with that. I do recognize that there are those who have an argument, and that it is a legitimate point. So therefore, because we need this bill passed, and to avoid that kind of difficulty and that kind of problem we should put it under both.

That is my position.

Senator MORTON. You made that point clear with Senator Cotton. I appreciate your repeating it. I won't belabor it.

You mentioned a recent executive order in the State of Kentucky where our Governor, by executive order, tried to reach the objectives of legislation which we now have before us. He is basing it on all licensed establishments. Whereas our legislature is in special session, he felt it best, as he stated it, not to complicate this special session with this matter. I'm sure that the legislators of Kentucky will meet in regular session next January and are watching our deliberations.

The Governor's order affects every business that has a license. It applies to barbershops, beauty parlors, funeral homes, and operations of that sort, whether clearly in interstate commerce or not; for instance, a terminal barbershop or one at a hotel and so forth. But the neighborhood barbershop or beauty parlor, funeral home, or whatnot, would not in your opinion come under this bill?

Mr. KENNEDY. That's correct.

Could I add one other point, Senator?

You're going to get into difficulties between States also. One State will license all of those establishments; another State will license other establishments and perhaps more. What is a license? It is fine for the State of Kentucky, because they know specifically what they want, and the Governor of the State of Kentucky is going to cooperate with us.

But if you run into another State which is going to be strongly antagonistic to any of this kind of legislation, I think once you have passed a law, just based on the 14th amendment, it could cause considerable havoc if the State just changed the licensing regulations and the resultant ordinances.

So I say you add a great burden and handicap, in my judgment, just basing it on the 14th amendment.

Senator MORTON. One other, finally. I'm glad, having felt somewhat frustrated and unimportant around here for the last couple of years, that the Republicans are going to be called upon to play a major role in legislation.

Mr. KENNEDY. I'm delighted we're working together.

Senator MORTON. If you need 22 of us, and 51 are required to pass this bill, if my mathematics are right that brings it down to 29, so you do have 29 solid on your side, I take it.

Mr. KENNEDY. I'm going to try to work on it, Senator.

Senator MORTON. Thank you. That's all.

Mr. KENNEDY. I hope you will work on that, too.

The CHAIRMAN. Before we go further with the questioning, I appreciate your statement. There is only one thing that I have to take issue with you. Maybe you should have added a little more.

You keep, in your statement, mentioning "Negro." I know that you didn't intend to limit this bill merely to the Negro situation.

Mr. KENNEDY. No.

The CHAIRMAN. There are a lot of discriminations in these United States that are being effected every day that don't necessarily always pertain to Negroes.

I think it should be understood that this bill covers all types of people that are discriminated against, whether they be Negroes or others. In our country we have a great number of Japanese, Chinese, and Filipino people who have been discriminated against. This would apply to them, too.

Mr. KENNEDY. Yes. And in my statement, Mr. Chairman, I do say that it is for race, color, creed, or place of national origin.

The CHAIRMAN. I just want to elaborate on it.

Mr. KENNEDY. I appreciate that.

The CHAIRMAN. There are a great number of problems. We have in our State still an alien property law. Aliens can't hold the property in fee. Many Japanese can't. What we are trying to do is eliminate discrimination, as I understand it, wherever it may occur, and to whomever it may occur, white, yellow, or Negro.

The Senator from South Carolina.

Senator THURMOND. Mr. Chairman, I haven't any direct questions. If you wish, I will defer to other members to accommodate them.

The CHAIRMAN. Off the record.

(Discussion off the record.)

The CHAIRMAN. The Senator from Texas.

Senator YARBOROUGH. Pardon me, Mr. Chairman, the Senator from Ohio precedes me. He happens to be sitting at the other end.

The CHAIRMAN. Oh, he is in the wrong place, then.

Senator MORTON. I question that, Mr. Chairman.

The CHAIRMAN. There has been some evidence of that.

The Senator from Ohio. We will be glad to have him.

Senator LAUSCHE. Mr. Chairman.

First of all, Mr. Kennedy, you state that the law pronounced in this 190th volume of the U.S. Supreme Court is the law of the land as far as interpretation of the 14th amendment of the Constitution is concerned applicable to factual situations such as we have in this bill?

Mr. KENNEDY. At the present time, Senator; yes.

Senator LAUSCHE. It is the law of the land. And at the time it was declared the Supreme Court had before it practically the identical efforts of the Congress to compel the rendition of impartial, objective, nondiscriminatory services to minority groups as we are trying to achieve now.

Mr. KENNEDY. That is correct.

Senator LAUSCHE. Hotels were involved; railroads were involved; restaurants were involved.

Mr. KENNEDY. Yes. Let me say that as far as the railroads are concerned, and the buses, they declared those constitutional.

Senator LAUSCHE. There was a bit of difference.

Mr. KENNEDY. That is correct. But the ones that are specifically involved in this legislation——

Senator LAUSCHE. When this matter went to the Supreme Court of the United States back in 1873, the Attorney General at that time concluded that if the laws were to be declared constitutional, they had to be declared so on the basis of the provisions of the 14th amendment.

Mr. KENNEDY. I assume that is correct.

Senator LAUSCHE. That is correct.

Mr. KENNEDY. I assume that is correct.

Senator LAUSCHE. He could have, if he so thought, used section 7; that is, the commerce clause, to support the argument that the bills were valid.

Mr. KENNEDY. Section 8, I believe.

Senator LAUSCHE. Section 8; yes. It was within the discretion of the Attorney General, in attempting to have those laws declared valid, to go before the Supreme Court and claim on the basis of the 14th amendment and the 8th section that these laws were valid.

Mr. KENNEDY. I don't believe that—I think that had already been decided for him before it got to the Attorney General.

Senator LAUSCHE. But it was within his discretion. He could have predicated his arguments on either of these constitutional provisions, or both.

Mr. KENNEDY. I think the laws that were passed and the debates which lasted for about 4 years were based on the 14th amendment. And I think it is quite clear that the Congress wanted these laws passed based on the 14th amendment.

Senator LAUSCHE. But he still could have gone into the Supreme Court and said that these laws are valid, whether you predicate them on the 8th section or the 14th amendment.

Mr. KENNEDY. I think that he would have had a pretty difficult time at that moment.

Senator LAUSCHE. He would have had a difficult time because the Congress indicated that it didn't believe that the commerce clause was applicable.

Mr. KENNEDY. I don't know if they even got into a discussion. In the debates I have read, or have seen, I don't know that they got into a discussion of that. It was just on the 14th amendment.

Senator LAUSCHE. The Attorney General, back in 1873, said:

I place my whole faith in this case on the 14th amendment.

You, however, feel that whatever is done should be predicated upon the hope that one or both, that is the 14th amendment and the 8th section, shall give support for validity.

Mr. KENNEDY. Article I, section 8, and the 14th amendment.

Senator LAUSCHE. Do you feel that there have been factual changes—you made some mention about movability—that induces you to think that you will persuade the Supreme Court to follow a course which it was unwilling to follow back in 1883?

Mr. KENNEDY. I do. The answer is "I do."

Senator LAUSCHE. Why do you feel that you will be able to induce the Court to do in 1963 what it refused to do in 1883?

Mr. KENNEDY. Because I think that the country is far different than it was 80 years ago; that there is far more travel, for instance, than there was 80 years ago.

A citizen of the United States is entitled to the privileges and immunities of all of the States as well as of the State in which he resides. I think that one of the privileges that we have is the right to travel and not to be interfered with in our right to travel. I think that a Negro now, if he wants to travel from Washington, D.C., or New York, and go to Jackson, Miss., has a very, very difficult time. His right as an American citizen to travel through those areas is being drastically impeded.

No. 2, I think that the shipment of goods, the movement of goods, is far different now than it was during the period of the time of the 14th amendment, and the States have taken far greater action to license and regulate the activities of establishments within their

State. So, therefore, I think that there is far more State involvement now than there was 80 years ago.

So although I believe that there are some problems, you can argue legitimately and properly—that the activities of a State in giving licenses to some of these establishments and permitting to operate, amounts to State action.

And I think that you can also make an argument on the 13th amendment.

Senator LAUSCHE. You would not base all of your arguments on the proposition that when the governmental unit once licenses, that that licensing makes every business a public business, would you?

Mr. KENNEDY. No; I would not.

Senator LAUSCHE. It would be a bit harsh to say that just because a village or municipality or a State licenses, that that, ipso facto, makes that business a public business.

But let us take a look at this——

Mr. KENNEDY. Could I——

Senator LAUSCHE. Yes.

Mr. KENNEDY. I think that better than I could ever do is the dissent of Justice Harlan in this case. For instance, on page 62, he says:

> At every step, in this direction, the Nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, "for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot." Today, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this Republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.

Senator LAUSCHE. His dissenting opinion is lengthier than that written by the majority of the Court. I observed that.

Mr. KENNEDY. Then, on page 58:

> In every material sense applicable to the practical enforcement of the 14th amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. * * * What I affirm is that no State, nor the officers of any State, nor any corporation or individual wielding power under State authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens, in those rights, because of their race, or because they once labored under the disabilities of slavery imposed upon them as a race.

Senator LAUSCHE. You finally take the position that you want to rely upon section 8 and the 14th amendment, although as the law now stands the 14th amendment cannot be used as the basis for declaring these laws valid?

Mr. KENNEDY. I think you can do that under the 14th amendment, Senator; but I think you impose a heavy burden by just putting it on the 14th amendment, as I have stated. So therefore we put it under article 1, section 8.

Senator LAUSCHE. You are putting it on both?

Mr. KENNEDY. Excuse me?

Senator LAUSCHE. I want today, for all of our people, a full enjoyment of constitutional rights. I do not want, however, in the effort to cure one wrong, to create a new one.

As mayor and Governor my record will show that I broke every improper barrier against the hiring of Negroes. I broke it in the fire department, in the police department, in the gas meter reading department, in the water reading department. I was primarily the backbone of the Negroes being employed on the metropolitan transportation system of Cleveland where they are in great numbers.

I went in the factories and spoke during the war to a thousand workers at one time when they refused to work with Negroes. I got up on the table and I was shouted down.

I said, "How would you feel if you are a Hungarian and you are denied a job on the basis of the fact that you are a Hungarian?" I was shouted down that night. But the next morning my argument had its impact.

I want to repeat that I don't want to begin playing with the Constitution where new wrongs will be created in the efforts to correct existing wrongs.

And it may be that what you say can be done. I hope it can.

Mr. KENNEDY. Thank you, Senator.

Senator LAUSCHE. But I want the Constitution to be revered. I don't want it to be approached as a plaything that can be changed according to the whims of people at different times.

I would like to pursue questions such as were led by Senator Monroney, but time will not permit.

I will yield the floor at this time.

Mr. KENNEDY. Thank you, Senator.

The CHAIRMAN. All right.

I think we will recess until 1:30, if that is agreeable.

(Whereupon, at 12:05 p.m., the committee was recessed, to reconvene at 1:30 the same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

The Senator from South Carolina and the Senator from Vermont have some longer questioning to propound to the Attorney General, but there are two or three other members of the committee that only have one or two questions and they have kindly consented to give way to them.

So I want to ask the Senator from Texas, Mr. Yarborough.

Senator YARBOROUGH. I think this is the only question I have at this time, Mr. Chairman:

A Texan this past weekend again posed this question to me and said: "If I take my motel and put up a sign over it 'Texans only; no out-of-State visitors accepted,' would the law apply to me if it passed?" This is the question he had propounded there.

Mr. KENNEDY. Under this bill, Senator, it would apply because that still would have an effect on interstate commerce. Now again the committee may decide it wants to except those kinds of establishments depending on what the size is, or define the terms more definitively. But there have been innumerable decisions hold-

ing that under the commerce clause you can cover an establishment if it has an effect on interstate commerce. The best known is *Wickard* v. *Filburn* where a man planted wheat and used the wheat himself, yet the Court said he was covered under the act. The theory of that was that there might be a large number of small farmers who did just that. This, in turn, would have an effect on wheat traveling in interstate commerce, if they took that action themselves or sold it.

Senator YARBOROUGH. Mr. Chairman, since I'm about halfway here between South Carolina to my right and California to my left, I believe I will defer further questioning. I feel their questions will answer anything I have in mind.

The CHAIRMAN. All right.

Mr. Kennedy, this morning there was some discussion implied in the questioning by some of the members of the committee as to the preparation of, by the Attorney General and by the President and Government officials, not only the message but the type of bill to be sent up to meet this particular problem.

The statement has been made by a Member of Congress, I believe in Long Beach, Calif., last week, in which he stated that—and I don't pretend to quote actually what was in the papers—in effect he said that he prepared a great deal of the civil rights statement.

There were some further statements, I believe, one by yourself to the effect that this was not correct and another in yesterday's paper by the Member of Congress who said he was misquoted in this particular case. Then in this morning's paper there was a statement from the newspaper in Long Beach, Calif., I believe, that they had a transcript of the statement and they were sending it on.

I was wondering if you would care to comment about that because there was some question brought up this morning regarding the preparation and the events leading up to the presentation to the Congress of this civil rights legislation.

Mr. KENNEDY. Well, I wouldn't be in a position to comment on all those various statements that were made, Senator.

The CHAIRMAN. Well, the only ones that I read, we can put those in the record. I suppose there are other comments, too. But you're familiar with them?

Mr. KENNEDY. Yes.

I believe Congressman Powell has stated he didn't have anything to do with either the message or the legislation. I think for a long period of time he has been interested in obtaining the passage of legislation in these general areas but, as I believe he stated, he didn't have anything to do with the President's message nor with the legislation that was sent up.

The CHAIRMAN. And I think that statement was made after he was quoted in Long Beach.

Mr. KENNEDY. What I understand is that he was erroneously quoted. But I believe he straightened it out himself that he didn't have anything to do with it in that statement.

The CHAIRMAN. As far as you're concerned, that statement stands?

Mr. KENNEDY. That is correct.

The CHAIRMAN. The Senator from California.

Senator ENGLE. Thank you, Mr. Chairman.

First, of course, I would like to compliment the Attorney General on a very excellent and fair statement and one which I thoroughly support.

I am glad that the chairman brought up the fact that although this statement deals basically with the Negro problem, that we do have other minorities. We have, for instance, in Los Angeles, Calif., the largest Mexican city outside of Mexico City itself. In San Francisco, we have the largest Chinese community outside of the Far East and we do have a great many Indians. So we are concerned with the fact that this bill does deal with the broad problems of racial discrimination and not with one particular ethnic group.

There is one question I would like to ask, Mr. Attorney General: You are familiar, I think, with the laws we already have in California. We have a law now against discrimination in public facilities. We have a law now on fair employment practices. We passed in this last session of the legislature a law dealing with housing.

Governor Brown announced the other day that he intended to file a practice—he didn't put it that way—as initiated in Kentucky, where by an order of the Governor all agencies licensed in the State will be required to act in a nondiscriminatory way.

Now in the light of that background, would you tell me what this bill will add to what we already have in California, if anything.

Mr. KENNEDY. I don't believe it would, Senator. You have covered it in California. If any of these matters arose we would defer to the laws of California and those responsible for enforcing the law.

Senator ENGLE. In citing that and receiving that answer, I do not mean to imply I do not support this legislation. I do. I'm coauthor of it.

But I also have a statement on my desk by the Governor of California that Los Angeles is the third worst segregated city on housing in the United States and we do have our problems with reference to segregation in housing, in education, and in employment.

Mr. KENNEDY. That's correct.

Senator ENGLE. What I would like to ask you is, after we pass all these laws, where do we go from there, when as I say in California, we already have the law and somehow the law hasn't gotten the job done.

Would you indicate to this committee where you lay down the guidelines as to where we go after we pass this bill?

Mr. KENNEDY. Senator, as I have said frequently, I don't think the passage of this law and the other laws by themselves are going to get this job done. I think we are going to still have problems and this is not going to disappear. Assuming we have the passage of this law in September or October, this problem is not going to disappear in December or the following January or the January after that.

We are going to have problems in this field in my judgment for some time to come. I think a lot of it goes back to education, vocational training and employment, basically to employment. As I said this morning, I think the fact you can go to a restaurant or to a hotel or to a variety store doesn't mean much, if you don't have the money to shop there, you don't have the money to spend there, you don't have enough money to feed your children and you have been

unemployed for 3 or 4 years. I think there has been a great deal of hypocrisy among us from the North as to what is happening in South Carolina, or Birmingham, or Louisiana, or Mississippi.

We have many problems in our own communities which haven't been faced up to. We are spending so much time looking at what Bull Connor is doing in Birmingham that we haven't bothered to take the steps, for one reason or another, to solve the problems in our own community.

I think the problems, to a great extent, rest with education and making jobs available for our people. But in New York, I think that there is an FEPC law, there are housing laws, and you still have two to three times as high unemployment among Negroes as you do white people in some of these metropolitan areas in the State of New York.

So the passage of legislation is not going to get this job completed. I think an awful lot of it rests with what we are going to do with the young people coming along now, whether they are going to get into it, don't go down the same road their parents have gone down, whether there will be greater opportunity for them, whether we will have a program for them at the State and Federal level to make sure that young people stay in school.

That is extremely important, that we create opportunities for vocational educational training. There are going to be enough jobs over the period of the next decade but there are not going to be jobs for people who are uneducated or untrained. When we have 8 million people here in the United States who have not completed the fifth grade, there will be a good deal of difficulty.

What we have to do is to attack this all along the way. I think this bill is important. I think the educational bill is important. I think that the tax bill is important. I think that all the legislation that is considered in the field of education is important. I think that the bills that come under the category of civil rights are important but there is a good deal of other legislation that bears just as directly on the future of minorities as civil rights legislation.

So in answer to your question, I think the problem is going to be with us for a long period of time and the mere passage of this bill or any of the bills being considered under the category of civil rights at the present time is not going to give the complete answer. We have to do it, but there is a great deal more that needs to be done as well.

Senator ENGLE. But you do have a provision, do you not, in legislation pending elsewhere that sets up a community facilities program in which the Federal Government works with local and State governments in trying to create better relationships in housing, education, employment training and that sort of thing?

Mr. KENNEDY. That is correct.

And then, of course, the President's meetings with all the businessmen, the clergy, and the educators, which will continue, we hope, will also have an effect.

Senator ENGLE. Would you have any objection to that particular provision being added as an amendment to this particular bill?

Mr. KENNEDY. Not a bit.

I might say, Senator, that, for instance, in the House where one committee is considering all of this legislation, it is tied more intimately

to this bill than it is in this piece of legislation. We make specific and particular reference to it in that legislation which we do not here.

But I think that would be fine.

Senator ENGLE. Then I'm convinced that because of our experience in California and because, as you said, sir, that this bill doesn't add an iota to what we already have in California that we have to find ways and means. I know the Governor is undertaking to do this with his community facilities groups, his interracial groups in all parts of California, and we have to add something in addition.

And it seems to me that it lies in that one section which is not in this particular piece of legislation pending before us but it does offer the facilities of the Federal Government to help us work out those situations where they need to be worked out, where we already have the law. I would hope that some way or other, we get that inside the four corners of this particular bill.

Thank you very much, Mr. Chairman.

Senator YARBOROUGH. I would like to add to my former statement, that I think, Mr. Attorney General, you have made a very forceful statement before the committee here, a very able statement.

Mr. KENNEDY. Thank you, Senator.

The CHAIRMAN. For the benefit of the committee members I have digested all of the State laws and the legislative reference services are added to it. They are all here if any committee member wants to see what his own State may have in this particular booklet.

This morning, Mr. Attorney General, I asked you about whether or not this bill covered all races.

I mentioned some of our oriental friends from my section and I neglected to mention but I think the record ought to show I was referring to Indians, too, our first Americans. There has been a lot of discrimination in the West against the Indians and this bill would apply to them, too.

Mr. KENNEDY. Yes, it would, Mr. Chairman.

The CHAIRMAN. The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Attorney General, I want to say that I do not think your bill is going to pass the Congress. If the mail coming to my office reflects the sentiment of the people over the country, not only from South Carolina and the South, but the other States, I am convinced that the people are strongly against it. I notice you quoted Lord Acton, the British historian. I would like to also quote Lord Acton.

If you recall he made this statement, "Power tends to corrupt; absolute power corrupts absolutely." This bill would bring more power to the Federal Government, would it not?

Mr. KENNEDY. Yes, it would, Senator.

Senator THURMOND. And there is only so much power and when you bring power to the Federal Government it has to come from the States, doesn't it?

Mr. KENNEDY. And the people.

Senator THURMOND. And the people. And therefore, this bill would deprive the States and the people of certain powers now within their possession.

Mr. KENNEDY. Well, of course, I think the Federal Government is the States and the people, Senator.

Senator THURMOND. How is that?

Mr. KENNEDY. The Federal Government is the States and the people.

Senator THURMOND. Well, the Constitution, of course, only refers to two levels of government, those at the State level and those at the National level. This bill would take away powers at the State level and transfer them to National level, would it not?

Mr. KENNEDY. Not necessarily, Senator. It can still have this power at the State level.

Senator THURMOND. You mean at the State level that they would still have a choice as to whether they could operate as they are now doing or be compelled to operate under the provisions of this bill if it passes.

Mr. KENNEDY. We are talking about the people then rather than about the State. If this bill is passed, people who open their doors to the general public will have taken away from them the right to discriminate. They can no longer discriminate.

Senator THURMOND. Well, then, they will also have taken away from them what the 5th and 14th amendments provide in these words, "No person shall be deprived of life, liberty, or property without due process of law."

Mr. KENNEDY. I don't believe so, Senator.

Senator THURMOND. Mr. Attorney General, do you feel Congress has the right to pass on the constitutionality of legislation before it votes?

Mr. KENNEDY. I think it certainly should consider that, Senator. I think each individual Senator and Member of the House of Representatives should certainly consider that.

Senator THURMOND. In the oath we take as Members of Congress to support and defend the Constitution, do you not feel we have an obligation as the very first question to ask ourselves, "Is this legislation constitutional?" And if we conclude it is not, if any Member concludes it is not, then we should go no further, even though the goals desired to be obtained might be laudatory.

Mr. KENNEDY. Well, I think it is certainly an important question for every Member of Congress to consider, as I have said.

Senator THURMOND. Incidentally, I have a document here which I think is the finest document that has ever been written next to the Bible. It is the Constitution of the United States.

This is the entire document. It says what everyone should know about the Constitution of the United States. It is written in such an interesting way that anyone can understand it. I would like to present you one of these when the meeting is over.

Mr. KENNEDY. Thank you, Senator. I appreciate your kindness and your courtesy.

Could I see it?

Senator THURMOND. I will be glad to let you see it. I will present it to you now.

The CHAIRMAN. I have a small version of the Constitution. If the Senator from South Carolina would see that the members of the committee would get that document, I would appreciate it.

Senator THURMOND. I will arrange to send all of them a copy. It not only gives the Constitution but in the margin it explains so simply and so carefully and so accurately just what it contains.

Mr. Attorney General, you have stated in your testimony that some 30 separate States now have public accommodations laws. I imagine that also there are many local governmental bodies that have such laws. What is the basis upon which these State and local laws rest?

Mr. KENNEDY. I think it differs in each area, Senator.

Senator THURMOND. Well, what is the basis, what authority do the States and local communities have to pass such laws?

Mr. KENNEDY. I think it varies in each particular State or community.

Senator THURMOND. Well, is there something in the Constitution that gives them that power?

Mr. KENNEDY. I don't think there is any question they have that authority under the Constitution.

Senator THURMOND. Where does it come from? There has to be a source of authority for everything that Government does, State or National.

Mr. KENNEDY. I was going to look at your document. It states, I think, quite clearly, under the 9th and 10th amendments, and I think specifically under the 9th and 10th amendments. I probably could get other authority. Under their police powers the States have authority to pass such legislation or issue such executive orders as the Governor of Kentucky did.

I don't think there is any conflict with Federal authority in this field.

I think, as I have said, the Federal Government also has authority in this field, but I think the States can also act.

Senator THURMOND. In other words, the 10th amendment to the Constitution provides that all powers not delegated to the National Government are reserved to the States and the people?

Mr. KENNEDY. That is correct.

Senator THURMOND. And since this power, the police power, has not been delegated to the National Government, therefore, it is reserved to the States, is it not? I think you are accurate in saying that it falls under the police power and since that power, as you well know, has never been delegated to the National Government, it is reserved to the States.

I want to commend you on saying that the authority, that is the police power——

Mr. KENNEDY. Do you want me to go on, Senator?

Senator THURMOND. I think you have answered the question quite well, Mr. Attorney General.

Mr. KENNEDY. Senator, so that we get the record straight, there is authority for the States to take action in this field and I think as we pointed out some 30 States have taken action. That does not preclude, as I have said—though perhaps not here—the Federal Government also from taking action.

I think it is quite clear, as I said this morning under article I, section 8, and very possibly under the 14th amendment, that the Federal Government also has authority to take action in this field.

Senator THURMOND. Mr. Attorney General, do you agree that the police power of the States and local governments is exclusive with them and the National Government has no general police power and

that all regulation by the National Government must stem from some other grant of authority contained in the Constitution?

Mr. KENNEDY. I think that is correct, Senator.

Senator THURMOND. Mr. Attorney General, the Constitution has granted to Congress the power to make all laws which shall be necessary and proper to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

What is your definition of the word "commerce" as it is used in this provision of the Constitution?

Mr. KENNEDY. Passage of goods either to or through foreign countries and amongst the several States.

Senator THURMOND. Mr. Attorney General, although the power of Congress is supreme as to the delegation of power to regulate commerce among the several States, I am sure that you would agree that some area of authority was retained by the States as to solely intrastate commerce.

Will you tell us the bounds by which you believe this reservation to the States is governed?

Mr. KENNEDY. Well, I would be glad to present you a memo on that, Senator. It is based on a good number of Court decisions. I mentioned some of them this morning. There are a number of others. I mentioned *Wickard* v. *Filburn* this morning and I mentioned an NLRB case, Santa Cruz.

There are a number of others that indicate the extent to which the commerce clause extends from interpretations of the Supreme Court decisions to the present time.

I also furnished the committee a list of legislation, bills which have been passed by Congress under the commerce clause. I would think that would be helpful.

Senator THURMOND. Well, the question I asked was whether you will tell us the bounds by which you believe this reservation to the States is governed.

Mr. KENNEDY. Well, I think that the States have a good deal of authority as long as it doesn't interfere with the activities of the Federal Government in this field.

Senator THURMOND. Mr. Attorney General, isn't it just the reverse?

We had States before we had a Union. The Colonies got together and wrote a Constitution. I believe all of the States were represented at this meeting in Philadelphia in 1787, with the exception of Rhode Island, which I believe was under the control of radicals at that time.

Mr. KENNEDY. I might say, Senator, that Rhode Island's ratification of the Constitution brought about the Constitution's coming into being in the United States. So I think we all have a great debt to Rhode Island.

Senator COTTON. I have to interrupt.

I think the Attorney General is mistaken. I claim that New Hampshire was the one.

Mr. KENNEDY. I believe the ninth State was Rhode Island.

Senator PASTORE. We were the 13th State and the only State that never ratified the prohibition amendment.

Senator COTTON. I want the Attorney General to look that up.

Senator THURMOND. Mr. Attorney General, up until that meeting in Philadelphia, when the Constitution was written, and up until at

least nine States ratified that document, each State was the same as an independent republic or independent nation. They had all the powers of an independent nation. In fact, South Carolina had a president; in fact we had two presidents.

I believe you would agree that each State did have all the powers until the Constitution was ratified; would you not?

Mr. KENNEDY. Well, they had some arrangement between them—when you talk about "all powers," they didn't have as many powers as they had before. They had more power than they had after the adoption of the Constitution. They had given up some of their authority and some of their power just prior to that time. But I think that they had a good deal more power than they had after the adoption of the Constitution.

Senator THURMOND. What authority had they given up, Mr. Attorney General?

Mr. KENNEDY. Well, they had gotten together into a confederation-type arrangement which proved to be unsatisfactory and which was originally accepted and proved to be unacceptable.

Senator THURMOND. And it was not observed, was it?

Mr. KENNEDY. They had given up some of their powers. It had not been a satisfactory arrangement. And they went a step further and adopted the Constitution.

Senator THURMOND. Now after the union, when the Constitution was written and ratified, the States wrote into article 1, section 8, the fields of jurisdiction in which the Congress would operate, did they not? And then all other powers under the 10th amendment are reserved to the States or the people; are they not?

Therefore, the States have all of the power that has not been delegated to the Union in the Constitution and the amendments adopted since then.

Mr. KENNEDY. I think that is correct.

Senator THURMOND. Now, Mr. Attorney General, if the legislation now pending before us were enacted, would there be any remnants of State authority remaining?

Mr. KENNEDY. Yes.

Senator THURMOND. In the field in question?

Mr. KENNEDY. Yes.

Senator THURMOND. Would you mind telling us just what authority would be left on this subject if this law is passed which you are proposing?

Mr. KENNEDY. I think every State, such as California in my answer to Senator Engle, every State can still have a law that deals—prohibits discrimination, and there will not be any interference with that. You cannot pass a law that requires discrimination, Senator. That would not be permitted.

Senator THURMOND. You do not think the Supreme Court would strike down those State laws as they did in the *Steve Nelson* case in Pennsylvania when the State had a law on sedition and the Supreme Court held when the Federal Government passed a law that the Federal Government preempted the field on the subject?

Mr. KENNEDY. No, I don't.

Senator THURMOND. You do not think it will occur here?

Mr. KENNEDY. No. As a matter of fact we have written it into the statute.

Senator THURMOND. Well, I believe that law which was authored by Mr. Smith in the House had written it in his statute, but it didn't seem to have much effect before the Supreme Court.

Mr. KENNEDY (reading):

> This act shall not preclude any individual State or local agency from pursuing any remedy that may be available under State or Federal law, including any State statute or ordinance requiring nondiscrimination in public establishments or accommodations.

Senator THURMOND. In fact the language in question in the *Nelson* case applied to all statutes under title 18 of the Code, didn't it? It was struck down anyway, was it not?

Mr. KENNEDY. It was written in a different way, Senator.

Senator THURMOND. You think this would have any more effect because you wrote it here?

Mr. KENNEDY. No. I think there are precedents for this, Senator, and I think it is quite clear that State statutes——

Senator THURMOND. Even if the State law——

Mr. KENNEDY. Can I finish, Senator?

I think it is quite clear from the way we have written this in, and from preceding legislation and decisions based on that legislation, that the Supreme Court would not interfere with the State's activity in this field.

Senator THURMOND. Assuming that the State and local laws did remain, the citizens who operate places of business would have no discretion, though; would they?

Mr. KENNEDY. In what way?

Senator THURMOND. As to whom they wished to sell or whom they wished to serve if this bill passes?

Mr. KENNEDY. No, they would have discretion.

Senator THURMOND. All remnants of authority reserved to them and to the States, so to speak, to permit them to do that, if the State wanted them to do that, would go out the window, would it not?

Mr. KENNEDY. As you pointed out earlier, Senator, if the Federal Government under the Constitution has the authority to deal with this subject—and they do have the authority to deal with this subject—they could pass a law to deal with it; and that is what we are suggesting be done.

Now an individual establishment can decide that they don't want to serve someone; they can do that. The only thing we would preclude by this legislation would be discrimination. They cannot refuse if they are open to the general public, they could not refuse to serve an individual based purely on the fact that he was a Negro or not white, an Indian or Chinese or whatever it might be.

Senator THURMOND. I think I had better clear the record about the authority.

I personally don't feel that this legislation is constitutional. Now if the theory upon which this legislation is predicated is valid, could not the National Government regulate and coerce every activity, whether State or individual, within the bounds of any and every State?

Mr. KENNEDY. I do not think so.

Senator THURMOND. Mr. Attorney General, how many States or local communities have statutes forbidding services in establishments

covered by this measure to a class of people solely because of their race, color, religion, or national origin?

Mr. KENNEDY. How many States have what?

Senator THURMOND. Or local communities have statutes forbidding services in establishments covered by this measure to a class of people solely because of their race, color, or national origin?

Mr. KENNEDY. Well, I put some of them in the record this morning, Senator. I said it was not complete. But some of them were put in the record this morning.

Did you want a list beyond that?

Senator THURMOND. If you have any others, I thought you might want to add those to the record.

I wanted to know approximately how many States.

Mr. KENNEDY. Well, some States—I think it varies. And the kinds of laws vary. But we have all that information. And that has been presented to the committee.

Senator THURMOND. Mr. Attorney General, in your view, what are the restraints placed upon Congress in its efforts to regulate interstate commerce?

Mr. KENNEDY. I think whatever legislation is passed and considered by Congress would have to have an effect on interstate matters.

Senator THURMOND. Aren't the first 10 amendments to the Constitution specific restraints upon Congress power to regulate interstate commerce, as well as other powers granted in the body of the Constitution?

Mr. KENNEDY. Yes, I would think generally; yes.

Senator THURMOND. Mr. Attorney General, are not these establishments which would be regulated by this act private establishments, notwithstanding the fact that they are subject to State or local regulation under the police powers retained by its governing bodies?

Mr. KENNEDY. No. I don't know whether you want short answers or long answers, Senator.

Senator THURMOND. Well, if you wish to explain, feel free to explain.

Mr. KENNEDY. I don't believe so. I think what we have suggested is that establishments which are open to the general public and which invite the general public, are covered for that reason.

Senator THURMOND. You have mentioned several actions on the part of the National Government which to a greater or lesser extent have regulated privately owned businesses. With the exception of the statute held unconstitutional in the *Civil Rights Cases* decided in 1883, has Congress ever invoked any of its powers to regulate the customer relationship of a business owner and individual citizen?

Mr. KENNEDY. Well, take oleomargarine, for example, I suppose that certainly involves the customer relationship with the individual business, the fact that oleomargarine has to be labeled as such, and have a different shape than you would have for butter. I think the sale of aspirin is another example. I think there are innumerable ones.

Senator THURMOND. Well, do you feel that that would be an applicable precedent for this legislation?

Mr. KENNEDY. I think that those are some precedents.

Senator, you passed the Taft-Hartley Act that regulates the relationship of employer and employee. You passed the Minimum Wage

Act; you tell people how they can bargain with their employees. You passed a law that says they shall be permitted to join a union. These are very personal relationships in connection with your own employees.

I think it's quite clear in talking about a pat of butter, the Congress of the United States can decide about the color of the oleomargarine; I think they can decide about not discriminating against people because they don't happen to be the same color as you and I.

Senator THURMOND. You don't feel there is a distinction between those cases which you cited and the proposal which you have submitted here?

Mr. KENNEDY. Well, I would be glad to hear from you what you think the distinction is.

What is it? I don't see any, as far as power is concerned, Senator.

Senator THURMOND. You don't see any distinction?

Mr. KENNEDY. Well, I would be glad to hear from you.

Senator THURMOND. Well, I am asking the questions right now. I will be glad to give you my opinion later. If I felt it would do any good, I would stop right now.

You have said that you believe this 1883 case would be decided differently today upon the same set of facts if the National Government cannot legislate to require positive action and can only prevent some action under the terms of the 14th amendment, which is concerned solely with State action. How could the decision be any different today upon the same set of legal facts?

Mr. KENNEDY. First, because I think the country has changed in the last 80 years, as I mentioned this morning. I think, second, that there is a great deal more travel, and I think it is clear that, in my judgment, at least one of the privileges of citizenship is that we can travel from one part of the United States to another and not be interfered with.

And, third, I think there is far more regulation of business by Government, including State governments, than there was 80 years ago; State governments are far more involved, Senator, in the operations of these public establishments than they were 80 years ago.

So I think that it would be declared constitutional under the 14th amendment; that it would be action by the States.

Senator THURMOND. More accurately, would you say, instead of the country changing, the Supreme Court has changed?

Mr. KENNEDY. Senator, I think the country is really moving along. I don't want to be facetious, but I think we are a different country than we were 80 years ago. We happened to have a large group of Negroes and Indians and others who were being discriminated against. We fought the Civil War 100 years ago. We have made a great deal of progress; but a lot of individuals have not gotten their rights of citizenship yet.

In many of these areas they cannot change it themselves. They are not permitted to move and vote. They can't move because they have not been permitted an adequate education.

If the local government is not going to remedy it, it is incumbent upon the Federal Government to do so; and the Federal Government has, quite clearly, the authority.

And I think we should move, Senator, not stand still.

Senator THURMOND. You feel the Federal Government should go into the field of education, although the word "education" is not found in the U.S. Constitution, and that field has not been delegated to the Federal Government.

Mr. KENNEDY. I think we have a responsibility, Senator, and I think it has been clear from the Supreme Court decision we have a responsibility to make sure, and insure, that every individual has his constitutional rights in education.

Senator THURMOND. Well, Mr. Attorney General, if the National Government—the Federal Government—should go into these fields of activity which are now reserved to the States, wouldn't it be better to follow the manner provided in the Constitution, one of the two ways provided in the Constitution, and amend the Constitution rather than to pass a law that would abrogate and usurp the Constitution and the rights of the States?

Mr. KENNEDY. I don't think it does that, Senator.

Senator THURMOND. Then you think, because the country is changing, that we should make the Constitution flexible and change with it?

Mr. KENNEDY. I don't think the Constitution——

Senator, I think that is one of the outstanding qualifications, or one of the things that is so outstanding about the Constitution; that it was viable for interpretation at the time of the war of 1812; it was viable at the time of the Civil War; that it was a viable, meaningful document during the difficult economic times of the last part of the 19th century. We have had revolutions here. We have had all these other difficulties and problems. It has gone through two World Wars and still it is a viable and meaningful document.

When you talk about the Constitution and say it means so much, it is the fact it doesn't mean something in 1783 but it means something in 1963.

I mean you didn't have airplanes, you didn't have automobiles, you didn't have many of these other things that you have at the present time.

We are a different country, Senator, than we were 180 years ago.

Senator THURMOND. And because the country is changed do you now feel the Constitution is outmoded?

Mr. KENNEDY. Not a bit, Senator. I don't; not a bit.

Senator THURMOND. Well, then, shouldn't we observe it and amend it in the way as provided in the Constitution, and not propose Congress to do things where they lack authority?

Mr. KENNEDY. I think that is correct, Senator. I couldn't agree with you more.

Senator THURMOND. So you want to withdraw this bill, do you?

Mr. Attorney General, what restraint upon the actions of Congress as to its general authority granted in the commerce clause do the provisions of the fifth amendment contain?

Mr. KENENDY. Well, that an individual will not be deprived of due process of law. I think that has the most major bearing.

Senator THURMOND. No person shall be deprived of life, liberty, or property without due process of law.

Mr. KENNEDY. Right.

Senator THURMOND. Would not this measure place the owner of an establishment subject to its provisions into the category of a public servant?

Mr. KENNEDY. I am sorry. You will have to come again, sir.

Senator THURMOND. Would not this measure that you are proposing here place the owner of an establishment subject to its provisions into the category of a public servant?

Mr. KENNEDY. No; I don't believe so.

Senator THURMOND. Do you think it is wrong if I ran a boarding house or restaurant, and wanted to cater to college students only, that I should be forced to take other people?

Mr. KENNEDY. No; you could cater to college students exclusively.

Senator THURMOND. Then would this bill do that?

Mr. KENNEDY. No; it would not.

Senator THURMOND. Where would be your breaking point? What number or what figures would determine when it applies and when it does not?

Mr. KENNEDY. It would not. There would be no problem about it. There is no figure.

Senator THURMOND. Suppose I ran a restaurant in a university town and wanted to cater to college students only, and no one else. Under this bill would I be forced to take others?

Mr. KENNEDY. No; I think you would make it quite clear that you were catering to college students; that is all you would have to take.

Senator THURMOND. Suppose I owned a restaurant and wanted to cater to redheaded secretaries?

Mr. KENNEDY. I think if you wanted to make it quite clear that you wanted to cater only to redheaded secretaries, I suppose they would want to inquire as to why you would want to do that, Senator.

Senator THURMOND. Would you repeat that?

Mr. KENNEDY. Excuse me, sir.

Senator THURMOND. I didn't hear the last statement.

Mr. KENNEDY. You want me to repeat that? I answered the question.

Senator THURMOND. I didn't hear you answer, sir. You are talking rather low.

You don't remember what you said?

Mr. KENNEDY. We can let the secretary read it back.

(Whereupon the official reporter read from the record as requested.)

Senator THURMOND. Would a person have to give a reason as to why he would want to cater to any particular group of people?

Mr. KENNEDY. I say, Senator, I don't know that that is going to arise, really, about somebody catering to redheaded secretaries.

Senator THURMOND. I just use that as an example.

Mr. KENNEDY. I would be glad to discuss any meaningful example with you, Senator.

Senator THURMOND. You think a person ought to be forced to take, to serve anybody that wants to come in, whether he wants to or not.

Mr. KENNEDY. No. Now, Senator, I don't agree on that.

Senator THURMOND. Suppose a man came in with overalls and grease all over his shoes and his clothes and you felt that you didn't care to serve him, under this bill would you have to serve him?

Mr. KENNEDY. No; you would not.

Senator THURMOND. How would you exclude him, on what grounds?

Mr. KENNEDY. Because he had overalls and you didn't want him in and he had mud on his shoes and you thought you didn't want to serve him.

Senator THURMOND. Suppose he was a Negro?

Mr. KENNEDY. Well still he had overalls.

Senator THURMOND. You say I can't exclude him on account of his race. Who would make that decision if he was a Negro and had grease all over his clothes and the owner says well, I want to exclude you, I can't take you because you are dirty and greasy and you will hurt my patronage. He says I am a Negro. You can't turn me down on my race.

Mr. KENNEDY. But he is not being turned down on his race, is he Senator?

Senator THURMOND. That is what the owner says, he is not turning him down on his race but the Negro says he is. Then who would make the decision?

Mr. KENNEDY. I think it would be quite easy, Senator. You would find out whether that particular establishment would cater to Negroes, what the history was, what the background was.

Senator THURMOND. But a case like that could go into court and force the operator of that restaurant to go into a law suit.

Mr. KENNEDY. And the worst thing that could possibly happen to him is that he would have to accept Negroes. That is the worst thing that can happen.

Senator THURMOND. The point I am getting at, if the Negro claims he is turned down because of his race, the owner of the establishment claims he was turned down for other reasons, whose opinions would prevail or would he be forced to go into court in such a case?

Mr. KENNEDY. First, Senator, you try to get into mediation service that we hope to have established and which Senator Engle mentioned, and we hope to get the matter resolved there. Ultimately, it is possible, it would go to court and the court would decide. But the worst that could possibly happen is that the establishment would have to serve Negroes. That is the worst thing that can happen. I agree that it can come to court; that is possible. But the worst thing that can happen is that they would have to start serving Negroes.

Once you establish quite clearly that the individual had overalls and mud on his shoes, and you don't want him in your establishment, I think the individual would be thrown out of court.

Senator THURMOND. But the owner of the establishment could be thrown into court.

Mr. KENNEDY. Thrown into court?

Senator THURMOND. That is right, he would have to defend a case, wouldn't he?

Mr. KENNEDY. To go to court?

Senator THURMOND. Mr. Attorney General, the Supreme Court in *United States* v. *Dickenson*, 331 U.S. 745, has held that property is taken within the meaning of the Constitution when inroads are made upon the owner's use of it to an extent that as between private parties, a servitude has been acquired either by agreement or in the course of time. What effect would this decision have upon a case brought under the provisions of this act?

Mr. KENNEDY. I don't think it would have any, Senator.

Senator THURMOND. I would like to read from the decision in a recent case, *Peterson* v. *City of Greenville*. This is from the concurring opinion of Mr. Justice Harlan and I quote:

> Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference.

What do you think of his views of this subject?

Mr. KENNEDY. Well, as I remember that, isn't that a dissenting opinion in that case? It is a dissenting opinion.

Senator THURMOND. Well, I believe he concurred in the result but there were his words in opinion——

Mr. KENNEDY. Maybe we could straighten it out in the record. I believe he dissented in that particular case.

Senator THURMOND. In either case what do you think about his words?

Mr. KENNEDY. I think I probably—might express it somewhat differently.

Senator THURMOND. How is that?

Mr. KENNEDY. I might express it somewhat differently. I have great respect for Justice Harlan.

Senator THURMOND. Well, do you agree with him when he says that:

> Freedom of the individual to choose his associates or his neighbors,——

Mr. KENNEDY. I agree with that.

Senator THURMOND (continuing):

> to use and dispose of his property as he sees fit,——

Mr. KENNEDY. Yes, there are certain limitations on that as you know, Senator. For instance, there is certain property that you can't dispose of as you see fit. There are a lot of laws on the books at the present time dealing with that.

Senator THURMOND. Well, if he owns the property and has the right to dispose of it, you think he ought?

Mr. KENNEDY. But the Federal Government restricts that to some extent, as you know.

Senator THURMOND. How is that?

Mr. KENNEDY. The Federal Government restricts that to some extent. There is legislation now on the books that governs the operation of one's personal property.

Senator THURMOND. And he goes on and says——

Mr. KENNEDY. It is quite extensive, as you know, whether it is the Clayton Act or the Sherman Act, or any of the other laws we have discussed.

Senator THURMOND. He goes on and says:

> He has the right to be irrational, arbitrary, capricious, even unjust in his personal relations, are things all entitled to a large measure to protection from governmental interference.

Mr. KENNEDY. I think all of those things are true as long as it does not hurt someone else, Senator.

Senator THURMOND. As long as it doesn't hurt someone else?

Mr. KENNEDY. Yes; I think that obviously has a limitation on your use of property, the effect it is going to have on your neighbors and friends, neighbors and associates and the general public.

Senator THURMOND. Mr. Attorney General, isn't it true that all of the acts of Congress based on the commerce clause which you have mentioned in your statement were primarily designed to regulate economic affairs of life and that the basic purpose of this bill is to regulate moral and social affairs?

Mr. KENNEDY. Well, Senator, let me say this: I think that the discrimination that is taking place at the present time is having a very adverse effect on our economy. So I think that it is quite clear that under the commerce clause even if it was just on that aspect and even if you get away from the moral aspect—I think it is quite clear that this kind of discrimination has an adverse effect on the economy. I think all you have to do is look at some of the southern communities at the present time and the difficult time that they are having.

Senator THURMOND. And you would base this bill on the economic features rather than the social and moral aspect?

Mr. KENNEDY. I think the other is an extremely important aspect of it that we should keep in mind.

Senator THURMOND. Mr. Attorney General, the most notable attempt on the part of the National Government to dictate morals to the country was the 18th amendment, and laws passed pursuant to that amendment. Do you have any particular reason for believing that this attempt will meet with any more success than that dismal failure?

Mr. KENNEDY. I don't understand that question. I think this law, if it is passed by Congress, will have a very major advantageous effect on the United States and that it will be held constitutional by the Supreme Court.

Senator THURMOND. In simple words, the people of the country did not favor the 18th amendment which is an attempt to dictate morals, public opinion rose up and it was repealed. Do you think that this bill here, if public opinion rises up would have the same effect?

Mr. KENNEDY. I think I have answered the question. I think it has an effect on the economy at the present time and I think that this bill if it is passed would be supported by the vast majority of American people. You have more than 30 States covering two-thirds of the American people at the present time that have laws at the local level similar to the one that we are suggesting at the Federal level. So I think this is already supported by the vast majority of American people. I do not think it is comparable to the 18th amendment.

Senator THURMOND. I would like to read you a copy of a letter which appeared on the front page of the Nashville Banner on Wednesday, June 26. This letter is addressed to the local chairman and secretaries of lodges 215, 648, 720, 774, and 922 and is from Mr. O. B. Gentry, the general chairman of the Brotherhood of Railroad Trainmen and reads as follows: "It Is Not the Hiring of Negroes, but the Way the Government Is Going About It."

As I stated, it is dated June 21, 1963.

DEAR SIRS AND BROTHERS: All the general chairmen on the L. & N. Railroad were called to the director of personnel's office on June 20, 1963, for a conference. We did not know for what purpose we were called, but we were informed soon

after arriving that the reason was the Negro problem that is facing everyone today.

The U.S. Government called the L. & N. Railroad and told them to have a representative in Washington on a certain date to discuss discrimination among the Negro employees on the railroad. A Negro porter from Etowah, Tenn., and a Negro laborer from Louisville shops wrote to Washington that they were being discriminated against. The officials in Washington told them in no uncertain terms that mail contracts, TVA coal contracts, or any other business that the Government had a hand in would be withdrawn from the railroads that did not comply with the Government's wishes in this matter.

The railroad officials stated the Government representatives were very positive in their statements that there was not to be any discrimination shown to any employees. If there is an opening for 10 switchmen, the Negro organizations would send 10 of the best qualified college graduates to take the examination for these jobs, and maybe 30 white men applied for them too, the 10 men making the highest score would be employed, and chances are the company would have to hire all 10 Negroes and no whites. If a position comes up for bid and a Negro wants to try and qualify for it, even if he holds no seniority in this particular craft, he must be given a chance to qualify for it and the company must post on bulletin boards at all places so it can be seen by the employees.

The Government told the railroad to sign an agreement with the unions, and tell the unions that they would be expected to show no discrimination. The railroad told them that they did not tell the unions what to do and the Government answered, you tell them anyway and we will take it from there. The railroads stated that they had to go by the Railway Labor Act in dealing with the unions, and the Government advised them that had no bearing on this case and they would change anything that did not conform to this Negro program.

They told the railroad to promote the Negro firemen on the Pensacola Division, and to promote all other Negro employees that stood for promotion in any craft, if he made application for it. It will work like this: If a Negro porter in Louisville makes application for a switchman in Atlanta, and passes the examination with the highest score, he must be employed in this capacity.

If a Negro is not employed after he has qualified for a job, a very detailed reason must be given and, if a good reason is not given, then somebody is in trouble.

The director of personnel made the statement that in the lodges if a Negro is to be taken in and a vote comes to take him in, and a black ball is dropped, it will have to have a hole bored in it and an explanation on paper put in this hole in the black ball as to why he is not being taken in the lodge.

Brothers, this is a very serious thing that is facing us now. It is not the hiring of the Negroes, but the way the Government is going about it. They have not mentioned taking our seniority and giving it to the Negro yet, but this could be in the near future, the way things are going at the moment.

The railroad is required to make 90-day reports on this to show what progress is being made in the hiring of Negro employees. The L. & N. is the first railroad to be subjected to this, but this was brought about by these two employees making a protest to Washington. The Government has a meeting called for next month in St. Louis and has invited all railroads and some labor leaders to discuss this problem in detail.

The Government stated all facilities such as washrooms, drinking fountains, eating places or any facility must not be segregated in any way. All seniority rosters must not show whether colored or white, and anything that shows a distinction between white or colored must be eliminated.

Mr. Scholl made the statement that in the past he had been on one side of the bargaining table and union representatives on the other. But it looks like it is coming to where union and company will be together on one side of the table and the U.S. Government on the other side.

I hope after you have read this, all of you will realize what is facing you in your working conditions in the future, and I am afraid this is only the beginning. I trust each of you will think this matter over and not try to do anything that will cause trouble, because the Government is backing them and will continue to do so in the future, and they have the advantage as long as the present situation exists.

Fraternally yours,

O. B. GENTRY,
General Chairman, BRT.

Mr. Attorney General, whoever the Government officials are who were involved in this, it is clear that they were demanding that the railroad management and labor violate the provisions of the Railway Labor Act, thereby endangering the seniority rights and the job security of thousands of railway employees.

Did the Department of Justice have anything to do with this, or was it solely an act of the Department of Labor?

Mr. KENNEDY. Senator, I don't even know if you know that those facts are accurate. Do you know if those facts are accurate?

Senator THURMOND. I am not familiar with it. This came out in the paper. If it is inaccurate, I would like for you to say so.

Mr. KENNEDY. I don't know. I never heard about that before. I don't know whether anybody can tell from that. We don't know what conversations somebody——

Senator THURMOND. We will put it this way then. If these facts are accurate, did the Department of Justice have anything to do with it, or was it solely the act of the Department of Labor?

Mr. KENNEDY. Senator, as I said, I never heard of it up until the time that you read it here and put it in the public record. I would think that it would be quite simple to find out who this man is who wrote the letter and find out what is the basis of making such statements. He talks about the Government. I don't know who that might refer to.

Senator THURMOND. I have read the entire letter. Would you care to look into this and supply the answer for the record if you find that this letter is accurate?

Mr. KENNEDY. I will be glad to do——

Senator THURMOND. And tell us whether the Department of Justice or the Department of Labor was responsible for it, or if not who was responsible.

Mr. KENNEDY. First we have to establish whether the facts are accurate. They are telling stories, writing a story there which is second, third, fourth, fifth hand. It is written so I think that probably in fairness to everybody involved, that you probably want to try to establish the facts.

If you want to establish the facts, I will be glad to establish the facts for you, Senator.

Senator THURMOND. I would appreciate it if you would look into it and supply the answer for the record. This letter is signed by O. B. Gentry, and it is very clear who he is. He is the general chairman of the Brotherhood of Railroad Trainmen.

Mr. Attorney General, do you not think——

The CHAIRMAN. As I understand it, the Attorney General is going to run this down.

Mr. KENNEDY. It has nothing to do with us, but I would be glad to look into it.

The CHAIRMAN. He had nothing to do with it.

Mr. KENNEDY. I had nothing to do with it. I never heard of it. I will try to get Mr. Gentry on the phone and find out who he had all these conversations with. I will be glad to do that and furnish a memo. This is not something we are involved in.

Senator PASTORE. Mr. Chairman, a point of order.

Is this going to be something between the Attorney General rendering the courtesy to the distinguished Senator from South Carolina, or is this to be made part of the record? I think if it is to be made part of the record it ought to be up to the committee to determine.

The CHAIRMAN. I think this is a matter of courtesy of the Attorney General.

Mr. KENNEDY. I will submit it to the committee and they can do what they wish.

Subsequently, the Attorney General supplied the following information:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., July 19, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Senate Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On July 1, 1963, I testified before the Senate Committee on Commerce in support of S. 1732, a bill to eliminate discrimination in public accommodations affecting interstate commerce.

In the course of my testimony, Senator Thurmond read into the record a letter identified as having been written by Mr. O. B. Gentry, general chairman of the Brotherhood of Railroad Trainmen, and printed on the front page of the Nashville Banner on Wednesday, June 26, 1963.

The text of this letter can be found at pages 142-145, volume 1, transcript of proceedings for that date. Essentially, the letter expresses the writer's dissatisfaction with efforts of the "Government" to deal with the problem of racial discrimination among employees of the L. & N. Railroad.

At the conclusion of his reading, Senator Thurmond asked if the Department of Justice had anything to do with the activities described in the letter or if they were solely the acts of the Department of Labor. I stated, at that time, that the letter had nothing to do with the Department of Justice but that I would be glad to look into the basis of the statements made and submit information concerning it to the committee.

In response to our inquiry to the President's Committee on Equal Employment Opportunity, the enclosed letter from Hobart Taylor, Jr., Executive Vice Chairman of the Committee, was received. Since this letter answers the specific questions raised by Senator Thurmond and goes into the matter in some detail, I am transmitting it directly to your committee.

At your request, I shall be glad to supply any additional information which might be of assistance to you or to the committee.

Sincerely,

ROBERT F. KENNEDY,
Attorney General.

THE PRESIDENT'S COMMITTEE ON EQUAL EMPLOYMENT OPPORTUNITY,
Washington, D.C., July 12, 1963.

Hon. ROBERT F. KENNEDY,
The Attorney General, Department of Justice,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: We have received four complaints of racial discrimination in upgrading and promotion against Louisville & Nashville facilities in Louisville, Nashville, and Knoxville. All involved terminal operations of the company and in each case the union involved was the Brotherhood of Railway Clerks.

The first complaint received, that of Mr. Charles Baker against the company's Louisville terminal, was investigated by General Services Administration. Mr. Baker was prompted to file his complaint by the Louisville Urban League.

General Services Administration's report of investigation, received on November 28, 1962, developed the following facts which, with minor differences hold true for conditions at the other L. & N. terminals complained of:

1. The collective bargaining agreement between company and union provides for three separate seniority groups. Ostensibly, separation is based upon function: Group 1 covers clerical positions; group 2 covers nonclerical office positions; group 3 covers laborers, baggage handlers etc. Seniority

accrues from the first day worked in a group, and an employee may establish and retain concurrent seniority in any or all groups.

2. Upon hire, Negro applicants, regardless of qualifications, have been placed in group 3. White employees are placed upon hire in whatever group their services are needed, generally groups 1 and 2, but in some cases group 3.

3. White employees placed originally in group 3 have always been able to gain promotion to groups 1 and 2 as vacancies occurred. No Negro employee has ever been able to gain such promotion. Under the collective bargaining agreement, promotion from one group to another is solely a matter of company prerogative. Bidding rights, based upon seniority, extend only to jobs in the group in which seniority is held. In recent years, an additional factor has been added. In many locations the company has interviewed white applicants, ascertained their clerical ability, hired them, placed them in group 1 for seniority purposes, but detailed them for work in group 3. This has had the effect of giving these individuals seniority in both groups. When clerical vacancies occurred in group 1, these men would bid on the open jobs.

4. The existing system has resulted in many white employees maintaining seniority in all three groups, extremely useful at time of layoff since such an employee could exercise seniority to "bump" less senior employees in all three groups. Negro employees, limited to group 3, do not have this opportunity. Further, group 3 jobs are the most arduous and pay less than those in groups 1 and 2.

5. Over and above the central issue as outlined above, GSA's investigation showed that the company was generally in noncompliance in other respects, including:

(*a*) Failure to establish a policy of equal employment opportunity.

(*b*) Maintenance of racially separate facilities.

(*c*) Maintenance of racially coded preemployment and postemployment forms.

(*d*) Failure to post equal employment opportunity posters or forms 38.

Based upon the above information, the company was determined to be in noncompliance and GSA was requested to take necessary action to resolve the complaint and to bring the company into compliance. This request, dated December 10, 1962, required completed action by February 10, 1963.

On September 25, 1962, and January 1, 1963, complaints against the company's facilities in Nashville and in Etowah (Knoxville district) were received and transmitted to Post Office Department.

Investigative reports concerning the above cases received January 18, and April 11, 1963, disclosed facts almost identical with those reported by GSA. Post Office stated, however, that it had no jurisdiction to act in this matter and requested that it be referred to the National Labor Relations Board. After consultation with counsel, Post Office was directed on May 1, 1963, to require action to resolve the outstanding complaints and to bring the company into compliance.

On March 15, 1963, GSA reported that it had been carrying on correspondence with the company and submitted a copy of a company reply to its requests in which both legal arguments and denials of discrimination were presented. GSA replied to the company on May 1, requesting immediate corrective action within 15 days, reiterating a previous offer to confer with company representatives. Concurrent with GSA's request, Post Office Department advised the company of the necessity for corrective action and resolution of outstanding complaints.

On May 14, the company replied to GSA accepting its offer to confer, and suggesting that, in view of Post Office's interest, a joint conference be held.

GSA forwarded the company's reply, suggesting that in view of the joint nature of the conference, Committee representatives be present to coordinate the negotiations.

This was agreed to and a date of June 10, 1963, was set for the meeting. Preliminary to the meeting, conferences were held with representatives of both agencies to familiarize both with common issues to be discussed.

One June 10, 1963, the meeting was held in the Committee's offices. Staff representatives John Rayburn and Robert Nagle were present, as well as Messrs. Hannah and Rosenfeld of Post Office and General Services Administration, respectively. The company was represented by staff representatives, Mr. J. O. Sullivan of its personnel division, and Mr. H. G. Breets of the office of its counsel. These representatives were empowered to speak for the corporation.

After preliminary discussion, the tone of the meeting was set, based upon the mutual understanding that the company's noncompliance was an accepted fact.

Thereafter, discussion centered upon action necessary to correct the existing situation. Commitments were asked for and given, which covered the two basic areas of resolution of individual complaints and affirmative compliance action.

The company stated that in its estimation it could comply with the Executive order within the framework of its existing collective bargaining agreements. It agreed to undertake to evaluate the qualifications of its Negro employees previously restricted to all or predominately Negro seniority groupings, and when vacancies occurred, to give these employees active consideration for promotion according to their qualifications. In the past when vacancies occurred in all-white groups, the company hired additional white persons to fill the jobs. It agreed to give active consideration to promotion of the complainants to vacancies in groups 1 or 2 if their qualifications permitted. As a practical matter, an attrition-caused vacancy in a given group always results in an opening in the entry classification since, when a vacancy occurs, successively lower job incumbents move up one step.

The company was told that upon receipt of firm commitments for action to resolve the outstanding complaints, those complaints would be closed. Action and commitments for compliance action would be expected; however, following closure of the individual complaints, the company's relationship would be confined to one Government agency, the predominant interest agency, probably Post Office Department (Post Office has since been assigned PIA and the company notified).

The company was aware that the Brotherhood of Clerks and other internationals with which it deals maintain segregated locals or exclude Negroes from membership. It was pointed out that this was not in accordance with the principles of the Executive order and that the company would be expected to extend its good offices in this area to aid in correction of these conditions. The company was apprised of the fact that if the conditions remained unresolved it was obliged to so certify to the committee in filing its compliance reports.

During the negotiations, the company expressed an interest in further information concerning equal employment opportunity and stated that it needed assistance in bettering its understanding of the program. As a result, a tentative invitation was extended for company officials to attend a regional conference in St. Louis held on June 25. This invitation was later formalized, and representatives of L. & N. were in attendance with several hundred representatives of industry, including many railroads, at the regional conference of business and labor addressed by the Vice President and Secretary of Labor.

At the close of the meeting, the company agreed to undertake study of its operations and all action possible and to report its program and progress by July 10, 1963.

On June 27, 1963, company representatives, Messrs. Scholl and Sullivan, called John Rayburn and reported that a letter from a union representative had been reprinted in a Nashville newspaper.

Subsequent telephone conversations have been held on July 8 and on July 9. As a result of these conversations, the company has forwarded copies of additional newspaper articles.

The company has reported in these conversations that its program has been moving smoothly; in fact it appears quite surprised with the acceptance it has encountered among its personnel. Mr. Sullivan, of the company's personnel division, has volunteered that the publicity was unfortunate, misleading, and regretted both by the company and the union official who wrote the letter.

He reports also that the Brotherhood of Clerks held its international convention late last month and that the matter of merger of segregated locals was a central topic of discussion. Labor liaison section and John Rayburn took this matter up with civil rights division of AFL–CIO immediately after the June 10 negotiations. Boris Shishkin notified the international president, Mr. Harrison, and requested action to merge locals dealing with L. & N., Atlanta Terminal Co., Houston Belt & Terminal Co., and Jacksonville Terminal Co. The international is a signatory to the program for fair practices and as such has pledged to eliminate racially separate locals wherever they exist.

The company's report of action and progress was received July 9, 1963. It reports meetings with the chiefs of all divisions, with heads of both operating and nonoperating unions, and the first of meetings with area superintendents. Meetings have been held at lower levels in Louisville and will be continued throughout the system. It has forwarded forms 38 to all unions and will post same at all appropriate areas. It has also reported that as a result of news-

paper publicity there has been a decided increase in the numbers of Negroes applying for positions in the various divisions.

The report does not, contrary to expectations, formalize the verbal commitments given in the meeting of June 10, nor does it specify action or commitments to resolve the individual complaints, so the matter remains pending. We have every confidence, however, that all questions will be harmoniously and appropriately resolved, because of the cooperative attitude and viewpoint both of the company and the union.

Sincerely yours,

HOBART TAYLOR, JR.,
Executive Vice Chairman.

The CHAIRMAN. The committee can decide what they want to do.

Senator THURMOND. Do you not think this is a proper area of investigation if you find there is merit in this letter, for the Department of Justice, when some Government official demands a violation of the Railway Labor Act?

Mr. KENNEDY. Any violation of Federal law should be investigated by the Department.

Senator THURMOND. I presume if these facts as contained in this letter by Mr. Gentry are true, then, that the Department of Justice would investigate and take steps to punish the guilty parties?

Mr. KENNEDY. Senator, I think it is slightly unfair, wouldn't you agree, until we have established the facts, to start announcing that the Department of Justice is going to investigate something, until we find out what the facts are. This is hearsay on hearsay on hearsay. And, this is a public hearing.

To announce that the Federal Government, the Department of Justice, is going to start to investigate, until we establish the facts—why don't we establish what the facts are and if you want me back—I would say, as a general proposition, Senator, I assure you if there is a violation of Federal law, we will investigate it.

Senator THURMOND. And if the facts in this letter are correct, it would be a violation of Federal law; would it not?

Mr. KENNEDY. I don't know that, Senator.

Senator THURMOND. Under the facts I read you?

Mr. KENNEDY. I don't know that; perhaps they would be.

Senator THURMOND. There is a question in your mind as to whether they violate the Railway Labor Act?

Mr. KENNEDY. I haven't read the act for some time.

Senator THURMOND. In which the people have seniority rights and job security?

Mr. KENNEDY. I would have to look at the act. I would be glad to do that. I haven't read the Railway Labor Act lately.

Senator THURMOND. I am not trying to embarrass you. I am not trying to get you to say anything you don't want to. I am simply saying that if the facts contained—if the information contained in this letter is accurate, then I presume you, as Attorney General, would wish to investigate and take steps; would you not?

Mr. KENNEDY. I think I said what I will do.

Senator THURMOND. And what is that?

Mr. KENNEDY. I am going to look and determine whether the facts are accurate. And I am going to give a report to the committee on all of the facts that we uncover.

Senator THURMOND. And if you find that someone has violated the law, you wouldn't hesitate to take steps to——

Mr. KENNEDY. No, Senator. I said that I believe.

Senator THURMOND. Now, Mr. Attorney General, I would like to read you an article which appeared in the New York Times on May 21, 1963, entitled, "Better Rights for Negro Urged."

CLEVELAND, May 20.—Negroes need more than equal rights, the leader of the National Urban League said here today. Negroes, he said, need to adopt a "dramatic demand for compensation." They need better schools, better teachers, better social workers, not just "equal" ones, declared Whitney M. Young, Jr., executive director of the league.

Mr. Young spoke at a discussion of civil rights at a session of the 90th annual national conference on social welfare. Another panel member, Roy Wilkins, executive director of the National Association for the Advancement of Colored People, said:

"The Negro wants more than a chance, because he's been held back so long."

TWO GOALS PRESSED

Mr. Young in his remarks and in a subsequent interview, what he called "compensatory activity" as one of two major aims for progress in civil rights for Negroes—and whites.

He compared the situation of the Negro with that of the veteran who was given preferential job treatment because he had lost 4 years out of the labor market during World War II. The Negro, he said, has lost 300 years of opportunity.

"Industry must employ Negroes because they are Negroes," he said.

The other goal should be the white man's realization that integration in school and neighborhoods is not a problem but an opportunity, Mr. Young said. People, he continued, must prepare to live in the world of reality, understanding that only insecure persons surround themselves with sameness and demand all-white neighborhoods and schools as status symbols.

Mr. Young criticized the seeming inability of the white community to use Negro talent and leadership.

The President, he said, called in white advisers during the recent Birmingham crisis without consulting, say, a Whitney Young.

Mr. Young characterized the settlement in Birmingham as a failure. A mere absence of conflict where the Negro people have suffered so much is not a victory, he said.

Mr. Wilkins, also commenting on the Birmingham situation, of the struggle. "What the Negro in Alabama wants is some of that power so he can get the foot off his neck," Mr. Wilkins said.

BOWLES NOTES IMPLICATIONS

Chester A. Bowles, the President's special representative, referred to Birmingham in an opening morning session that implications of domestic affairs for the Nation's foreign policy.

Mr. Bowles cited Birmingham as an example where "a continuing pattern of racial segregation and discrimination erodes our national values and marks our international integrity."

Racial discrimination in America must be ended, he declared, not because it is unconstitutional, not because of the Communist challenge or the fear of disapproval of new African nations, he said. It must be ended, he said, because it is immoral and violates basic principles of mankind.

I want to ask you, Mr. Attorney General, are you in accord with the statement of Mr. Whitney M. Young, Jr., that they are entitled to preferential treatment rather than to equal treatment?

Mr. KENNEDY. My feeling is, Senator, that jobs, positions, should be based on a person's ability, integrity, and willingness to perform a particular function or a particular task. I think that for a long period of time that the Negroes have been deprived of equal opportunity.

I think, therefore, that we have to make a major effort to improve their position in the United States. I think a major effort is called for, and that requires vocational training, and education. The

Negroes happen to suffer from this more than white people. So that therefore the intensive effort will be directed more at Negroes and nonwhites than perhaps at white people.

I think that when you are making a decision on a position of employment, that that decision should be based on a person's ability to get a job done and their integrity.

Senator THURMOND. Do I construe from what you said that you feel that they are entitled to preferential treatment or equal treatment?

Mr. KENNEDY. I think I spoke in my own words what I feel, Senator. I don't know about making comment on what somebody else said, but I think that, I repeat, we have to make a more intensive effort to make up for the deprivations of Negroes, and the injustices to Negroes in the past.

I don't think that they should receive preferential treatment as far as particular positions or jobs are concerned. But I do think that we have to make a major effort to do better in the field of education and vocational training, and a lot of that will be centered on Negroes just because Negroes have a more difficult time in this field than white people have had.

Senator THURMOND. Did I construe from what you said then that they are entitled to equal treatment as on jobs but preferential treatment to prepare them for jobs?

Mr. KENNEDY. Again it is not a question of preferential treatment. I think that we have to make a greater—it is difficult, Senator, because I think at least I tried to express it as best I could—I think we have to make a major effort on the whole field of the economy, to make sure that our people are prepared, particularly our young people who are coming along.

The ones that have a particular difficulty and problem at the present time happen to be Negroes and other nonwhites. So the more intensive effort, undoubtedly, will go among these groups because these are the people who are suffering the most and are subject to the greatest number of injustices.

Senator THURMOND. That would naturally take some preferential treatment.

Mr. KENNEDY. I hope that we can make an effort, Senator. We shouldn't be able to say that a Negro has half the chance that a white person has of finishing school, or a third of a chance that he has of finishing college—that Negroes' life expectancy will be 7 years shorter and that they have a seventh of a chance of making $10,000 a year or becoming a professional person.

If we make an effort with those groups then I think that we will no longer have these discrepancies in the United States.

Senator THURMOND. Mr. Attorney General, we will turn to some specific provisions of the bill. You might want to get a copy of S. 1732, as I refer to it. I would like to turn first to section 2, paragraph (h) of the bill.

It is stated that in all cases described, official State action is involved. Are the State or local governments forcing individuals in all cases to act against their will, or is there some chance that these individuals are acting according to their own best judgment?

The CHAIRMAN. What section?

Senator THURMOND. Page 4, Mr. Chairman.

Mr. KENNEDY. Let me make sure that we know exactly what we are talking about, and not to have a paraphrase of it:

Discriminatory practices described above are in all cases encouraged, fostered, or tolerated in some degree by the governmental authorities of the States in which they occur, which license or protect the businesses involved by means of laws and ordinances and the activities of their executive and judicial officers. Such discriminatory practices, particularly when their cumulative effect throughout the Nation is considered, take on the character of action by the States and therefore fall within the ambit of the Equal Protection Clause of the 14th amendment to the Constitution of the United States.

Senator THURMOND. Now, the question I am asking is this. Are the State or local governments forcing individuals in all cases, as this says, to act against their will, or is there some chance that these individuals are acting according to their own best judgment?

Mr. KENNEDY. With all due respect, Senator, it doesn't say that.

Senator THURMOND. In other words is the word "all" in here accurate?

Mr. KENNEDY. Yes, but Senator, it doesn't say what you said it says, excuse me. It doesn't say what you said its says. With all respect to you, Senator, it doesn't say that.

Senator THURMOND. I don't get what you mean. On page 4, subparagraph (h):

Discriminatory practices described above are in all cases encouraged—

and so forth.

Mr. KENNEDY. Yes. And so forth, though.

Senator THURMOND. Is that accurate?

Mr. KENNEDY. Yes, it is. But that is not an answer to your question because that is not the way you described it, Senator. You didn't describe it that way.

Senator THURMOND. The question I asked, and I repeat the question, are the State or local governments forcing individuals in all cases to act against their will, or is there some chance that these individuals are acting according to their own best judgments?

Mr. KENNEDY. The answer is "Yes," that they are sometimes acting in their own best judgment.

Senator THURMOND. Mr. Attorney General, with regard to that same section, how can the nationwide effect of such freedom of choice either add to or diminish its character as action by the State governments?

Mr. KENNEDY. I am sorry, Senator, I didn't get that one. Can I have that again, please?

Senator THURMOND. Certainly.

With regard to that same section——

Mr. KENNEDY. Yes.

Senator THURMOND. (continuing). How can the nationwide effect of such freedom of choice either add to or diminish its character as action by the State governments?

Mr. KENNEDY. Senator, when you said, "and so forth," that is why these words are so important in this—you just can't say "and so forth," because it says—

in all cases are encouraged, fostered or tolerated in some degree by the governmental authorities of the States in which they occur.

Now, for instance, as they go on to say, they are licensed or protected in some fashion by the State, and therefore there is some governmental involvement in these establishments which discriminate.

This paragraph, I might add, is the paragraph that follows along the bill that was introduced by Senators Cooper and Dodd, and a number of other Senators. It is based on this point.

Senator THURMOND. Section 3, subsection 8, is limited to discrimination or segregation on account of race, color, or national origin. I presume there are other reasons for denying services remaining to the proprietor of an establishment. If a Negro was denied admission to an establishment for some other reason, would the burden of proof be upon him or upon the proprietor to prove he did deny service to the Negro for some other valid reason?

Mr. KENNEDY. It would be upon him.

Senator THURMOND. Who is that?

Mr. KENNEDY. On the plaintiff, the individual bringing the action.

Senator THURMOND. That would be upon the Negro?

Mr. KENNEDY. Yes.

Senator THURMOND. If he brought it?

Mr. KENNEDY. Yes.

Senator THURMOND. The burden of proof would be upon him?

Mr. KENNEDY. That is correct.

Senator THURMOND. I realize at the present time in the eyes of the Department of Justice that there would arise a presumption of discrimination because of race, but would this bill give rise to the same legal presumption?

Mr. KENNEDY. I think I answered that. I don't think your characterization of the Department of Justice is accurate, if I may say so, with all due respect.

Is that all right?

Senator THURMOND. Mr. Attorney General, even though the ostensible basis for this bill is the power of Congress over interstate commerce, the wording of section 3, subsection (a), paragraph (1), that is on page 5——

Mr. KENNEDY. I have that.

Senator THURMOND (continuing). Would also cover travelers within a single State; is that not right?

Mr. KENNEDY. That is correct. Could I explain that?

Any boarding house or motel or a hotel would have a definitive effect on interstate commerce; whether they took by and large people who are intrastate, it would still have an effect on interstate commerce. And I think that there are innumerable court decisions which support that and make it quite clear.

Senator THURMOND. Now how could the denial of services to an individual who is a resident and has no intention of leaving that State be a burden on interstate commerce?

Mr. KENNEDY. Because we are talking about a cumulative situation here, Senator. It is not just an individual. If this was just an individual situation and there was one restaurant or one motel or one hotel, we wouldn't all be sitting here today.

What this is a general practice, and a practice that has existed for many, many, many years. What we are trying to do is to get at that general practice.

The cumulative effect of a number of establishments which take in transients, and some of which would be interstate, some of which would be intrastate—the cumulative effect of all these has a major effect on interstate commerce. That is the theory, and it is a theory that has been borne out in a number of decisions. And I suppose the best known is *Wickard* v. *Filburn*, where the man just ran his own wheat farm.

Now, Senator Monroney, if the Congress decides and the committee decides that they want to define that in different terms, then obviously we would be willing to work with the committee on that.

Senator MONRONEY. Will you yield?

Senator THURMOND. Yes.

Senator MONRONEY. What you have just said is if Congress wants to put a limit on how far the interstate commerce clause can be used in enforcing, extending, and absorbing police powers of the State, then we ought to have the courage to say so.

Mr. KENNEDY. That is correct.

Senator MONRONEY. And not leave it to the courts to write into acts, because of the vagueness of congressional language, interpretations that may extend the commerce clause far beyond that which some of us feel was intended in the Constitution.

Mr. KENNEDY. I think the Congress can make that decision. I would hope, as I said here, that this would be more an effort to define rather than to present a lot of loopholes, such as implying that if you run a small businss or small establishment you can discriminate; if you run a larger business you cannot. But if Congress wants to define this, which we discussed this morning, certainly Congress has the authority to do that.

We suggested the language that we think is the most applicable. But as I said before the House, and as I said in my statement, if Congress wants to define that in mathematical terms, we will be glad to work with Congress on that.

I would hope, as I say, it does not become a matter of a loophole rather than just defining terms.

But I can understand the problems, sir.

The CHAIRMAN. Congress can't limit the interstate commerce clause, but Congress can limit as far as it wants to go within the clause.

Mr. KENNEDY. That is correct. Such as the minimum wage.

Senator PASTORE. Will the Senator yield?

Senator THURMOND. Yes.

Senator PASTORE. When you begin to fragmentize in that way, when you begin to make an exception because of the number of people who patronize an establishment, or the volume of business, how about the question of equal protection of the law? Don't we get into a constitutional question on that?

Mr. KENNEDY. Well, as I said this morning, as a practical matter—and I would like to bring some letters that I have received—as a practical matter for business establishments, I think that if you took that kind of a cutoff line when you start in this area, then you might very well get in more difficulty than you are resolving; because many businesses, as I said this morning, many establishments will say, "If we can do it, everybody does it." But if you give preferential treatment, to make this law applicable to the chainstores but not to the local

stores, then the chainstores will feel they should pick up and move someplace else.

Senator PASTORE. The reason I raise the question is that only recently the Rhode Island Supreme Court on a State case that involved an exemption on the part of small business from a corporate tax, the court held that the law itself was unconstitutional for the reason it discriminated.

I am afraid if we put in these discriminations we are creating what we are trying to avoid, and that is another parallel.

Mr. KENNEDY. Yes, it is. But I think this committee will be hearing testimony in these kinds of matters.

Senator THURMOND. Mr. Attorney General, section 3, paragraph (a) (2) reads this way:

Any motion picture house, theater, sports arena, stadium exhibition hall, or other place of amusement or entertainment which customarily presents motion pictures, performing groups, athletic teams, exhibitions or other sources of entertainment which move in interstate commerce.

Would the provisions of section 3, subsection (a), paragraph (2) which I just read, extend to teams or participants in athletic events as well as to spectators; thereby preventing the management of a privately owned stadium or sports arena from denying their facilities to colored athletic teams?

Mr. KENNEDY. It would not cover the teams, in my judgment, Senator.

Senator THURMOND. In other words, it would not cover participants in athletic games?

Mr. KENNEDY. That is correct.

The CHAIRMAN. At least that is what is intended. We may have to clear it up in the report.

Mr. KENNEDY. Yes, I think it is clear even from the language. It says—

any motion picture house, theater, sports arena, stadium, or other public place.

The teams would not fall in that category.

The CHAIRMAN. The committee intends to have as a witness, or witnesses, some of the baseball/football commissioners on this one point, so we could clear it up.

Mr. KENNEDY. Only the places they play.

Senator THURMOND. Mr. Attorney General, section 3(a), paragraph (3) covers the services and facilities of the specific places mentioned, as well as any other public place. Would this be broad enough to include the local barbershop or beauty shop?

Mr. KENNEDY. As a general proposition, Senator, my judgment is that it would not. There is a possibility, however, if a beauty shop or barbershop is in a hotel or railroad station, or in an airport, that it would be covered. But as a general proposition I would say it was not.

Senator THURMOND. Now if you will turn to page 6 of the bill and look at subparagraph (i), I would like to know the legal definition of the word "substantial."

Mr. KENNEDY. More than minimal, Senator.

Senator THURMOND. More than minimum, or minimal?

Mr. KENNEDY. Minimal.

Senator THURMOND. Well, for instance, would two interstate travelers per year be substantial?

Mr. KENNEDY. Now where is this, Senator? Applicable to what? Two interstate travelers going where?

Senator THURMOND. That is page 6.

Mr. KENNEDY. But going where? Two interstate travelers. What is the business? What kind of business are you talking about?

Senator THURMOND. Well, let me read page 6, that paragraph.

The goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers.

In other words, the place that has services for intrastate travelers. And the question I ask is whether or not, if there were two interstate travelers would it apply to that particular place?

Mr. KENNEDY. I think it would apply to the business, Senator, depending on how many other people it had. I think I would have to have a bit more information.

Senator THURMOND. Well, what type businesses would it apply to, and which would it not apply to, just in brief?

Mr. KENNEDY. Well, I think I have it here.

Senator THURMOND. You might tell us which one that it does not apply to.

Mr. KENNEDY. I would have to have more information about the two people, Senator. What kind of business it is. How many people are visiting the business.

If you ask me if this is substantial, I would have to find out what percentage it is, two out of a million, or two out of three.

You can tell me what the business is, Senator.

Senator THURMOND. This says the goods and services, facilities, and so forth, accommodations offered by any such place or establishment, or provided to a substantial degree to interstate travelers.

Suppose you have two interstate travelers who are doing business at some of these places that are covered here. Would two be sufficient to make that business fall under the scope of this bill?

Mr. KENNEDY. I think it depends. Is it a retail shop? A market? A drugstore? Gasoline station? Is it a lunch counter? Soda fountain? How many people?

I would have to know more than that there are two travelers.

You ask me whether it is a substantial degree, and all you tell me is two people.

Senator THURMOND. Well, would you tell us whether it would apply if two interstate travelers visited each of those you just mentioned, or would it not be applicable?

You mentioned about six or seven different types of establishments.

Mr. KENNEDY. Senator, I'm sorry. I have to know what the shop is, or restaurant. I have to know a little bit more about it than that just two people came in there.

Do you understand?

Senator THURMOND. Well, if two intrastate travelers visited a barbershop it would not apply?

Mr. KENNEDY. You mean two interstate travelers?

Where is the barbershop?

Senator THURMOND. Well, it is not connected with a terminal of any kind.

Mr. KENNEDY. I doubt very much if it would.

Senator THURMOND. Well, suppose 50 interstate travelers visited the barbershop. Would it apply?

Mr. KENNEDY. Where is the barbershop?

Senator THURMOND. It is off to itself; the same barbershop.

Mr. KENNEDY. But it is getting closer to a highway, Senator.

Senator THURMOND. Well, the barbershop is right on Main Street, and it is not connected with some other business.

Mr. KENNEDY. I say generally it would not apply to barbershops. If you get into a high percentage of interstate traffic, if it's right on the border, for instance, between South Carolina and North Carolina, and people are always going over from North Carolina to come to the barbershop in South Carolina, it might apply.

Senator THURMOND. Well, I mean now, for instance, there is a little town, Fort Mill, near North Carolina, just in South Carolina. Now if two travelers went in the barbershop that is not connected with anything else in that town, who came from North Carolina, who just stopped there to get a haircut and were going to South Carolina to spend some money, would that apply to them?

Mr. KENNEDY. I don't think it would.

Senator THURMOND. Well, suppose 50 stopped at that barbershop. Would that apply, or would——

Mr. KENNEDY. How many barbers does this barbershop have? I don't want to be facetious.

Senator THURMOND. They might have only five barbers.

Mr. KENNEDY. This is Mr. Murphy's barbershop.

The CHAIRMAN. In what period of time?

Senator THURMOND. Say in 1 day, say 50 went in this barbershop in 1 day.

Mr. KENNEDY. I would think he would have to come under it. I would think he would have to cut a Negro's hair. I don't think he could discriminate.

Senator THURMOND. Suppose we cut that in half and only 25, say, went from Charlotte down to Fort Mill.

Mr. KENNEDY. All in 1 day?

Senator THURMOND. In 1 day.

Mr. KENNEDY. How many barber chairs?

Senator THURMOND. The same five barbers.

Mr. KENNEDY. And how many other customers do they have?

Senator THURMOND. How is that?

Mr. KENNEDY. How many other customers does this barbershop have?

Senator THURMOND. Would that make any difference?

Mr. KENNEDY. Yes, a substantial degree.

Senator THURMOND. Well, say half of them.

Mr. KENNEDY. I think it would apply.

Senator THURMOND. Well, what is your percentage now?

Mr. KENNEDY. But I can't give you a percentage, Senator. You tell me what the story is.

Senator THURMOND. What I am trying to do, in construing this bill, how is the court going to determine whether 25 is the figure or 10 is the figure or 100 is the figure, or just what is the figure?

Mr. KENNEDY. How could you define specifically, for instance, what due process of law is?

Senator THURMOND. What does "substantial" mean when you say "substantial"? That is what I am trying to get at. I wonder if your guideline here is sufficiently clear so that a fellow will know whether or not he will have to cut somebody's hair. He may not want to cut it. For instance, if half his customers were from interstate, would that be sufficient?

Mr. KENNEDY. I don't think you can have any mathematical precision and a cutoff line. There has been a good deal of legislation that has been passed by Congress, passed on by this committee where you have expressions such as this. What is "interstate commerce"? Even if you didn't have "substantial," Senator, how would you be able to define it? You can't define, with mathematical precision, "interstate commerce." You can't define, specifically and particularly, "due process of law" or "equal protection of the laws." These are terms that we use frequently in our legislation and in court decisions. So you can't do that. But I think you could work it out in the individual case.

Senator THURMOND. Well, would it be any more different in one case than the other if you have the same business?

Mr. KENNEDY. I think 99.9 percent of the people in establishments would know whether they were covered. As for the very, very minute proportion of the population or establishments that didn't know whether they were covered, the worst thing that could happen to them is that they would have to serve Negroes—the worst thing.

Senator THURMOND. Suppose a barbershop got half the business from out-of-State travel, offhand, would that be covered?

Mr. KENNEDY. If what?

Senator THURMOND. If one-half, 50 percent, of their business came from interstate travelers.

Mr. KENNEDY. I think it would be covered.

Senator THURMOND. What about 40 percent?

Mr. KENNEDY. I think it probably would be covered.

Senator THURMOND. What about 30 percent?

Mr. KENNEDY. I think you are getting close now, Senator. I think it depends. Where is this barber shop?

Senator THURMOND. Well, it is right on Main Street, there. Stores on other sides, both sides. I will ask you about 25 percent next time.

Mr. KENNEDY. You can go as far as you want.

Senator THURMOND. I am just trying to find out what, so a fellow would know, for instance, if he got three-fourths of his business from interstate travelers, would he be covered by this bill?

Mr. KENNEDY. I would think he would.

Senator THURMOND. But if he got two-thirds of it from interstate travel he probably would not be covered, as I construe it, more or less because you said 30 percent is getting close and we haven't yet reached 30 percent.

Mr. KENNEDY. Well, you are getting down to zero. You went from 50 to 30, so you are going down rapidly.

Senator THURMOND. Well, in other words, if three-fourths of the business is interstate business he would be covered?

Mr. KENNEDY. I think he would.

Senator THURMOND. If two-thirds were interstate business he would not be covered?

Mr. KENNEDY. Senator, I did not say that. I think three-fourths and two-thirds are both covered.

Senator THURMOND. You think two-thirds would be covered?

Mr. KENNEDY. Yes.

Senator THURMOND. Suppose he got 20 percent of it? Suppose 40 percent of it is interstate, would that be covered?

Mr. KENNEDY. I would think it was, Senator.

Senator THURMOND. And only 30 percent was interstate; would that be covered?

Mr. KENNEDY. I think it probably would. But I think it would depend somewhat where the barbershop was established and perhaps a number of other factors. But—

Senator THURMOND. Well, say a fellow got only one out of five, 20 percent of his business from interstate travelers, would that be covered?

Mr. KENNEDY. And this fellow wanted to discriminate?

Senator THURMOND. I am not talking about discrimination.

Mr. KENNEDY. If he doesn't want to discriminate he has no problem.

Senator THURMOND. Suppose he does want to discriminate. Suppose he prefers to cut the hair of only certain people.

Mr. KENNEDY. Well, then he wants to discriminate against Negroes.

Senator THURMOND. It may not be Negroes.

Mr. KENNEDY. He is not affected by the bill. There is no problem.

Senator THURMOND. It may be Mexicans, Puerto Ricans, maybe Indians.

Mr. KENNEDY. And he doesn't want to cut their hair?

Senator THURMOND. If only 20 percent of his business is interstate would he have to serve everybody?

Mr. KENNEDY. No; he would have to serve—he could not discriminate against anybody because of their race, color, or creed or national origin.

Senator THURMOND. Twenty percent?

Mr. KENNEDY. Again, I think it would depend on other factors.

Senator THURMOND. What other factors?

Mr. KENNEDY. Was he near an airport, Senator? I don't know.

Senator THURMOND. What difference does it make whether he is near an airport or 10 miles from the airport if 20 percent of his business came from out of State? Would he have to serve them?

Mr. KENNEDY. I think these other factors play a role in it, Senator—whether an establishment deals with those in interstate commerce. That would be a factor you would have to take into consideration. I would say that perhaps it very well might be covered. But I think that he could, he wouldn't have any problem if he wouldn't discriminate. It wouldn't be difficult for him. He would decide, "I am not going to discriminate."

Senator THURMOND. Suppose 10 out of 100 came to him from other States to do business, would he be covered under this law?

Mr. KENNEDY. I think the answer is the same I gave to the other.

Senator THURMOND. You think he would be covered?

Mr. KENNEDY. I think it is possible it would be. I don't think barber shops generally are covered. The intention is not to cover them, Senator; but I think it is possible under certain circumstances it might be covered. But, again, he is not going to have any problem if he doesn't want to discriminate.

Senator THURMOND. It is a little bit vague, isn't it, Mr. Attorney General?

Mr. KENNEDY. I think the Constitution and the laws passed on by this committee, Senator, and passed by the Congress of the United States and Supreme Court decisions, all have the same kind of expressions. As I mentioned to you, what is "due process of the law" or "equal protection of the law?" You can't define those with mathematical precision. The court decides each time if somebody has been denied the due process of law and all these other matters. This is not the same kind of penalty. The individual doesn't get involved in any criminal action. The only thing he has to do is to stop discriminating. I don't think this is so awful anyplace in the country, Senator.

Senator THURMOND. Now I presume in order to play safe it would be better for that barber to keep a record there and have one page of all the in-State customers he serves and another record of all the out-of-State customers he serves so he can prove he didn't serve many out-of-State customers and therefore he wouldn't come under it if he didn't want to be under it.

Mr. KENNEDY. No; I think probably he has to first to decide in his own mind, "I am going to discriminate" before he makes up any list.

Senator THURMOND. Suppose he wants to serve whom he pleases and they charge him with a violation of this law. He would have to ask everybody where they live in order to know whether or not ——

Mr. KENNEDY. Is he a man that wants to discriminate or not, Senator?

Senator THURMOND. Well, I wouldn't say he wants to discriminate. He just wants to serve whom he pleases.

Mr. KENNEDY. Senator, if he doesn't want to discriminate I suppose he could say "I can serve a Negro."

Senator THURMOND. He just wants to exercise his free American choice.

Mr. KENNEDY. Does that mean he doesn't want to serve Negroes?

Senator THURMOND. I don't know, if he voluntarily wants to serve them, he can, but if he doesn't, he wouldn't.

Mr. KENNEDY. He doesn't have any problem if he is not going to discriminate. When you are making up this list ——

Senator THURMOND. He would have to keep a record of the people he has to serve or he will get in trouble.

Mr. KENNEDY. I don't think so.

The CHAIRMAN. He can serve the customers he wants but if he discriminates on race, color, or creed and he holds himself open for all types of business, interstate—then he would come under the law, I think the Court would say.

Senator THURMOND. In other words, if he wants to choose his customers he had better keep a pretty good record of whether they live in or out of the State or otherwise he might find you right back on his back.

Mr. KENNEDY. Not a bit, Senator. All he has to do is not discriminate. Then he won't have anything to do with anybody else.

Senator THURMOND. Well, I am sure you recognize the same difficulty and uncertainty exists with the use there of the word "substantial" that I was talking about because it is a very nebulous term.

Now with regard to these three subparagraphs, that is on page 6, Mr. Attorney General, would the establishment have to meet the test of all three of them before it would be covered?

Mr. KENNEDY. No.

Senator THURMOND. Or would any one be sufficient?

Mr. KENNEDY. Any one would be sufficient and I believe there are four, Senator.

Senator THURMOND. There are four, that is correct.

Mr. Attorney General, where would the burden of proof lie in any action brought under this bill? Would the plaintiff have to prove it?

Mr. KENNEDY. The plaintiff would have the burden of proof.

Senator THURMOND. Under the terms of the bill as it is now drawn, would there be any establishment except the bonafide private club which would not be covered by this bill?

Mr. KENNEDY. Yes.

Are you waiting for something? Excuse me.

Senator THURMOND. I wondered if you wanted to say anything more about the line of demarcation, rather than the private club?

Mr. KENNEDY. What was the beginning of the question?

Senator THURMOND. Under the terms of the bill as now drawn, would there be any establishment other than the private club which would not be covered by the bill?

Mr. KENNEDY. You have four provisions under the bill and any establishment that does not fall within those provisions would not be covered, Senator.

Senator THURMOND. Well, that pretty well gets them all, doesn't it, those four?

Mr. KENNEDY. I don't think so.

Senator THURMOND. Now, Mr. Attorney General, since this bill is based upon the commerce clause, what is the compelling reason for including the words "whether acting under color of law or otherwise" in the first sentence of section 4?

Mr. KENNEDY. Well, "acting under color of law" would bring you under the 14th amendment quite clearly, "or otherwise" involves the commerce clause.

Senator THURMOND. Excuse me. I didn't hear all of that.

Mr. KENNEDY. "Under color of law" involves quite clearly the 14th amendment, "or otherwise" would cover the commerce clause.

Senator THURMOND. Since it is based on the commerce clause, do you think you need that?

Mr. KENNEDY. Well, this bill is based on both the 14th amendment and the commerce clause.

Senator THURMOND. Now throughout section 4, reference is made to "any person," rather than limiting the provision to any person covered by section 3, but the rights and privileges mentioned are specifically limited to those mentioned in section 3.

Does this in fact broaden the coverage of the bill so that no person, even though he may have some difficulties, could be denied service in one of these covered establishments?

Mr. KENNEDY. He could be denied service.

Senator THURMOND. Mr. Attorney General, what would you consider to be the reasonable ground for believing that a person is about to engage in a prohibited practice which is mentioned in section 5(a)

of the bill. Who would make that determination and what would be the basis of it?

Mr. KENNEDY. Well, I think that if a Negro came to one of these establishments and was dressed properly, didn't have a loathsome disease, and wanted service and he was refused service and had reason to believe that he was refused service on the basis that he was a Negro, then I think that he would be able to bring some action and try to get the matter resolved.

Senator THURMOND. Now, since one of the so-called aggrieved parties could obtain the Department of Justice as his attorney, do you think that money from such wealthy organizations as the NAACP, or CORE, that is the Committee for Racial Equality, would be made available as it is today?

Mr. KENNEDY. I think it is quite clear in the bill that we say the individual brings the case, that the Department of Justice will not get involved in it if the individual has the finances to bring their own case and/or obtain the finances from another organization. That is spelled out in the bill, Senator.

Senator THURMOND. Do you expect that the Department of Justice would be involved in the majority of the litigation stirred up if this bill is passed?

Mr. KENNEDY. No, and I don't anticipate that there is going to be a great deal of litigation, Senator. I don't think there will be a great deal of litigation. I think that from our conversations with business groups and business organizations over the period of the last 6 weeks, I think that most businessmen will welcome this and get this behind them.

Senator THURMOND. You don't think it will be a very small percent that will be affected?

Mr. KENNEDY. I think the litigation will be very minor. I think if every institution, every establishment, every business group felt that everybody else had to do it, they will gladly do it.

This is causing them all kinds of difficulty and trouble. The mere fact that we have had these conferences, Senator, and just since the 22d of May is an indication.

As of last week 37 percent of all the southern communities of over 10,000 population had taken some steps in this direction of voluntary desegregation. This indicates quite clearly that businessmen would like to get this behind them.

As I said this morning, with one exception everybody with whom we talked, with whom we have had correspondence and everybody with whom we have worked over the period of the last 6 weeks has been willing and anxious to take this step.

Now, some of them have not been able to take the step. The reason they have not taken it is because they have not been able to get other groups to go along. Every individual with whom we have met—and we have met with important business and financial interests in the South—is willing and anxious to take this step.

That is why it is really shortsighted for the business and financial future of this part of the country to oppose this step which will make a difference economically, but also make a major difference for a high percentage of our population.

Senator THURMOND. If they are willing and anxious to take this step then why not let them do it on a voluntary basis and exercise their

American right to sell to a person if they want to or serve a person if they want to do so or refuse to do so?

Mr. KENNEDY. They can still do that.

Senator THURMOND. If practically all of them are willing to do it, why do we need a Federal law and Federal compulsion and Federal penalties and Federal prison terms if they don't?

Mr. KENNEDY. That is adding a few things on that are not in the bill, when you are opposed to the bill. There is no prison term in the bill.

Senator THURMOND. I should have said "punishment."

Mr. KENNEDY, The punishment is you cannot discriminate any more. But there are communities, Senator, as you know well, that still will not take the step voluntarily, and the discrimination is having an effect on interstate commerce and on many of our nonwhite fellow citizens.

I think there are some States at the present time which will not take this action and I don't think it can be brought about by the local people—for instance, the Negro population, because many of them have been denied the right to register and vote and participate in elections and many of them have been denied an adequate education. Therefore, it is difficult, if not impossible, for them to bring this about in their own locality.

Senator THURMOND. Do you contemplate under this bill that a judge could use contempt powers?

Mr. KENNEDY. Well now, there can be contempt powers, as in any violation of Federal court orders, if there is a violation of a Federal court order there will be contempt procedures.

Senator THURMOND. And that is the way you can punish, can't you?

Mr. KENNEDY. Wouldn't you agree, Senator, that if you have a court order the court order should be obeyed?

Senator THURMOND. I didn't say it shouldn't be obeyed. You said there is no punishment. I said if they are found guilty of contempt, they could be punished.

Mr. KENNEDY. Now what that is, that is not a violation of this law but a violation of a court order, and that is quite different. If they violate a court order, they are in difficulty.

Senator THURMOND. It is all part of the bill and they could be punished and put in prison.

Mr. KENNEDY. But, Senator, it is fundamental, any time anybody disobeys a court order they are in difficulty.

Senator THURMOND. I wonder if you are going to increase the staff of your Civil Rights Division and obtain larger appropriations from the Congress if this bill passes?

Mr. KENNEDY. I am hopeful we will. If this provision and the education provision is passed, I would think that we would probably add about—that we might add approximately 40 lawyers to our staff of the Civil Rights Division.

Senator THURMOND. How many employees do you have now in your Civil Rights Division, and how many of these are attorneys?

Mr. KENNEDY. We have 40 attorneys at the present time.

Senator THURMOND. In the Civil Rights Division?

Mr. KENNEDY. That is right. I imagine there are perhaps 50 nonlawyers.

Senator THURMOND. How large is the staff of the Internal Security Division of the Department of Justice?

Mr. KENNEDY. Approximately the same number, perhaps a little larger.

Senator THURMOND. So you will have as many in your Civil Rights Division as you have in your Internal Security Division?

Mr. KENNEDY. Yes.

Senator THURMOND. Would the local district attorneys be required to handle these matters as a part of their other duties or would they all be handled from Washington?

Mr. KENNEDY. They would be handled in the same fashion we are handling these matters at the present time.

Senator THURMOND. How is that?

Mr. KENNEDY. They will be handled in the same fashion as we are handling them at the present time.

Senator THURMOND. By your district attorneys?

Mr. KENNEDY. In conjunction with the district attorneys.

Senator THURMOND. Would there be a right to a trial by jury if a question as to the facts of any particular case arose?

Mr. KENNEDY. In that connection, Senator, on the jury trial matter—which is a controversial matter, and which was debated to some great extent in 1957—we would be willing to accept and have written into this law the same provision that you have in the 1957 law, which does grant a trial by jury under certain circumstances. If the sentence is more than a 45-day jail sentence and a $300 fine, the individual would be entitled to a trial by jury.

Senator THURMOND. I am just wondering about your statement on page 3 here. You say white people of whatever kind, even prostitutes, narcotics pushers, Communists, bank robbers, are welcome at establishments which will not admit certain of our Federal judges, Ambassadors, and members of our Armed Forces. Now, if this bill passes, suppose a hotel would refuse to admit some person and they would claim they were doing it on account of their race. Then that would raise a question of fact as to whether the race was the reason they refused to admit them or whether they were prostitutes or narcotics pushers.

Mr. KENNEDY. That is correct.

Senator THURMOND. That would raise a question of fact and maybe they would have to pay the cost of defending in a lawsuit.

Mr. KENNEDY. That is correct. I think all they have to show, Senator, is that they refused to serve for that reason, it was a disreputable person—if they hadn't discriminated—all they would have to show is that they were serving Negroes and nobody could contend they were discriminating.

Senator THURMOND. You don't feel that this bill goes directly to the Constitution in that it interferes with a man's control and use of his property. You say, no, it makes no difference whether the property is in an individual's name or whether the State owns it. If the State is going to directly control the use of it, really what difference does it make?

If I have a piece of property in my name and the Government is going to directly control the use of this property, I have no more control over it than if the Government owned it.

You don't think this goes directly in the face of the Constitution?

Mr. KENNEDY. No more than many, many, many dozens of provisions at the present time, Senator. You have a lot of local, State, and Federal laws that govern the use of property. Your right to property is not absolute, Senator. This is not the first time anybody has brought in any legislation that deals with your right of property.

All this deals with is when you open your doors to the general public, you ask for the general public. All we say in this bill is that you shouldn't discriminate. You can't refuse somebody just on the basis of the fact they don't happen to be white.

Senator THURMOND. Suppose you don't open it to the general public, you just open it to who you want to come in?

Mr. KENNEDY. Then you are not inviting the general public.

Senator THURMOND. Doesn't a man have a right to do that?

Mr. KENNEDY. Again it depends on what kind of an establishment.

Senator THURMOND. If this bill passes, he won't have that right.

Mr. KENNEDY. He is not going to have the right to discriminate if he has an inn or motel or these other kinds of establishments which are traditionally open to the general public, in which he invites the general public, if they have a substantial effect on interstate commerce.

Senator THURMOND. Now, this bill would permit the Attorney General to sue in the name of the United States when in his judgment the aggrieved person is unable to bring suit and the purposes of the act will be materially furthered by such a suit.

Now, one Attorney General might be reasonable where another one might not be reasonable. Say, one 20 years from now might be very arbitrary. Isn't this an unnecessary power that is being given to any Attorney General you might say?

Mr. KENNEDY. I don't think so, Senator.

Senator THURMOND. You don't think it would be abused?

Mr. KENNEDY. I would hope it would not be abused. There are a good number of other powers that rest with the Attorney General that he could abuse, and I would hope to a great extent it would rest with all our public servants, whether in the executive or legislative branch of the Government. It would depend on the individual. But I don't think this is power and authority that is given to the Attorney General——

Senator THURMOND. You're asking Congress here to pass a law similar to the one that the Supreme Court in 1883 has declared unconstitutional, aren't you, Mr. Attorney General?

Mr. KENNEDY. They declared it unconstitutional under the 14th amendment. I don't think they would do it again.

Senator THURMOND. You don't think they would do it under the 14th amendment?

Mr. KENNEDY. No.

Senator THURMOND. You think the Court over here is so liberal they would approve it?

Mr. KENNEDY. No. I think they would reach the proper decision and declare it constitutional in order to avoid that problem.

Senator THURMOND. You think this decision was not proper back in 1883?

Mr. KENNEDY. Well, I will tell you, having read it, I would probably have sided with Justice Harlan. But I can understand the majority.

Senator THURMOND. His was a dissenting opinion. I didn't think you thought much of dissenting opinions a few moments ago when I read the dissenting opinion of the present Justice Harlan rather than his ancestor back yonder who wrote this opinion. That is another Harlan. The Harlan that wrote the dissenting opinion back yonder is more in line with your thinking than the Harlan who wrote the dissenting opinion today, isn't he?

Mr. KENNEDY. I'm not certain of that, sir.

Senator THURMOND. Now I believe you mentioned about the 13th amendment that this decision of 1883——

What statement did you make?

Mr. KENNEDY. I think that there is an argument for putting it under the 13th amendment and the 14th amendment.

Senator THURMOND. Now of course you know this decision in 1883, they specifically said it couldn't come under the 13th amendment then.

Mr. KENNEDY. I'm aware of that.

Senator THURMOND. Why do you think it could come under the 13th amendment? That is the amendment that provides that slavery shall be abolished. The only one that is going to be under any condition of servitude here is the man who owns a store or motel or restaurant. He is under the condition of servitude because he has to sell to people he doesn't want to sell to and he is the only one that is affected here so far as a condition of servitude goes, isn't he?

Mr. KENNEDY. Would you like me to answer that?

Senator THURMOND. Yes, I would.

Mr. KENNEDY. I think under the 13th amendment—which deals with servitude and freedom of the slaves—that involved in all of that were all the rights, privileges, immunities. When the 13th amendment was written, it involved granting to the Negroes all the privileges, rights, and immunities of all the other citizens.

I think quite frankly, Senator, that there are sections of the country where they have never received that and this is a whole major effort. It doesn't just go to allowing them to go into a tavern or barbershop or store of one kind or another. It involves the fact that they are not permitted to register or vote in elections so they can't change the system in their own State. It involves the fact they have not had an adequate education, so they can't rise above the lowest positions.

One of the great arguments I had a couple of weeks ago with a distinguished official from one of the Southern States was that what the Negro wanted was to be able to be promoted from moving the garbage to driving the garbage truck.

Senator, it is 1963. We have gone beyond that and I think that all of this effort to keep the Negro from obtaining really a decent and reasonable life in the United States—it is all part of a system. And I think, therefore, the fact that they haven't received all their rights and privileges under the 14th amendment, that you could say and argue forcefully that under the 13th amendment that this would be declared constitutional. I think it is a different situation than

in 1883 because we have gone 80 more years when these practices and procedures still exist.

So I think it is about time that we in the executive branch of the Government and the legislative branch of the Government do something about it. One hundred years have gone by. The States are not going to do it Senator. You know; you come from South Caroline, which produces very distinguished people, produced Major Anderson who performed that very heroic act in Cuba.

But there is no question, Senator, if the matter is just left on its own for a long period of time to come, the Negro is going to have a difficult time. I'm not saying he is not having a difficult time in Boston, Chicago, New York, and Los Angeles, and all these other communities. As I said this morning, there has been a good deal of hypocrisy on this. But at least where we can pass some legislation to help and assist these unfortunate fellow citizens, that it is constitutional, I think that kind of action is required.

Senator THURMOND. Since you mentioned South Carolina, I might say that we have as good or better schools down there for our Negroes than we do for whites and you have probably visited some. And they have hotels and other facilities but they just prefer to be with their own people if they have their choice. They feel that way; they would rather be with their own people.

Mr. KENNEDY. Senator, I don't want to cast any aspersions on South Carolina but there is an education problem and the Governor is working very hard on it. There is a major education problem in South Carolina, as you know, I'm sure.

Senator THURMOND. I don't know of any major education problem down there that we have. They were all getting along fine until the NAACP and the CORE organization came in there and instituted lawsuits.

I can give you an example: For instance, down in Summerton School District in Clarendon County—I want you to hear this—they built a new school for the Negroes and I might say that in that district, 90 percent of the school district is Negro. And in spite of a new building that they have, some lawyer from New York came down there and brought a suit, and got the parents of 40 children to bring a suit against the district to integrate, to send those Negroes to the old school building that the white children occupy.

Now they were perfectly satisfied until this outsider came in and brought this little gimmick. The building is brand new and the facilities are better. As I say, 90 percent of them are Negro and it just shows that the outside influence is doing this. It is not the will of the people.

And I think the Justice Department or our Government as a whole is misconstruing in a lot of cases the true situation in different States because when a suit is brought like that, you get the impression that the white people are not treating the Negroes right down there, where, as a matter of fact, they have a newer building and better facilities for them.

I just wanted to mention that because I think it is worthy of your taking note.

Mr. KENNEDY. Thank you, Senator.

Senator THURMOND. Now I notice you mentioned, too, here about Greenwood, S.C., having an ordinance. Did you mention the mayor's name? I don't believe you did. Anyway the mayor is W. H. Leary.

They do not have any ordinance now on that and I thought I would call your attention to that because I knew you would want to make the correction if you were in error.

Mr. KENNEDY. Do you know when that ordinance was repealed?

Senator THURMOND. It was repealed. We called the mayor today just after you made that statement and he says they do not have an ordinance to that effect.

Mr. KENNEDY. I think, Senator, that the Supreme Court decision in the last 3 weeks has had an effect on these ordinances.

Senator THURMOND. Well, it may have had.

Mr. KENNEDY. These ordinances and laws have been out of existence for just a short period of time.

Senator THURMOND. There are some other questions I might ask Mr. Attorney General but I think we have covered most of it. I want to thank you for your patience and your consideration in answering these questions.

Mr. KENNEDY. Thank you for your courtesy, Senator.

The CHAIRMAN. All right.

Thank you, Senator Thurmond.

The chairman just wants to say for the benefit of the American amateur historians here today and the committee that Vermont was the last State to sign the Constitution, but Vermont was part of New York when the other States signed and they had to pay $30,000 to get released from New York and become a State. So they signed on January 10, 1791.

But Rhode Island was the last State to sign it on May 29, 1790, and New Hampshire was the ninth State to sign it and thereby tipped it and the Constitution, so both Rhode Island and New Hampshire contributed.

Senator COTTON. I know the distinguished Attorney General would not discriminate against New Hampshire, but it was my understanding that the Attorney General said Rhode Island was the State that brought the Constitution into being, and I merely want to say that perhaps I misunderstood him.

But I merely want to make it very clear that the Constitution came into being when the ninth State ratified it and that was the State of New Hampshire which ratified it on June 21, 1788. So I just want to get that into the record.

Mr. KENNEDY. I'm glad you straightened it out.

The CHAIRMAN. It was a vote of 47 to 66 and Vermont didn't have the $30,000 so they came in later after they paid New York. Then Rhode Island voted 34 to 32——

Senator PASTORE. On May 29, 1790.

The CHAIRMAN. Correct.

Now we will recess until 10 o'clock tomorrow morning.

(Whereupon, at 4 p.m., the committee was recessed to reconvene at 10 a.m. tomorrow morning.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

TUESDAY, JULY 2, 1963

U.S. SENATE, COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 10 a.m., in room 318, Old Senate Office Building, the Honorable Warren G. Magnuson, chairman of the committee, presiding.

The CHAIRMAN. The committee will come to order.

Yesterday at adjournment time we ended up with the Senator from Vermont, who has several questions to ask the Attorney General about the proposed legislation. He was ready to do so, but the hour got late, and we decided to begin again this morning.

The Chair recognizes the Senator from Vermont.

Senator PROUTY. Thank you, Mr. Chairman.

FURTHER STATEMENT OF HON. ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

Mr. Attorney General, I might say first that I am up to my neck in proposed legislation relating to this overall question.

As a member of the Labor Committee, I am concerned with FEPC, manpower retraining, education. Quite frankly, when I became a member of the Commerce Committee, I did not imagine we would be dealing with civil rights legislation. I am not a lawyer, but I have picked up a little information concerning some of the legal and constitutional questions involved, with the help of qualified attorneys, and I hope that perhaps you can add to my store of knowledge in this respect as a result of a few questions which I have to submit.

Mr. KENNEDY. Fine, Senator.

Senator PROUTY. Would you turn to page 6. A lengthy discussion evolved around the four subsections. Yesterday you indicated that the retail store, gasoline station, or restaurant would not have to meet all of the conditions set forth on page 6 in order to be covered by the bill.

You indicated further that if one of these establishments met only one of the conditions, it would be covered. Am I correct?

Mr. KENNEDY. That is correct.

Senator PROUTY. Now, may I draw your attention, Mr. Attorney General, to the fact that the word "or" does not appear between conditions one and two, nor does it appear between conditions two and three, and therefore, a literal reading of the bill I think would lead one to believe that an establishment is covered if it meets the conditions set forth in one, two, and three conjunctively, or if it meets the fourth condition. I think I know what the intention was. Does the language carry out that?

Mr. KENNEDY. No, I think that is a fair criticism, Senator. I think we should clarify that and have "or" between each one of the paragraphs.

Senator PROUTY. Again on page 5, and page 6, applying to hotels and motion pictures.

According to the legislative counsel's office, because of the indentation of the conditions on page 6 and for other reasons, the conditions appear to qualify only the establishments described in paragraph 3 of page 5. I call that to your attention.

Mr. KENNEDY. I appreciate that, Senator.

Senator PROUTY. On page 29 of the reported transcript of yesterday's hearings, you said, and I quote:

I think I haven't seen anybody contend that this would be unconstitutional on the Commerce Clause.

Similarly, on page 32 of the transcript you were recorded as saying, and I quote:

There cannot be any legitimate question about the Commerce Clause. That is clearly constitutional. We need to obtain a remedy. The Commerce Clause will obtain a remedy and there won't be a problem about the constitutionality.

Now to come to this conclusion you must have decided that the *Civil Rights Cases* of 1883 did not deal with the issue of whether Congress had the power to pass such public accommodation laws within its interstate commerce power. On page 35 of the transcript you are recorded as saying, and I quote:

In that 1883 decision the Supreme Court specifically stated that this kind of legislation might very well have been passed under the Commerce Clause; they said they were not passing on that question, just on the question of the 14th amendment.

During the hearing you testified that there was some doubt that this bill would be found constitutional if based on the 14th amendment alone. Therefore, I must assume that the constitutionality of this bill as you see it rises or falls on the validity of the bill under the commerce clause.

You said the Court, in the *Civil Rights Cases* of 1883, was not passing on the question of whether the validity of the Civil Rights Act of 1875 might be found in the commerce power of Congress.

I am going to quote you a statement by one of your predecessors, Mr. Charles Devens, who was Attorney General at the time the *Civil Rights Cases* were before the Supreme Court. This statement comes from the briefs of the United States for three of the litigants in the *Civil Rights Cases*. It seems to urge upon the Court that this law should be found constitutional and within the commerce powers of Congress.

As you recall, the *Civil Rights Cases* involved in part actions by several persons to gain access to inns. I now quote from the Attorney General's brief:

Inns are provided for the accommodation of travelers, for those passing from place to place. They are essential instrumentalities of commerce * * * which it was the province of the United States to regulate even prior to the recent amendment to the Constitution.

Now, Mr. Attorney General, I would ask you to review your statement of yesterday that the Supreme Court did not consider the issue of whether Congress had the power to pass such a law under the com-

merce clause of the Constitution. Do you still feel that the Court didn't have to deal with that issue?

Mr. KENNEDY. What I am saying, Senator, there is a specific quote in this case by the majority, saying that they hadn't passed on the commerce clause. I had it marked in my other book. It will take me some time to find it here.

Senator PROUTY. I think perhaps I can help you. Are you referring to 6, under the "Statement of Facts," which reads——

Mr. KENNEDY. No. It is in the decision.

Senator PROUTY. You will find it at the bottom of page 19.

Mr. KENNEDY. Shall I read it into the record?

Senator PROUTY. Yes, if you wish to. I would like to point out, I think the key words are public conveyances.

I am starting on page 19, at the bottom:

And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

They are referring to public conveyances.

Mr. KENNEDY. I think in the context, Senator, in the decision that was handed down, it included all of these matters. As far as public conveyances, and as far as the travel were concerned, they determined that they were constitutional.

Senator PROUTY. You certainly wouldn't consider theaters public conveyances back in that period.

Mr. KENNEDY. As I say, I think that in the context of it, Senator, and the basis of this decision, it included all of these matters.

Senator PROUTY. I do have a copy of the Attorney General's brief of 1879 from which we have quoted. I would ask unanimous consent that I be permitted, Mr. Chairman, to submit that for the record.

The CHAIRMAN. Without objection, it is so ordered. I think, though, that we ought to put in the record the brief of the other counsel along with it, to get the two in proper context.

Senator PROUTY. Certainly I have no objection to that.

The CHAIRMAN. We can get that.

How long are they?

Senator PROUTY. I don't know.

The CHAIRMAN. Let's leave it this way, without objection the pertinent parts of the briefs can be put in the record. We will decide later what it will be, so we won't have too long a record.

(The document referred to follows:)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

No. 26. UNITED STATES *v.* MURRAY STANLEY.
No. 37 UNITED STATES *v.* MICHAEL RYAN.
No. 105. UNITED STATES *v.* SAMUEL NICHOLS.

CIVIL RIGHTS CASES.

BRIEF FOR THE UNITED STATES.

The first and last of the above-entitled causes are indictments for denying to colored men the accommodations of an inn.

No. 37 is an *information* against Ryan for depriving a colored man of the right to a seat in the parquet of a theater in San Francisco.

Though the main question of the constitutionality of the civil rights act approved March 1, 1875, is the same in these three cases, which are therefore submitted together, the court below divided upon the question whether the indictment in the first case stated an offense, and a demurrer to the information was sustained in the second; so the first indictment and the information against Ryan must be here printed in full. In the last case the division of the court below presents only the question of the constitutionality of the statute aforesaid so that indictment will not be reprinted.

No. 26. UNITED STATES *v.* MURRAY STANLEY

STATEMENT.

At the term of the district court of the United States of America in and for the said district of Kansas, begun and held at Topeka, in said district, on the 10th day of April, in the year of our Lord one thousand eight hundred and seventy-six, the grand jurors of the United States of America, duly empaneled, sworn, and charged to inquire of offenses committed within the district of Kansas, upon their oaths do find and present that one Murray Stanley, late of the district of Kansas aforesaid, on the tenth day of October, in the year of our Lord one thousand eight hundred and seventy-five, at the district of Kansas aforesaid, and within the jurisdiction of this court, being then and there in charge and having management and control of a certain inn, did then and there unlawfully deny to one Bird Gee, then and there a citizen of the State of Kansas and of the United States of America, full and equal enjoyment of the accommodations, advantages, facilities, and privileges of said inn by then and there denying to said Bird Gee the privileges of then and there partaking of a meal, to wit, of a supper, at the table of said inn, for such purpose then and there provided, he, the said Murray Stanley, having then and there so as aforesaid denied to said Bird Gee the aforesaid full and equal enjoyment of the accommodations, advantages, facilities, and privileges of said inn, for the reason that he, the said Bird Gee, was then and there a person of color and of the African race, and for no other reason whatever, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States of America. (Record, 1, 2, and 3, 4.)

The foregoing indictment was demurred to; and, upon argument of the demurrer, the judges were divided in opinion upon these questions:

1. "Does the indictment state an offense punishable by the laws of the United States, or cognizable by the Federal courts"?

2. "Is the act of Congress entitled 'An act to protect all citizens in their civil and legal rights,' approved March 1, 1875, constitutional"?

That statute is prefaced with a preamble, and reads as follows:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under

their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provision of this act; and actions for the penalty given by the preceding section may be prosecuted in the Territorial, district, or circuit courts of the United States wherever the defendant may be found, without regard to the other party; and the district attorneys, marshals, and deputy marshals of the United States, and commissioners appointed by the circuit and Territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specifically authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States or Territorial court as by law has cognizance of the offense, except in respect of the right of action accruing to the person aggrieved; and such district attorneys shall cause such proceedings to be prosecuted to their termination as in the other cases: *Provided*, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person whatever by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars: *And provided further*, That a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution respectively.

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

SEC. 5. That all cases arising under the provisions of this act in the courts of the United States shall be receivable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court. (18 Stats., 335 to 337.)

No. 37. UNITED STATES *v.* MICHAEL RYAN.

STATEMENT.

This was an information in the circuit court of the United States, ninth circuit, district of California, in the form following:

Be it remembered that on this 12th day of February, A.D. 1876, comes into court, in his own proper person, Walter Van Dyke, esq., United States attorney for the aforesaid district of California, and in the name and on the behalf of the United States gives the said court to understand and be informed that on the 4th day of January, A.D. 1876, at the city and county of San Francisco, State of California, and within the district aforesaid, and within the jurisdiction of this court, Michael Ryan, then and there being, did then and there wilfully, knowingly, and unlawfully, deny to a citizen of the United States the full and equal enjoyment of the advantages, accommodations, facilities, and privileges of a public theatre, such denial being for reasons by law not applicable to citizens of every race and color, to wit, the said Michael Ryan, on said day, at said city and county, did knowingly, wilfully, and unlawfully deny to George M. Tyler, a citizen of the United States, the full enjoyment of the accommodations, advantages, facilities, and privileges of Maguire's new theatre, situate on Bush

street between Montgomery and Kearney, being on the southerly side of said Bush street, in the city and county of San Francisco, State of California, aforesaid, the same being a place of public amusement, as follows, to wit, that is to say, on the said 4th day of January, A.D. 1876, the said George M. Tyler did purchase a certain ticket of admission to said theatre of the ticket-seller or authorized agent of said theatre, for the sum of one dollar, which sum said Tyler duly paid to said agent, to wit, said ticket-seller, a certain printed ticket of admission to the said theatre, and to the part thereof known and designated as the dress-circle or parquette, and orchestra seats, which said dress-circle, otherwise known as the parquette, and said orchestra seats, did possess superior and better advantages, facilities, and privileges to any other portion of said theatre; which said ticket did purport to admit, and did entitle said George M. Tyler to admission to the said portion of said theatre known and designated "the dress-circle," otherwise called the "parquette," and to that portion of the said theatre known and designated the "orchestra" seats.

And on said fourth day of January, A.D. one thousand eight hundred and seventy-six, in the evening of said day, and about or between the hours of seven and eight o'clock p.m., while the doors of said theatre were open for the purpose of admitting the public to, and about the time of the hour of the commencement of the performance in said theatre, said George M. Tyler, then and there being a citizen of the United States, and under the jurisdiction thereof, did then and there present said ticket in his own person to said Michael Ryan, who was the doorkeeper to admit persons with tickets, and ticket-taker of said theatre, standing at the proper entrance thereof, and did, upon said ticket, ask and demand admission to said theatre, and to the part and portion thereof designated as the dress-circle, otherwise called the parquette, and the orchestra-seats thereof: and thereupon said Michael Ryan, then and there being as aforesaid, did then and there wilfully, knowingly, wrongfully, and unlawfully, by force and arms, deny to said George M. Tyler, as aforesaid, admission to said theatre, or to any part thereof, and did then and there deny as aforesaid, to said George M. Tyler the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of the said theatre, said denial and refusal not being for reasons applicable by law to citizens of every race and color, and regardless of any previous condition of servitude; that said refusal and denial as aforesaid was solely and entirely on account of and for the reason that said George M. Tyler was and is of the African or negro race, being what is comonly known and called a colored man, and not a white man. That said George M. Tyler was then and now is a person of the African or negro race, being what is known and commonly called a colored man.

And so the said attorney of the United States, in the name and behalf of the United States, gives the said court to understand and be informed that said Michael Ryan did then and there as aforesaid, on said day, in the manner aforesaid, commit the crime of unlawfully denying and refusing to a citizen of the United States the full enjoyment of the accommodations, advantages, facilities, and privileges of a theatre (the same being a public place of amusement), for reason not by law applicable to citizens of every race and color, regardless of any condition of previous servitude, contrary to the form of the statutes of the United States of America in such case made and provided, and against the peace and dignity of the people thereof. (Record, 4.)

A demurrer was filed to this information, together with a motion to dismiss it. (Record, 4, 5.)

The court sustained the demurrer and ordered the information to be dismissed. (Record, 5.)

ASSIGNMENT OF ERROR.

The United States assign for error the sustaining of the demurrer and the dismissal of the information.

No. 105. UNITED STATES *v.* SAMUEL NICHOLS.

A demurrer was filed to the indictment in this case; "and the demurrer to the indictment herein coming on now to be heard, and the judges of this court being divided in opinion on the point of the validity under the Constitution of the United States of the statute under which said indictment is drawn. * * * it is ordered on the request of said parties that said point be certified under the seal of the court to the Supreme Court of the United States," &c. (Record, 6.)

BRIEF.

As no informalities have been pointed out in the indictment and information, we shall confine this brief to the main question, common to the three cases, of the constitutionality of the statute upon which they are founded.

Inns are provided for the accommodation of travelers; for those passing from place to place. They are essential instrumentalities of commerce (especially as now carried on by "drummers"), which it was the province of the United States to regulate even prior to the recent amendments to the Constitution.

The relation of innkeepers to the State differs from that of a man engaged in the more common avocations of life. The former is required to furnish the accommodations of his inn to all well-behaved comers who are prepared to pay the customary regular price.

This business and that of conducting a theatre are carried on under a license from the State, through the intermmediate agency of municipal authority, which is part of the machinery of the State, being delegated to this extent with the power of the State. This is because the business to be carried on is quasi public in its nature, and for the general accommodation of the people.

For this reason Congress has the right to prohibit any discrimination against persons applying for admission to an inn or theatre based upon race, color, or previous condition of servitude.

The early amendments to the Constitution were added further to limit the Federal power. The last three, the result of bitter, costly experience, were intended to enlarge that power. Such enlargement must necessarily be pro tanto a diminuation of, or an encroachment upon, the power previously exercised by the State. These amendments also interfered, for the first time, with the relation borne by the citizen to his State, and with those institutions and regulations of a (so called) domestic character.

This innovation was not so dangerous to liberty as many theorists imagine. Both State and National Governments are mere machinery by which the individuals composing the Nation secure life, liberty, rights, and privileges. From time to time, as experience demonstrates the necessity or expediency of so doing, the people may change the mutual adjustment, or even the essential character, of this machinery to accomplish the desired purpose.

It was thought that the lately emancipated portion of our fellow-citizens could more safely depend for the security of their newly acquired rights upon the government which conferred them than upon that which had so long denied them. It may be remarked, in passing, that the greatest freedom is only attainable through the agencies and operation of the Federal Government. In one State, discriminations are made on account of religion; in another, upon the acquisition of land or other property; in a third, upon the basis of color; and in another by reason of Mongolian birth. It is in Federal legislation and in the action of Federal courts alone that these discriminations are wholly disregarded.

Equality before the law, then, is the privilege of American citizenship, conferred by the national Constitution; therefore, to be protected by national legislation. (16 Wall., 79; United States *v.* Reese, 92 U.S., 214, 217, where the court say that appropriate legislation "may be raised to meet the necessities of the particular right to be protected.")

The exclusion complained of in the causes at bar were because of the race and recent servile condition of the persons excluded. The law forbidding such exclusion, for such motive, is "appropriate to efface the existence of any consequence or residuum of slavery." (Hon. F. T. Frelinghuysen in debate on this bill; vol. 2. Cong. Rec., pt. 4, first session Forty-third Congress, p. 3453, end of first column.) At the bottom of the same page he cites the Slaughter-House cases as holding "that freedom from discrimination is one of the rights of United States citizenship."

What the United States had the right to give, it necessarily has the right and duty to preserve and protect.

We cannot proceed against or deal with the States to procure needed legislation; nor compel action by the grand juries of a State. We must necessarily prosecute directly those offenders who deny, on account of race or color, that equality which the Constitution guarantees.

The fourteenth amendment made native-born colored men citizens of the State in which they were resident. Their State citizenship originated in the national Constitution. Therefore Congress may legislate to compel the concession to them of such rights, whatever they may be, as are conceded to other citizens

of the State, without dictating what those privileges may be; except that, in discharge of the duty imposed by other articles of the Constitution, the Federal Government must see that there is no denial of liberty, nor such legislation as will deprive the State of its republican form of government. The fundamental right to liberty, and to participate in the choice of rulers, and to be equal to every other citizen in the enjoyment of lawful privileges, is secured to the colored man by recent amendments. As Mr. Edmunds remarked, these amendments did not mean to leave the Constitution just as it was before; so "that every man, woman, and child in a State shall have whatever rights the laws of that State choose to give every man, woman, and child in that State." (Cong. Rec., vol. 2, pt. 5, Forty-third Congress, first session, page 4172, second column.)

Power to *enforce* by appropriate legislation these constitutional amendments, giving liberty and equality, does not mean simply to re-enact their prohibitions. It means to legislate as to those particular matters and things in which equality is denied.

Their meaning and purpose must be gathered from "the history of the times." (Slaughter-House cases, 16 Wall., 67, 68.)

Upon that same page first cited (67) the court say that, "in the construction of those articles" they have only considered them as applicable to the case then in hand, which did not involve the rights of colored citizens; to which these amendments, as the court say, in the succeeding pages of that report, particularly relate.

In the enumeration of privileges by Judge Washington, in Corfield *v.* Coryell (4 Wash., 380, 381), quoted in the Slaughter-House cases, he speaks only of the rights of citizens of *States*, because that was the only question before him. The enumeration, however, is of those privileges belonging to the citizen of any free, well-constituted, republican State—and not as peculiar to those forming the American Union. Therefore they belong to citizens of the United States, as such, as well as to citizens of the several States, as such citizens.

The distinction noted by Mr. Justice Bradley (16 Wall., 117, bottom), that Judge Washington was speaking of the privileges of citizens *in* a State, not of citizens *of* a State, is peculiarly pertinent here.

It is purely accidental and immaterial that the several persons denied access to inn or theatre in the cases now pending were residents of the States in which the offences were committed. Their right to equal accommodations would have been the same had the travellers been citizens of New York or of this District, temporarily in Missouri or Kansas. This suggestion shows that the right secured by the legislation in question accrues to one as a citizen of the United States, and not as the citizen of a State.

As noticed by Mr. Justice Field, in his opinion in the Slaughter-House cases, the fourteenth amendment "was adopted to obviate objections which had been raised and pressed with great force to the validity of the civil-rights act," &c. (16 Wall., 93, near bottoms.)

Upon a subsequent page he says: "This act, it is true, was passed before the fourteenth amendment was adopted, as I have already said, to obviate objections to the act; or, speaking more accurately, I should say, to obviate objections to legislation *of a similar character*, extending the protection of the national government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress re-enacted the act, under the belief that, whatever doubts may have previously existed of its validity, they were removed by the amendment." (16 Wall., 96, 97.)

The correctness of this statement will be seen by reading the debate upon the proposition to submit that amendment for adoption. Though the language of legislators in debate cannot be used to control the legal effect of the phraseology employed, as to any single clause or sentence, the universal acquiescence of all the speakers as to the general scope and purpose of an act may be read, as part of the history of the times, to determine the meaning to be attached to the words employed—the sense in which they are used, and the force to be given them.

The first civil-rights act was passed April 9, 1866. (14 Stats., 27-30.) Though not identical in phraseology with that above printed, not containing this provisions as to inns, &c., it is "of a similar character." The debates upon the passage of that bill will be found in volume 70 of the Congressional Globe, for the first session of the Thirty-ninth Congress, pp. 1100-1833. Doubts were then expressed as to the constitutionality of that measure, which Mr. Bingham, of Ohio, and others, thought should be remedied by further amendment of the Constitution. (*Ib.*, 1291.)

Upon the 8th of May, 1866, the proposed fourteenth amendment was first discussed in the House of Representatives. (71 Cong. Globe, 2459, *et seq.*) Hon. Mr. Boyer said: "The first section embodies the principle of the civil-rights bill. * * * The fifth and last section of the amendment empowers Congress to enforce by appropriate legislation the provisions of the article." (*Id.*, 2467.) Mr. Broomall said that, while he did not agree with those who thought the civil-rights act unconstitutional, "yet it is not with that certainty of being right which would justify me in refusing to place the law *unmistakably* in the Constitution." (*Id.*, 2498.) Other declarations to the same effect can easily be found in the report of the House proceedings.

Similar expressions are found in the Senate debate: *e. g.*, Mr. Doolittle said: "The celebrated civil-rights bill, which was the forerunner of this constitutional amendment, *and to give validity to which this constitutional amendment is brought forward*," &c. (*Id.*, 2890.)

It would be strange if language avowedly chosen to effect a desired object, and deemed apt for that purpose by a large majority, if not by everybody, in each house of Congress, should now be held by the court not such as to accomplish the end contemplated. The intent of the legislator would not then be the law.

The case brought up in debate against the enactment of the existing law, under the fourteenth amendment, was the Slaughter-House case. It seems as if, but for that case, the sole opposition to this measure would have been directed to the question of expediency and not of constitutionality. Yet that case was decided upon issues entirely outside of any which those now submitted present. It involved only the determination of the proper limits of the *police power* of the State. Every member of the court held that *if* the law of Louisiana, giving to one corporation certain rights as to the landing and slaughter of cattle for the markets of New Orleans and adjacent parishes, was an exercise of police power *merely*, it was valid. Upon the question of its being such an exercise of police power, the court divided; a bare majority held it was within that power and the minority that it exceeded that power, or was not an exercise of it. All agreed, too, if it were not an exercise of that power, the law was invalid.

No question of police power arises in the present cases, or under the legislation upon which these cases are based. Leaving out that element, and the opinion of every member of the court in the Slaughter-House case sustains the validity of this act.

In the course of a speech in the Senate by Mr. Stockton against the bill he alluded to the opinion in that case, and Mr. Morton interrupted him with this question: "I ask him if Judge Miller did not say in the same opinion that whatever rights and obligations were conferred or created by the fourteenth amendment belonged to citizenship of the United States as such, and were under the control and guardianship of Congress?" To which Mr. Stockton replied that he had no doubt that such language was used, though he had not the volume of reports by him to determine it. (Vol. 2 Cong. Rec., Pt. 5, first session Forty-third Congress, p. 4147.)

At the close of Senator Stockton's speech, Mr. Howe, of Wisconsin, took the floor, and said:

I admit that when the Constitution was framed originally, there was committed to the Government of the United States no power to do the things we propose to do in this bill. I admit when that Constitution was framed its makers committed the status and condition of individual citizens to the control of the States within which they lived. What they pleased to do with the individual, that they did. There was a malign power reserved to the government of every State to deprive any one or any number of its citizens of every the commonest rights of the commonest man, and they did it. The time was when every State did it. The time is, thank God, when no State can do it. That malign power no longer exists in any government in this land acknowledging the supremacy of the Constitution of the United States. The Constitution has been changed. Some prerogatives have been withdrawn from the States; some new faculties or powers have been given to the Government of the United States. Three whole chapters have been added to the organic law. One of them, I say in the face of the country, as well as in the face of the Senate, was made on purpose to transfer the control of citizens to the Government of the United States; and if Congress does not possess to-day the power to snatch from the oppression of unequal laws every colored citizen of the United States, it is not because the people did not mean to clothe us with that power; but it is unmistakably because the draughtsman who framed the fourteenth amendment did not know enough

to construct a clause which would give us that power. (2 Cong. Rec., Pt. 5, first session, Forty-third Congress, p. 4147, May 22, 1874.)

In the progress of his speech, as reported upon the next page of the Congressional Record, the same gentleman thus referred to the citation of the Slaughter-House case by the opponents of the bill:

And yet we are told that that very point has been already decided. We are told that the Supreme Court of the United States have declared in advance that we have not authority to pass this bill. That is a mistake, in my judgment. The Supreme Court of the United States never have told me any such thing. I stand here to deny that they have ever said any such thing. * * * The only point which the court asserted was that a statute passed by the State of Louisiana was not in contravention of the fourteenth amendment. That act made no discrimination between a white man and a black man. It made, I think, broad discrimination between the rights of white men—a discrimination which, upon my soul, I believe the fourteenth amendment condemns—but not a syllable of discrimination between the two colors. The court undertook to say that it was but an exercise of the ordinary police powers, which belonged to every State before the fourteenth amendment was adopted, and were not taken from the States by the fourteenth amendment, and then the court went on—or the judge who delivered the opinion of the court goes on—to defend that conclusion, entering upon an argument to prove that such an act did not contravene that one clause of the fourteenth amendment which declares that no State shall impair the privileges and immunities of citizens of the United States. (*Id.*, 4148, second column.)

In closing the Senatorial debate upon the bill, just before the vote was taken, February 27, 1875, Mr. Edmunds, of Vermount, said:

The Constitution of the United States, as was stated in an opinion of the Supreme Court once by an eminent Democratic judge, is a bill of rights for the *people* of all the States, and no State has a right to say you invade her rights when under this Constitution and according to it you have protected a right of her citizens against class prejudice, against caste prejudice, against sectarian prejudice, against the ten thousand things which in special communities may from time to time arise to disturb the peace and good order of the community. That is all which this bill undertakes to do. Now let us see what this bill is.

The first section of it simply provides that all persons shall be entitled to certain common rights in public places, in the streets if they were in—they are not in, but that illustrates it—that no State shall have a right, and no person shall have a right, to interrupt the common use by citizens of the United States of the streets of a town or city. Where is the authority for that, Senators ask; where is the authority for saying that a State shall not have a right to pass a law which shall declare that all citizens of the German race shall go upon the right-hand side of the streets, and all citizens of the French race shall go upon the left, and so on: and that all people of a particular religion shall only occupy a particular quarter of the town, and all the people of another religion another side? Is it possible, with a national constitution which creates fundamentally a national citizenship, that anybody can say a State has a right to make laws of that kind? I should be amazed to hear it stated. If that can be stated, then I should be glad to know what there is in being a citizen of the United States that is worth a man's time to devote himself to defend for a single instant.

What is it to be a citizen of the United States, if, being that, a citizen cannot be protected in those fundamental privileges and immunities which inhere in the very nature of citizenship? And there is the fault into which my honorable friends on the other side have fallen in arguing this constitutional question. The question is not whether citizens of a particular character, either as to color or religion or race, shall exercise certain functions; but the question is the other way. It is that no citizen shall be deprived of whatever belongs to him in his character as a citizen; and what belongs to a man in his character as a citizen has been long in a great many respects well understood. There was the old Constitution, the fourth article, you remember, which said that citizens of each State should be entitled to the privileges and immunities of citizens of the several States. What did that mean? That has received a judicial interpretation.

By common consent of all parties, before this gravest question arising out of the rebellion and the war had been forced upon us, the courts had held, with universal acceptance, I believe, that there did belong to citizens certain inherent rights which could not be denied to them; and that you could not, under the Constitution of the United States, either through State or other authority, set up distinctions which interfered with these fundamental privileges. Perfectly consistent with that, as everybody knows, you may say that in order to fulfill

a certain function in the State, or to hold a certain office, all citizens alike must conform to certain qualifications. * * * The only thing that the Constitution says is that there shall never be a distinction in respect to the rights which belong to a citizen in his inherent character as such. Now, what are those rights? Common rights, as the common lawyers used to say; common rights, as the courts of the United States have said, under the fourth article. Among those may be enumerated—it may be that you cannot make a precise definition, but you can always tell, when you name an instance, whether it falls within or without it—the right to go peaceably in the public streets, the right to enjoy the same privileges and immunities, without qualification and distinction upon arbitrary reasons, that exists in favor of all others. That is what it is. Then apply it to this bill, and what have you? You say it shall not be competent for any person, either under the authority of a State or without it, to exclude from modes of public travel persons on the ground that they have come from Germany, like my distinguished friend behind me, or that they have come from Ireland, as some other Senators here may have come, or that their descent is traced from Ham, Shem, or Japhet. And yet Senators seem to be greatly alarmed when this simple proposition of common right inherent in everybody is put into a statute book, which carries out a constitution which declares that every privilege and every immunity of an American citizen shall be sacred and protected by the power of the nation. That is all there is to it; and those, therefore, who go fishing and talking dialectics about attorneys and about slaughterhouse cases and police regulations find themselves entirely wide of the mark.

The real thing, Mr. President, is that there lies in this Constitution, just as in Magna Carta, and in the bills of rights of all the States, a series of declarations that the rights of citizens shall not be invaded. These bills of rights do not say that A or B or C or any class shall hold an office or be a witness or a juryman, or walk the streets. They only say that these common rights, which belong necessarily to all men alike, shall not be invaded on the pretense that a man is of a particular race or a particular religion.

At this point the designated time for taking the vote upon the bill arrived. (Vol. 3, Cong. Rec., Part 3, second session Forty-third Congress, page 1870.)

It is thought unnecessary to try to add anything to what was said in support of the law in question.

CHARLES DEVENS,
Attorney-General.
EDWIN B. SMITH,
Assistant Attorney-General.

Senator PROUTY. In the States where discrimination with respect to public accommodations exists, do injured parties have any rights that they can pursue on the basis of the old common law doctrine in regard to innkeepers?

Mr. KENNEDY. I think it varies in each State, Senator. It depends on what the law is that has been passed in each State to deal with that matter.

Senator PROUTY. In some of the most common law States, they would have some case in law relating to innkeepers?

Mr. KENNEDY. That is correct, and I think it varies from State to State, Senator.

Senator PROUTY. Does every American have a right, afforded by the Constitution, to the full and equal enjoyment of the accommodations of hotels, restaurants, and similar facilities?

Mr. KENNEDY. You means does he have a constitutional right?

Senator PROUTY. Under the Constitution?

Mr. KENNEDY. I am not prepared to answer that at the present time, Senator. It is very possible that a case that is now before the Supreme Court will deal with that matter. We will submit a brief. I am going to have further discussions on that matter. I think that is extremely serious and one that requires a good deal of thought and attention.

Senator PROUTY. If it does not now exist, does this legislation establish a new right, separate and apart from constitutional rights?

Mr. KENNEDY. No, it does not. It does not establish a constitutional right. It establishes, by legislation, a person's right.

Senator PROUTY. The findings of the bill state, in effect, that when a State tolerates discriminatory practices, it commits an action which falls within the scope of the equal protection clause of the 14th amendment.

Has the Supreme Court ever said that the toleration of discriminatory practices constitutes in and of itself an action that interferes with the protections afforded by the 14th amendment?

Mr. KENNEDY. Will you read that again, please?

Senator PROUTY. Has the Supreme Court ever said that the toleration of discriminatory practices constitutes, in and of itself, an action that interferes with the protections afforded by the 14th amendment?

Mr. KENNEDY. I don't believe they have.

Senator PROUTY. Has the Supreme Court ever held that licensing in such State action as to invoke the protections of the 14th amendment?

Mr. KENNEDY. I don't believe they have as such, Senator. I think that the decisions over the period of the last few years have gone somewhat in that direction. But I don't believe that they have said licensing, per se, is State action.

The CHAIRMAN. But they have indicated that some type of licensing might violate State action.

Mr. KENNEDY. If there is another connection, for instance, with State action.

Senator PROUTY. I think I will get to that.

Mr. KENNEDY. It is my judgment, as I said yesterday, I think, at the present time, that they might very well indicate that licensing was State action.

Senator PROUTY. Does the State deprive individuals of their constitutional rights if it provides fire and police protection for a business that discriminates in its patrons?

Mr. KENNEDY. I don't believe so, Senator.

Senator PROUTY. Does it deprive individuals of their constitutional rights if it refuses to provide fire and police protection for a business that discriminates?

Mr. KENNEDY. I don't believe so.

Senator PROUTY. It is my understanding that before a citizen can invoke the protection of the 14th amendment, he must demonstrate State involvement with discriminatory practices.

Does this bill consider activities as State involvement that are not now so considered?

Mr. KENNEDY. The answer to that question would be "Yes," but, that raises a constitutional question. That is the question that was passed on by the Supreme Court in 1883, and the Supreme Court ruled that laws passed on that basis were unconstitutional.

It is my judgment, as I have said, that they would very possible rule differently today because the country has changed so much. But I think that you can make a strong argument that they would not, and that this does not constitute State action. In view of that, Senator, we have placed our legislation under the commerce clause

as well as the 14th amendment. So it would be constitutional in any case under the commerce clause, even if there was a question about the 14th amendment.

So although we have the 14th amendment, only those establishments covered by the commerce clause would be covered by the legislation.

Senator PROUTY. Are there any existing Federal statutes which implement the 14th amendment upon which an individual can bring suit when he is denied admission to a hotel or retail establishment? If so, describe those statutes.

Mr. KENNEDY. I am sorry, you will have to do it again.

Senator PROUTY. Are there any existing Federal statutes which implement the 14th amendement upon which an individual can bring suit when he is denied admission by a hotel or retail establishment?

Mr. KENNEDY. I don't believe so; I don't believe there are.

Senator PROUTY. Are you familiar with 42 United States Code 1983?

Perhaps I can refresh your memory. As I understand it, this statute provides that if an individual, because of the custom or usage of any State, is deprived of rights and privileges guaranteed by the Constitution, he may sue for damages or get an injunction for relief.

To your knowledge, has this statute been used?

Mr. KENNEDY. I think then you come down to a question of whether this is a right that is guaranteed by the Constitution, Senator. I don't think that it has been established yet that this is a constitutional right to be accepted in a hotel, motel, restaurant, or a theater.

The courts have never ruled that that is a constitutional right at the present time. As I say, there will be some decisions that perhaps bear on this point that will be argued this term, but the decisions in the cases that were argued and decided this last spring did not go that far.

Senator PROUTY. Am I correct in understanding that there is no right to sue for damages under this bill as there is under 42 United States Code 1983?

Mr. KENNEDY. There is no right to sue for damages under this bill.

Senator PROUTY. What is your justification for that?

Mr. KENNEDY. What we are looking for under this bill is a remedy for an injustice and a remedy for the harm that this injustice causes in interstate commerce. We feel that to remedy that injustice is sufficient.

Senator PROUTY. Is there any action that an individual can bring under this bill that he couldn't bring under the section of the Code to which I have just referred, namely 42 United States Code 1983?

Mr. KENNEDY. I think under the statute that you have just read, Senator, you have to claim that this was a constitutional right to be accepted at one of these establishments, and that has not been established as yet. That theory has not been accepted as yet.

Senator PROUTY. Under that section of the Code to which I referred, could the Attorney General come in and assist the complaining party?

Mr. KENNEDY. You mean because an individual is refused at an establishment because of his race?

Senator PROUTY. Yes.

Mr. KENNEDY. We could not. As I said, I don't believe it has been established as a constitutional right, that you have a constitutional right to be served at a particular restaurant, for instance, or that an owner of an establishment is violating the Constitution of the United States if he turns you down.

Senator PROUTY. I understand the answer to my original question is that the Attorney General cannot come in and assist a complaining party.

In September 1960, the then Solicitor General, J. Lee Rankin, cited two provisions of the United States Code that offer protection to a person who seeks to patronize a retail establishment.

Mr. Rankin has this to say, and I quote:

> When a State abets or sanctions discrimination against a colored citizen who seeks to patronize a business establishment open to the general public, the colored citizen is thereby denied the right "to make and enforce contracts" and "to purchase personal property" guaranteed by 42 U.S. Code 1981 and 1982 against deprivation on racial grounds.

Do you agree with the statement Mr. Rankin made?

Mr. KENNEDY. Could I see it, Senator?

It is difficult without looking at the whole matter.

Could I have 1981 and 1982? Could I have those, the code?

I feel like I am taking my bar exam.

I would agree with the statement.

Senator PROUTY. Thank you.

Mr. Attorney General, Is State sanction, or State tolerance of discrimination, sufficient to call into aid these two existing statutes?

Mr. KENNEDY. Is what?

Senator PROUTY. Is State sanction or State tolerance of discrimination sufficient to—sufficient State action—to call into aid these two existing statutes?

Mr. KENNEDY. I think it would be a question of degree, No. 1. If it gets into the field of licensing, it is my personal judgment that it would. But I can understand that you could make a very forceful and strong argument on the other side.

Senator PROUTY. Is State inaction a sufficiently broad concept to protect against discrimination without relying on the commerce clause?

For example, if a State failed to take affirmative action against a private discriminatory practice, is this State action for purposes of invoking these two statutes?

Mr. KENNEDY. I think that would be more difficult, Senator. I think it would be more difficult to make that argument.

Senator PROUTY. Does the bill contemplate State inaction as a basis for suit?

Mr. KENNEDY. This bill rests, as I said, basically on the commerce clause.

Senator PROUTY. I think you touched on this yesterday. Is the language in the bill sufficient to protect the right of a businessman to throw out a patron who is improperly dressed or unruly? As I recall it you answered in the affirmative yesterday.

Mr. KENNEDY. Absolutely.

Senator PROUTY. I might say that I had an experience a good many years ago when I was working in a sawmill during a school vaca-

tion. I went into a local barber shop with my hair covered with shavings, and I was tossed out.

On page 8, subsection (b), the bill provides that a complaining party shall be allowed a reasonable attorney's fee as part of the costs if he prevails. That is correct, is it not?

Mr. KENNEDY. That is correct.

Senator PROUTY. If the complaining party loses in a legal action, may the defendent obtain a sum to pay his legal costs?

Mr. KENNEDY. We don't have any provision in the bill on that matter, Senator.

Senator PROUTY. Wouldn't that be desirable? Would you have any objection to such provision?

Mr. KENNEDY. No, if the committee decides that they wish to put that kind of a provision in the bill.

The CHAIRMAN. Any judge can decide the costs, whether they are requested or not, in most States; he may settle the allocation of the costs, if he wishes. It is an inherent power of the bench in most States.

Senator PROUTY. It seems to me that if this bill becomes law a great many suits may be instituted. And I certainly think the defendant should be given sufficient protection.

When a suit is——

Mr. KENNEDY. I would not object to that, Senator.

Senator PROUTY. When the suit is brought by the Attorney General under this bill will it be brought to enjoin the proprietor of an establishment from discriminating against one person, or to enjoin him from discriminating against any and all persons on account of race, color, religion, or national origin?

In other words, does this bill give the complaining party the right to bring a class action?

Mr. KENNEDY. It does.

Senator PROUTY. Suppose that an individual is discriminated against in a public accommodation and an action is brought by State officials or by the individual himself under State law to correct the situation. Would a decision adverse to the complaining party or witness be res judicata?

Mr. KENNEDY. You mean as far as the Federal Government is concerned?

Senator PROUTY. As far as the individual is concerned, or the Federal Government, yes.

Mr. KENNEDY. Could you read that question again, please?

Senator PROUTY. If an individual is discriminated against and an action is brought by State officials or by the individual himself under State law to correct the situation, would a decision adverse to the complaining party or witness be res judicata?

In other words, as I understand the meaning, a decision has already been rendered.

Mr. KENNEDY. I don't think that would prevent the Federal Government from bringing an action. I think it is very unlikely that the Federal Government would; but the Federal Government, nevertheless, could still bring an action.

Senator PROUTY. Mr. Attorney General, as I read the bill there is no firm requirement that the Attorney General allow time for voluntary procedures or State action; is that correct?

Mr. KENNEDY. Senator, in our whole package we have suggested establishing a community relations service. Where that aspect of the bill is included, we have said that this matter should first be referred to this organization to see if they can resolve it on a voluntary basis by negotiation, by mediation. The Attorney General should only bring a suit after there has been an effort for 30 days to try to resolve it.

This bill before this committee does not include that. But we want that as a part of the measure.

Senator PROUTY. Are you not given full discretionary authority under the provisions of this bill?

Mr. KENNEDY. Yes, but as I say, if the whole package is passed and the other parts of the legislation that we have sent up here are included, it would specifically state that we should wait for 30 days, unless it is against the national interest or mediation would be fruitless.

Senator PROUTY. The act of March 1, 1875, provided that:

> All persons * * * shall be entitled to the full and equal enjoyment of the accommodations of inns, public conveyances, theaters and other places of public amusement subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color.

We have discussed this previously, but isn't it a fact that this statute which was held unconstitutional is quite similar to the bill presently before us?

Mr. KENNEDY. That is correct.

Senator PROUTY. Isn't it possible that the Supreme Court might find this bill, if enacted, unconstitutional in the *Civil Rights Cases*?

Mr. KENNEDY. It could be declared unconstitutional under the 14th amendment. I don't believe they would find it unconstitutional under the commerce clause. That is why we based on both the 14th amendment the the commerce clause.

Senator PROUTY. How could this belief be reconciled with the statement of Mr. Justice Bradley, who, when delivering the opinion in the *Civil Rights Cases*, said that no one could argue that any provision in the original Constitution gave Congress the power to enact a statute relating to places of public accommodation and that if such power existed at all, it had to come from the 13th, 14th, and 15th amendments?

Mr. KENNEDY. I think, as they said, it has to come from the 13th, 14th, and 15th amendments, and I think that they would find that constitutional, in my judgment, under the 14th amendment and possibly the 13th amendment.

Senator PROUTY. Many questions were raised yesterday concerning the term "substantial." The bill contains these terms, or such terms as "substantial portion," "substantial degree," "substantial effect." Yet it fails to provide any definition of these terms, and fails to give any administrator or commission authority to establish regulations interpreting them.

Has Congress ever before used such terms as these in a statute without defining them, or giving an administrator or commission the authority to define or interpret them?

Mr. KENNEDY. I believe they have, Senator. I mentioned the Clayton Act yesterday. I think that there are a good number of bills that have been passed by Congress, and a number of Supreme Court decisions, in which the wording has also been difficult to define with mathematical exactness.

I mentioned yesterday "due process of law" and "restraint of trade." What is "restraint of trade," "monopolization," "substantial lessening of competition"? What does "substantial" mean in that context? Or "equal protection of the laws"?

It is difficult to define mathematically some of those phrases or clauses.

Senator PROUTY. If you find an agency, for example, like the NLRB which establishes certain jurisdictional standards, or standards over which they claim jurisdiction, it seems to me that it might be wise to at least have some definitive interpretation, some meaning of these words.

Mr. KENNEDY. I can understand that, Senator. I just say this is not a precedent. There are numerous other statutes that have these kinds of phrases which cannot be defined exactly. But if the Congress decides that they want to define "substantial," and want to define "effect on commerce," if they want to do that then we would be glad to work with the committee on that matter.

I think that you do, as I have said before, I think you do get into some difficulties when you start to define it exactly, because then you have to have a cutoff. Then you say that those below a particular type of business can discriminate and the ones above cannot discriminate. That doesn't really make a great deal of sense.

Senator PROUTY. Suppose that the Attorney General brings suit seeking injunctive relief against the owner of a restaurant who discriminates in admitting patrons. Suppose further that an injunction issues and that several months later a Negro attempts to get in the same restaurant and is denied admission. Must he start suit all over again, or what must he do to take advantage of the injunction previously issued?

Mr. KENNEDY. I think he would bring it to the attention of the court.

It would then be a question of whether the owner of the establishment was in contempt of the order of the court; and the court would be the one to determine that.

Senator PROUTY. Mr. Justice Harlan, whom I believe is the grandfather of the present Justice Harlan of the Supreme Court, Mr. Justice Harlan, dissenting in the *Civil Rights Cases* of 1883, indicated that he thought the Court had gone astray in construing the 14th amendment to require State action before a party could be protected by that amendment. He indicated that civil rights were rights of national citizenship and that the framers of the amendments so intended.

Do you concur with this facet of the dissent?

Mr. KENNEDY. Yes, I do.

Senator PROUTY. Would you care to elaborate briefly?

Mr. KENNEDY. No, I wouldn't.

Senator PROUTY. Mr. Attorney General, the New York Times of June 27—this has been discussed by various members of the committee and you have answered some questions relative to this problem, but I would like to pursue it a little bit further—the Times of June 27 carries a caption on the front page, the lefthand column: "Robert Kennedy Offers To Modify Civil Rights Bill. Would Exempt Small Stores, Tourist Homes."

Then, again, the story continues:

The chairman of the House Judiciary Committee, Mr. Celler, asked why there should not be a floor that would provide a standard and be easier to police. He noted that stores, hotels, and motels, came under the provisions of the National Labor Relations Act if they did an annual business of $500,000.

Then they quote you as saying—

There is a good deal of merit in that idea. If Congress wants to be more explicit, we would be willing to work something out.

Are you suggesting that figure of $500,000?

Mr. KENNEDY. No; I am not. In fact, I don't remember it being mentioned in that context.

Senator PROUTY. Are you willing to suggest a figure?

Mr. KENNEDY. No, I am not, Senator.

We have suggested what we feel is the best bill. There were questions raised here, there were questions raised in the House, on the basis that the wording was too nebulous. I think there are difficulties when you attempt to define it mathematically, as I have said here.

If the Senate and the House feel that that is the best way to proceed, we would be happy to work with you on that matter. I can see that there is a good argument.

Senator PROUTY. Let me make it perfectly clear that I do not intend to offer any amendment, because I think any compromise on this bill should originate on the majority side. I can think of a possible amendment——

The CHAIRMAN. What side?

Senator PROUTY. On the majority side.

Mr. KENNEDY. Let me say, Senator, that I don't think there is any question of watering down or changing the bill.

I think some Members of the Congress and Members of the Senate have a legitimate question whether the type of phraseology that is used in the bill is exact or not. Such questions do not show that anybody is less interested in obtaining the passage of the bill, or less interested in obtaining civil rights; but if you feel that the bill should be defined more exactly, to make sure that it does not cover those who have a social or personal relationship or somebody who runs a very, very small establishment and doesn't want to have to go to court to find out whether he is or is not covered, I can understand that, and I don't consider that changing the purposes of the bill.

My feeling is that the way we have drawn it is the best. I can understand the feeling by Republicans or Democrats, Members of the Senate or Members of the House; if they want to define it more exactly, we would be glad to cooperate in attempting to arrive at some figure.

I would say that my first judgment when I went into this was that it should be defined mathematically, that this was too nebulous. After studying it and working on it, talking about it for a period of time I felt that this was the best way to proceed.

I can understand very well the opposite point of view.

Senator PROUTY. I yield.

Senator SCOTT. I want to commend the statement the Senator from Vermont has made, and say that I agree entirely with him. If amendments are to be offered, which many quite rightly feel would be perfecting, I would hope, with the view of the preservation of the position

of the majority, that such amendments would be offered by the majority side since they have not been proposed by the Department of Justice.

I would think it would be the responsibility of the majority to perfect this bill if they wish to do it. I do not intend to offer any amendments of that character myself in view of the fact that I feel the responsibility lies in the areas which I have indicated. I just want to say that I agree with the Senator from Vermont.

Mr. KENNEDY. Senator, if I could find out what you would like to change I would like to offer it myself.

The CHAIRMAN. Let the Chair say that every Senator on this committee has the responsibility to suggest such amendments as he thinks are necessary to the bill in order to make a better bill, to achieve the objective.

It is not the responsibility of the majority or the minority or the Republicans or the Democrats. It is the responsibility of every Senator.

Senator PROUTY. Mr. Attorney General, I have heard of an approach which might be more realistic than some that I have heard.

The CHAIRMAN. Let me state further that the minority on this committee have offered amendments to every single bill I think we have had in front of the committee this session or last session or 10 sessions previously. Some of them have been good and some have been accepted. We have worked it out together to make better legislation. And to pass the buck onto whoever has the responsibility for amendments I think presupposes that because you are in the minority you have no responsibility to help make a better piece of legislation.

Senator SCOTT. If the chairman would yield, I am sure we all would want the best possible legislation that is in the interests of the country.

I repeat that in view of many statements which have appeared in the press indicating that some people would want to offer crippling amendments, watering down amendments, or weakening amendments, I am making it clear that my responsibility indicates that I should support this bill. If amendments are to be offered in good faith for the purpose of perfecting the bill, which may subsequently be interpreted as crippling amendments, I will not accept that as part of my responsibility. And I commend the Senator from Vermont for refusing to accept it as part of his.

That is all I would suggest.

Senator PROUTY. This is not a suggestion. The suggestion has been made to me that in view of the very real difficulties involved in the passage of legislation of this nature, and the tension among people who are affected most directly, it might be possible to start with the idea of a figure of a million dollars the first year; in other words all establishments doing business of less than a million dollars the first year would be excluded; the second year drop that figure to $750,000; the third year to $500,000; the fourth year to $250,000; and the fifth year maybe to $100,000; and after that there would be no figure.

In other words, it would not satisfy either group most directly concerned, but it would give some assurance to the Negro community that we have a definite determination to end segregation in this country, and it would at least bring about such an end, even though it would be a gradual process.

As I say, I shall not offer any amendments because I think it is the responsibility of the majority to offer all of the amendments on this.

We have read in the newspapers time and time again, particularly by columnists, by radio and TV commentators, that the Republicans are going to be blamed if civil rights legislation fails. And I think the public and the Negro community should recognize that we have in the Senate of the United States today 67 Democrats; more than a 2-to-1 majority; enough to invoke cloture if they so desire. And the Democratic administration, and a majority of Democrats in the House, and two-thirds on this committee. So I think that anyone who makes a statement that the Republicans should be blamed if civil rights legislation fails is not being very impartial and is being completely political.

Mr. Attorney General——

Senator PASTORE. Would you yield for a question on the point you just raised?

Senator PROUTY. Let me ask a question first.

The CHAIRMAN. You just yielded to Senator Scott.

Senator PROUTY. All right.

Senator PASTORE. The Senator from Vermont has just made a fantastic suggestion about how this ought to be graduated, and he has a perfect right to make the suggestion. But does he expect me to put in the amendment for him?

Whose responsibility is it to put that in the form of an amendment?

Senator PROUTY. May I say emphatically that is not my suggestion. Someone made that suggestion to me.

The CHAIRMAN. Who?

Senator PASTORE. And you said you thought it was a very good one.

Senator PROUTY. No, I did not. I said it might seem more logical than others.

Senator PASTORE. You said it was more logical. If you believe it I think you ought to advance it.

Senator PROUTY. No, I don't intend to. I probably will vote for the bill as it is now.

Senator PASTORE. I don't see how you can expect us to do it for you.

Senator PROUTY. Mr. Attorney General, I would like to ask you one question.

This has gotten into the area of partisan politics and I will not comment on the cartoon which appeared in the Washington Post, a Herblock cartoon on June 27, 1963. I won't even try to describe it. Obviously most people here have seen it. I think it represents a very dangerous type of philosophical bias, or it is partisan politics at its best. Certainly there are some columnists who are quite objective——

The CHAIRMAN. At its best?

Senator PROUTY. I should say partisan politics at its worst. I mean that.

Some of the more objective columnists in Washington have recognized this fact, the fact that this has become a partisan political question.

Here is one by Richard Wilson which appeared in the Evening Star on Wednesday, June 26: "Putting Rights Program Through. Democrats Reminded They Have Hopes and Can't Blame GOP if Bill Stalls."

In the New York Times, June 27, Arthur Krock, who is certainly one of the most respected and outstanding columnists in this country, had a column with the caption "An Imaginary but Not Too Fanciful Interview." The interview, of course, purported to have taken place with the Attorney General. I assume you have seen that.

Mr. KENNEDY. I wrote him a letter about that, Senator, and said that that conversation was in the privacy of my own home and I was shocked that he had printed it.

Senator PROUTY. You are not suggesting that he reported it inaccurately.

Mr. KENNEDY. I wrote the letter in the same tone that he wrote the column.

Senator PROUTY. Mr. Chairman, I ask to have Mr. Krock's article and the one by Mr. Williams included at this point in the record.

The CHAIRMAN. For the benefit of the committee: The chairman has no objection to putting things in the record, discussions on this matter, but I am wondering whether we should start to put all of the columnists who discuss the civil rights question in the record. If you put in one that is favorable to, say, what your viewpoint is, I might want to put in one that is favorable to mine. We would just be reprinting the newspapers for the past month. Things that are pertinent to the questioning, I think we ought to include.

I have no objection to these two articles.

Senator PROUTY. Mr. Chairman, I think these are both very pertinent and I am sure they will——

The CHAIRMAN. If the Senator from Vermont thinks they are pertinent, without objection they will go in the record.

(The clippings follow:)

[From the New York Times, June 27, 1963]

IN THE NATION

AN IMAGINARY BUT NOT TOO FANCIFUL INTERVIEW

(By Arthur Krock)

WASHINGTON, June 26.—(The following interview with the grand master of President Kennedy's reelection strategy took place entirely, of course, in the realm of fancy:)

Question. General—Do you mind being addressed as "General"?

Answer. Not at all. I have grown used to it in my job—it is a sort of "short title," as we lawyers say.

Question. Well then, General. It seems to me that you are getting ready to fell the Republicans in 1964 with an improved model of the old whipsaw that has cut 'em down before. I mean you will put the blame on them for the rejection or emasculation in Congress of the President's equal rights bill, and claim full credit for the administration for whatever part of the bill survives.

Answer. You are correct. But if this is to be called a whipsaw, it is the implement of truth, for the enforcement of the greatest moral issue in American history—that there shall be no second-class citizens.

Question. I gather from statements made by the President, by you, and by news analysts who have the privilege of daily exposure to the wonders of your thinking, that this will be a three-blade whipsaw. The third is a charge that the inside Republican strategy is to impress the GOP upon the voters as "the white man's party," with the objective of solidifying the great racial majority behind its candidates of 1964.

Answer. Well, this charge will be self-creating, won't it, if the Republican attitude toward compulsory equal rights bill is as cool as it was at their leadership meeting last week in Denver, and if they don't give us the votes we need in Congress to get our legislation through? If the "party of Lincoln" acts

that way, it will be our public duty to point it out in expounding the moral issue.

Question. General, haven't you been a little slow in fitting the teeth to that moral issue? Won't people ask why Roosevelt never proposed an equal rights bill, why Truman didn't fight for the one he proposed, how come that Eisenhower's were the only ones enacted in half a century, and why President Kennedy was in office more than 2 years before he got around to legislating the 1960 platform he ran on?

Answer. Our answer will be that we look only forward, that to get the country moving forward the timing has to be right, and that, so far as Eisenhower is concerned, Lyndon Johnson was responsible for what was passed by Congress.

ANSWERS FOR EVERYTHING

Question. But, General won't people remember that the Democrats were in the majority in Congress at all these times, and that Lyndon Johnson showed no pain when he cut part III out of the Eisenhower bill to keep it from being beaten by the votes of Democratic Senators?

Answer. Some may remember these purely incidental things. But you know the old Alben Barkley story that ends, "What have you done for me lately?" And that is what will influence the voters we need, the groups that, when united, can carry the big States and therefore the Presidency. We'll get them solidly for us on our new moral issue, and divide the other groups on the political issues, as usual.

Question. But, General, isn't your strategy dependent on the choice of Goldwater by the Republicans? Suppose they pick Scranton or Romney? And, since you have enough Democrats in the House to pass your equal rights bill, and the exact number in the Senate needed to invoke closure, how can you blame the Republicans for emasculation or defeat? And how can you agree to let the Mrs. Murphys discriminate racially on public accommodations in a bill founded on the concept that discrimination by anyone is an immorality which must be forbidden by law?

Answer. We'll solve those first two problems in due course. As for your third question, there are many more Mrs. Murphys who vote than there are Conrad Hiltons. The Kennedys need at least 4 more years in office to save the country, and to say in office you got to be practical.

[From the Evening Star, Washington, D.C., June 26, 1963]

PUTTING RIGHTS PROGRAM THROUGH

DEMOCRATS REMINDED THEY HAVE VOTES AND CAN'T BLAME GOP IF BILL STALLS

(By Richard Wilson)

It is little noted, but the Democratic majority in the U.S. Senate is exactly the number needed to force a vote on the President's new civil rights program.

A two-thirds vote of the Senate can break a filibuster. The Democrats have 67 votes and the Republicans 33. Yet it will be charged, in fact it is already intimated, that Republicans will be responsible if Congress fails to pass a new civil rights law.

This is the reason Republican leaders have conferred with President Kennedy on a bipartisan approach with their fingers crossed. However sincere the President's motives, Republicans in the Senate will not be spared mendacious attack if civil rights legislation fails of passage.

Yet the reason why such legislation cannot be passed lies in the simple fact that the Kennedy administration has no control of the overwhelming Democratic majorities in the Senate and House.

The Democratic majority is like Barnum and Bailey's menagerie, a big tent housing carefully caged animals which would eat each other in the jungle. The Senate Democratic leaders say they cannot break a filibuster and pass the President's program without 20 to 25 Republican votes. Therefore the Republicans are to blame if they don't vote to a man for the President's program.

Democratic leaders could well afford to blush while making such a confession of the ineffectuality of their powers of leadership. Nor is their ineffectuality confined to civil rights. They cannot claim that only on the racial issue are the fierce conflicts within the Democratic Party exposed. The flagrant schism is equally evident on social, economic, and labor legislation.

Whatever the President's popularity in this and other countries, his prestige in the Congress of the United States is at low ebb. According to old hands in Congress, the resentment against the President of the United States has no parallel except possibly the revolt against Franklin D. Roosevelt when he sought to pack the Supreme Court with new appointees. Roosevelt lost his hold on Congress then, though he continued to enjoy a public adulation which Mr. Kennedy has never had in anywhere near the same degree.

The congressional discontent with Mr. Kennedy is not confined to the southern Democrats, or the Republicans. The liberals are dissatisfied with what they consider to be half measures. Even some of the moderates think Mr. Kennedy has helped to create, by unfulfillable promises and bravura statements, the conditions for racial demonstrations of a dangerous character. When faced by this dangerous condition, the Kennedy tone quickly changes. Equality will have to come slow and not by legislation alone.

It is in this atmosphere that the President has proposed his program to hasten the inevitable advance of Negroes toward higher levels of equality. And it is a shame that this question cannot be considered apart from its political aspects.

But those political aspects exist and it is truly amazing that Negro leaders do not recognize them. Negroes made their greatest advances since their emancipation in a Republican administration. Whatever Negro leaders may think today, no civil rights legislation was recommended to Congress by Roosevelt and none was enacted. Harry Truman was the first President to offer a comprehensive program. It was not enacted. President Eisenhower offered a program in 1956 and it was enacted in major part. Again in 1960 on President Eisenhower's initiative civil rights legislation was enacted.

In spite of the urgent promises of the Democratic platform of 1960, Mr. Kennedy delayed for more than 2 years offering any kind of general civil rights legislation, and he does so now under the pressure of mounting racial demonstration, and with sentiment built up in Congress against him.

These are the facts. Now it is to be seen whether President Kennedy, with two-thirds of Congress under Democratic control, can do as much as did President Eisenhower, whose party did not have control of Congress.

And if Mr. Kennedy cannot win, then let the blame go where it ought to.

Senator PASTORE. I raise a point of order.

It is a procedural point. This is a very large committee. I think the chairman of this committee is to be congratulated for having such full attendance as we have experienced over the past 2 days. I congratulate him for the procedure that he has suggested, that each of us be given an opportunity to ask questions, which is an excellent suggestion. We did begin yesterday by alternating from the majority to the minority. But no limitation was put on the individual Senator.

I think it is unfair for the rest of us to sit here, hour after hour, waiting for a turn that may never come.

Senator PROUTY. Mr. Chairman.

Senator PASTORE. Wait until I finish. I raised a point of order. Do you want to deprive me of a little point of order after an hour?

Senator PROUTY. May I say to my friend that during one hearing of this committee I waited 8 days before I was allowed to be heard.

Senator PASTORE. That is what I am trying to cure. I am trying to cure precisely that situation.

Senator PROUTY. I have one more question which I would like to ask the Attorney General and then I am through.

Senator PASTORE. If I may——

The CHAIRMAN. Senator Pastore has made a point of order on the admission of certain columnists' comments on this bill.

Senator PASTORE. I think, Mr. Chairman, that we ought to be limited to a certain time, and that it ought to come back to us; that each member of this committee ought to exhaust in any way he deems fit any questioning or interrogation that he desires to make of any witness. But for the benefit of the whole group I think there ought to be

a limitation of a half hour to each member, and then he ought to pass to the next member, and then he ought to wait until his turn comes around again. Otherwise we are going to sit here hour after hour just sitting here waiting maybe for 2 days before we can even ask a pertinent question.

I make that as a suggestion.

The CHAIRMAN. The Chair will entertain the suggestion.

Senator SCOTT. Mr. Chairman, may I be heard on it? Briefly?

The CHAIRMAN. Briefly, all right.

Senator SCOTT. I merely want to observe that I am deeply impressed by the eminent fairness of an arrangement which will give an hour to one side of this table and a half hour to the other as we proceed. And I understand that under our rules in the Senate that an hour for the majority and a half hour for the minority is usually regarded as more than fair. Since we have not had limitations here before, when I have long wished them, I would like to make it clear that I have no objection whatever if we are so fortunate as to get a half hour now and then. I think this is a very happy situation and much to be praised, and I have no objection to it.

The CHAIRMAN. We are getting along fairly well here. The committee will discuss that matter. It will have to discuss it in committee session.

The Senator from Vermont had one more question.

Senator PROUTY. Subject to the answer.

The CHAIRMAN. Subject to the answer.

Senator PROUTY. Mr. Attorney General, let me point out first that I have the honor to represent a State which I believe was the first State, and perhaps the first government, to abolish human slavery by constitutional action. I am very proud of the action of my State in that regard. I intend to support meaningful civil rights legislation.

I believe it is necessary and highly desirable. But I would like an answer to this question: In view of the politics which have crept into this, unfortunately, do you believe the vote of any Republican for meaningful civil rights legislation will be acknowledged by the Negro community in the same manner as a vote by a member of the Democratic Party?

Mr. KENNEDY. I don't know, Senator, that I am the best one to answer that question. I think that this should be approached as you have approached it, on a bipartisan manner, and the interest that you have taken in it, and I think the same kind of an interest has been taken by Democrats. And I think that people—whether they be Negroes or whites—who are interested in making progress in this very difficult field, in the interests of our fellow citizens who are Negroes, should be grateful to those whether they be Republicans or Democrats, who support legislation which will alleviate great injustices.

Senator PROUTY. Thank you very much.

The CHAIRMAN. The Senator from Rhode Island has a couple of points. We will turn to him.

The Chair is trying to be as fair as he can in this matter of going back and forth. As a matter of fact, the chairman himself has a lot of questions, but he is foregoing asking those questions to let other members of the committee ask them.

The Senator from Rhode Island has one or two points to clear up.

Senator PASTORE. Merely for purposes of clarification, Mr. At-

torney General, because I don't believe you want to leave the record in that state, I refer now to the Code, sections 1981, 1982, and 1983, but with particular reference to 1983.

Under existing law today if an individual is deprived of constitutional rights that he has, and he can so prove it, doesn't section 1983 entitle him to a remedy?

Mr. KENNEDY. Yes.

Senator PASTORE. I thought that in answering your question by Mr. Prouty, you had answered that at the present time if a Negro went into an establishment and he was deprived of service or denied service because of his color, that today under existing law he wouldn't have a remedy.

Mr. KENNEDY. What I said, Senator, is that at the present time the Supreme Court has not ruled on that matter. Those cases will be before the Court. That point, very possibly, will be before the Court this coming term. But at the present time the Court has never ruled that you have a constitutional right to be served in an establishment or restaurant.

Senator PASTORE. I realize that. But Justice Harlan in the 1883 case, where he had the dissenting opinion, stated that an individual has a right to enforce his civil rights under section 1983, he would have a remedy in a court of equity, would he not?

Mr. KENNEDY. Yes. I think Justice Harlan went that far. If those laws had been declared constitutional, they certainly would have had that right. But it would have been a right that would have been established by legislation.

Senator PASTORE. You are saying that the right to be served in a restaurant, regardless of your color, is a constitutional right and if you are denied that right because of your color, that is a violation of the Constitution insofar as the commerce clause is concerned, and even insofar as the 14th amendment is concerned. That is your position now, it is?

Mr. KENNEDY. Not really. It is not a violation of constitutional right. I say that Congress has the authority to pass legislation under article I, section 8, and under the 14th amendment, giving individuals—establishing their rights under the 14th amendment and under article I, section 8.

But it has not been established as a constitutional right, for instance, under the 14th amendment, not to be discriminated against in a restaurant in Rhode Island or Boston or Chicago, for instance.

Senator PASTORE. I realize that completely. But maybe we are not seeing eye to eye on the point.

I also understand, and I think I am correct, that the Congress has passed laws giving remedy to the individual as such, and the only inadequacies of the remedy is that the individual sometimes is either impotent because of his individual capacity, or because he doesn't have the means by which to enforce his right, or once he has been denied the right it has become a fait accompli, and it was for that reason that we invoked the power of the U.S. Government when we passed a law several years ago giving the power to you as the Attorney General of the United States to enforce the rights of that individual.

Now if I understand this bill correctly, that is precisely what you are doing here. You are not adding to the rights of the individual. The only thing that you are doing now, you are giving to that individ-

ual the right to invoke his constitutional rights, and you are also allowing that individual to call upon the Attorney General of the United States to invoke the prestige of his Government to enforce his individual rights.

Am I correct in this or not?

When you enforce your rights now, you bring a case in the name of the Attorney General of the United States; that is the first time you have been allowed to do this by law. That right was given to you several years ago.

All I am saying here this morning is that we did pass these laws which give to individuals the right to enforce their constitutional rights, and that is exactly what 1983 states.

Mr. KENNEDY. There is no question about that, Senator. Then it becomes a question of what your constitutional right is.

Senator PASTORE. Can't that person go in the court and say, "It was my constitutional right to be served"?

Mr. KENNEDY. Yes.

Senator PASTORE. Regardless of my color?

Mr. KENNEDY. Right.

Senator PASTORE. He could do that today without this law.

Mr. KENNEDY. That is correct. But why? It is a question of whether that is in fact a constitutional right, and the Supreme Court has never passed on the question of whether it is a constitutional right to be served in a particular restaurant. They have held that there was a right in the sit-in cases that were handed down this spring, the *New Orleans* case, and five or six or seven other cases, where there was some State action involved. They decided that there was a violation of a constitutional right because there was State action. But where there is no State action the Supreme Court has never ruled, Senator, that it is a constitutional right to be served in a restaurant.

Senator PASTORE. I realize that, but the State court could rule that, or the Federal court could rule that if the suit was brought today, could it not?

Mr. KENNEDY. It could.

Senator PASTORE. In other words, if a Negro went into a restaurant and he was denied service and told he couldn't be served because he was Negro, couldn't that individual today bring a suit and prove that it was his constitutional right?

Mr. KENNEDY. I think that is a very serious question, and the Court has never passed on that.

Senator PASTORE. Then what do you think 1983 means?

Mr. KENNEDY. Senator, there are constitutional rights that you have other than the fact of being served in a restaurant.

Senator PASTORE. I realize that. I just took that as an example. I am talking about any constitutional right.

Mr. KENNEDY. But Senator, there are things that you have that are constitutional rights, and there are other deprivations, other matters that you are deprived of which are not constitutional rights.

Senator PASTORE. I realize that. I don't want to belabor this point, Mr. Attorney General——

Mr. KENNEDY. For instance, if you weren't admitted to a public school, that would be a violation of a constitutional right. But for a privately owned restaurant which doesn't have anything to do with the State government, doesn't have anything to do with the local

government, doesn't have anything to do with the Federal Government, whether you have a constiutional right to be served in a restaurant, whether it is against the Constitution for an individual to practice discrimination, that question has never been decided by the courts. That is the only point I am making. I say that section 1983 gave you a right to sue when you are being deprived of your constitutional rights.

My only point is that it hasn't been established that eating in a privately owned restaurant, going to a privately owned hotel, is a constitutional right. That is my only point.

Senator PASTORE. You have already said that if a person today goes into a terminal and is denied service, that that has been adjudicated as a constitutional right.

Mr. KENNEDY. That is correct.

Senator PASTORE. Could he invoke section 1983 under the code?

Mr. KENNEDY. I expect he could, yes. And we could enter a case as a friend of the court.

Senator PASTORE. Under what authority?

Mr. KENNEDY. As a friend of the court, as an amicus, on the basis——

Senator PASTORE. But not as a party in the suit?

Mr. KENNEDY. No. What we did in those particular cases, Senator, is that we went before the ICC and established that, and the result was that all the railroad terminals, and the airports, have all been desegregated in the last 2 years.

Senator PASTORE. You see, Mr. Attorney General, I am not quarreling with you. The point I am trying to establish is this: It is my firm belief that today every person under existing law as an individual has the right to bring suit if any constitutional right is denied him. And whether or not there has been an adjudication of the existence of the constitutional right, that person has the right under the law to say that he has that constitutional right, but he is compelled to prove it before the court.

By this bill, you are allowing the Attorney General to come in and use the prestige of the Government as the Attorney General should, as we have been doing in the educational cases, and assume the responsibility of seeing that that man's rights are protected with the full force and effect and power and prestige of the U.S. Government.

You are going a step further by saying that later on when any other individual's rights are violated, the court has a perfect right to render an injunction which runs to a class, which under 1983 cannot be done now.

I am supporting this bill because I feel that even though today a man's individual rights are protected by existing law, a man's constitutional rights are his rights inherent in the fact that he has them under the Constitution, whether or not the Supreme Court has ever said that particular right is or isn't constitutional, you can bring that question up any time you want as an American citizen through the medium of your courts.

But this bill goes a step further. This bill gives to the Attorney General the authority to use the U.S. Government to enforce those rights, and more than that, it allows that right to run to a class of citizens.

I hope you would give some thought to what I have just said.

Mr. KENNEDY. Thank you, Senator.

Let me make just one last point. The courts have never ruled as yet that it is a violation of constitutional rights to be discriminated against in a privately owned establishment. That is my only point.

Senator LAUSCHE. Would the Senator from Rhode Island yield?

Senator PASTORE. I yield.

Senator LAUSCHE. Isn't it a fact that the Supreme Court in the 1883 decision said that there was no constitutional right, and that the effort by the Congress to impose an obligation to serve everyone was in violation of the Constitution?

Mr. KENNEDY. That is correct——

Senator LAUSCHE. Answer that yes or no, please.

Mr. KENNEDY. I said that is correct. It is somewhat different than the point of Senator Pastore.

Senator PASTORE. That is not the point I made.

Mr. KENNEDY. That is correct.

Senator LAUSCHE. But the Attorney General is implying, though he is not saying it, that as a consequence of the 1883 decision an aggrieved person going into court and suing under section 1983 would be met by the 1883 decision which declares there is no constitutional right.

The Attorney General didn't answer in those words, but that is what he implied.

Senator PASTORE. All I am saying is if an individual gets on a train in Boston, Mass., and the conductor comes up to him and says, "You can't ride this train because you are Negro," that person under existing law has a right——

Mr. KENNEDY. That is correct.

Senator PASTORE. That is all I am saying. And the Attorney General is taking the position today that he is advancing this law because he believes it to be constitutional.

Now even before the Congress of the United States enacts this law, if this law is constitutional, and if these people have these rights, these rights are enforcible under existing law. The only thing that this law actually does is give the Attorney General the right to come in and see to it that it can been enforced.

Mr. KENNEDY. Thank you, Senator.

The CHAIRMAN. With reference to the rights we referred to in the 1883 case I refer to the majority opinion, page 19 of the United States Reports, volume 2, 109, where the Court, in speaking of just what the Senator from Rhode Island was talking about, said, and I quote,

> Whether it is such a right or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated it is not necessary to examine.

So they didn't pass on whether this right existed as a constitutional right or not. And then, to clear up another matter, I think there has been an implication here that may have been left in the record that the discussion in the *Civil Rights* cases foreclosed the use of the Commerce Clause for a public accommodation bill.

I want to read from page 18 of the same majority opinion, and I quote. The Court said:

> Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject,

accompanied with an expressed or implied denial of such power to the States, as in the regulation of commerce with foreign nations, and among the several States, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, et cetera. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof.

Mr. KENNEDY. That is right.

The CHAIRMAN. This is their reference to the Interstate Commerce Clause. It is as clear as you could make the English language.

Senator PASTORE. The point, not to belabor it, Mr. Chairman, is that the Congress can regulate, but the Congress cannot give a man the constitutional right or take it away from him. He either has it or he doesn't have it, because the Constitution gives it to him, and the Congress has not given any constitutional right to anyone. We may be regulating the conduct of the exercise of that constitutional right, but the rights under the Constitution are inherent in every citizen, and we in the Congress are not passing upon whether or not we are going to give these people a constitutional right or not.

The Constitution gave their rights to them. When we passed the 13th amendment and freed the slaves they became American citizens, and they enjoyed every constitutional right, not what the Congress gave them, but what the Constitution gave.

The CHAIRMAN. That is what the Court said in examining it. The Senator from Pennsylvania, the Senator from Maryland, and the Senator from Michigan have not had an opportunity to ask questions of the witness. We will call on the Senator from Pennsylvania. He says he has only a very few questions—three or four.

Then we will go back to the rest of the members of the committee who want to ask further questions and see if we can't give them a further opportunity to clear up some points that have been made during the testimony.

Senator SCOTT. Thank you, Mr. Chairman.

The CHAIRMAN. The Chair is so overwhelmed with this attendance of the committee that it is a little difficult for him to promulgate rules. Normally, I don't have enough to get into an argument about who is going to ask questions or not.

The Senator from Pennsylvania.

Senator SCOTT. Thank you, Mr. Chairman.

Mr. Attorney General, this, as I understand it, creates within the meaning of section 1893 a statutory right, and it creates that statutory right absent a finding by the courts that these are constitutional rights.

Mr. KENNEDY. That is correct.

Senator SCOTT. Is that the real situation?

Mr. KENNEDY. That is correct, Senator.

Senator SCOTT. As you know, I support the bill. I am a cosponsor of the bill. I appreciate what help we can get in clarifying certain of these matters.

To what extent does this bill include, if any, the features the old title 3 of previous civil rights bills would eliminate? To what degree if any are you applying the provisions of title 3 which was the subject of so much debate in the last Congress?

Mr. KENNEDY. I think the title 3 was more encompassing than this particular public accommodations bill is. And also there are cer-

tain procedural steps that we take in connection with public accommodations which were not established in title 3.

Senator SCOTT. Referring to page 8, beginning with line 6, which has to do with the fact, and I am quoting subsection (b):

> In any action commenced pursuant to this Act by the person aggrieved, he shall if he prevails, be allowed a reasonable attorney's fee as part of the costs.

You have discussed this with the Senator from Vermont. The wording would seem to me to be the question of who is the party aggrieved. I have in mind the possibility of harassing suits occurring, or of suits perhaps brought in good will but brought in such numbers as to subject the defendant to the burden so great as to amount to a deprivation of some of his rights and property.

I understand that you have no objection to the committee's clarifying the rights of the defendant to have the costs put upon the losing plaintiff. Is that correct?

Mr. KENNEDY. Yes. I would say that frequently, looking at the financial statistics, a Negro is not as well off and it might impose a great difficulty on him if he has to pay all of the lawyer's fees. He might be extremely reluctant to bring a suit if he feels that he is not going to be able to pay his own lawyer's fees, and even if his cause is just he might lose and have to pay the lawyer's fees for the defendant. I think maybe the committee would want to examine it quite carefully before it wrote in that provision.

Senator SCOTT. I am simply trying to find out whether there are areas where the person aggrieved might in fact be the victim of a reverse suit, the proprietor of a small shop might in fact be a member of the minority group, a Negro, to be specific, and try to get services obtained by a white man, and the person who brings the suit in this case would be the white man, and the defendant would be the Negro. The right to fix the costs by the court ought to be preserved so as to protect the equities involved here. That is what I mean.

Mr. KENNEDY. Yes, if we can work out something like that.

The CHAIRMAN. Before you leave that point, I think we could work out something so that the court would assess costs in a case in an equitable manner. I think they have the right to do that now.

Senator SCOTT. It could be done very easily. I don't think it is a great point. Are the common law rights of innkeepers in your mind preserved? I have in mind such rights that have long existed under the common law to dispossess a drunken or unruly person of low repute, or persons engaging in gaming and other phases that you find in the common law.

Mr. KENNEDY. They are preserved, Senator.

Senator SCOTT. They are?

Mr. KENNEDY. Yes.

Senator SCOTT. On page 6, I refer to the four subsections (i), (ii), (iii), and (iv), appearing in section 3(a)(3); I am sure I know the answer to this, but I think it should be on the record. It is necessary, as I read it, that only one of these subsections shall appear as a condition existing, rather than all four subsections should prevail before the whole master section prevails.

Mr. KENNEDY. Yes, and I think your colleague suggested that we should perhaps clarify that. I think it is a good suggestion.

Senator SCOTT. That is all I have, Mr. Attorney General.
Thank you.
Mr. KENNEDY. Thank you.
The CHAIRMAN. The Senator from Maryland.
Senator BEALL. Thank you, Mr. Chairman.
I did have some questions, but I think they have all been answered. I would like to make an observation, if I may. I have supported, I believe, every civil rights bill or legislation that has been offered in the last 21 years in Congress. Certainly I am a cosponsor of this bill.
I would like to add that as far back as 1931, I introduced a repeal of the so-called Jim Crow law when I was a member of the Maryland State Senate. We do appreciate the very excellent statement that the Attorney General has made. I am happy to be a cosponsor of this legislation.
Thank you.
Mr. KENNEDY. Thank you, Senator.
The CHAIRMAN. The Senator from Michigan.
Senator HART. Mr. Chairman, I hadn't anticipated that there would be such sensitivity about the time to be consumed. It was not my purpose in planning to testify in support of the bill following the Attorney General, that this would be my way of getting back at the committee in terms of time. But in appreciation of the fact that I shall follow, I think I should defer.
I have no questions. I do want to congratulate the Attorney General and the President on the whole civil rights recommendation.
There was great concern in response to the underlying surge that we see across the country that there might be a measure of strength not in keeping with what some of us feel is a crying necessity of today.
The recommendations made to us by the President in every respect are sound and necessary. I hope that the Congress will deliberate each one of them. I congratulate you.
The CHAIRMAN. There was one matter yesterday that wasn't quite cleared up in the record, and I would like to ask this question. Would the Community Relations Services play any part under the bill, if passed?
Mr. KENNEDY. Yes, and the Community Relations Service went to a different committee. There we spelled it out in a good deal more detail.
Let me say this, Senator. What we anticipate is that if a complaint is made, and the Department of Justice or the Federal Government becomes involved, that first it will go to the Community Service; that they will attempt to resolve this matter, and they will keep it for at least 30 days and attempt to resolve it through mediation and discussion.
The CHAIRMAN. It will obviously be a better way to work it out if it could be worked out that way.
Mr. KENNEDY. That is correct. I would be glad to furnish a memorandum in full on that.
The CHAIRMAN. We will leave the record open. I don't believe that was quite cleared up.
Mr. KENNEDY. Could I furnish a memorandum on that then, Senator?

(Following is the memorandum requested:)

MEMORANDUM RE COMMUNITY RELATIONS SERVICE

Section 5(e) of S. 1732, the public accommodations bill, would require the Attorney General to utilize the services of any Federal agency or instrumentality which may be available to attempt to secure compliance with its provisions by voluntary procedures, before instituting an action, if in his judgment, such procedures are likely to be effective in the circumstances. The agency contemplated is the Community Relations Service provided for by title IV of S. 1731, which is pending before the Judiciary Committee.

Title IV of S. 1731 would establish a Community Relations Service headed by a Director to be appointed by the President. The function of the Service would be to assist communities in resolving difficulties relating to discriminatory practices based on race, color, or national origin, which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce. The Service, either upon its own motion or at the request of an appropriate local official or other interested person, would be authorized to offer assistance when in its judgment peaceful relations among citizens in the community are threatened. It is directed, whenever possible, to utilize the cooperation of State, local, and nonpublic agencies. Information acquired by the Service is to be treated as confidential and its work must be conducted without publicity. Its employees would be prohibited from performing any investigative or prosecuting functions for any agency in litigation arising out of a dispute in which an employee acted for the Service. The Director of the Service would be required to submit an annual report to Congress of the activities of the Service.

Title IV would thus provide the machinery through which compliance with the provisions of S. 1732 might be obtained without the necessity of litigation.

The CHAIRMAN. We have covered every member of the committee for questions. We will go back again, if there are any further questions while the Attorney General is here.

Off the record.

(Discussion off the record.)

The CHAIRMAN. The Senator from Rhode Island?

Mr. PASTORE. No further questions.

The CHAIRMAN. The Senator from Oklahoma. Do you have any further questions?

Senator MONRONEY. I would like to ask the Attorney General for the purpose of the record to give us the effect in law, if any, of section 2, on page 1 through page 4. This is the ordinary preamble of the bill, is it not; and would not have any effect before the courts in determining the scope of the law?

Mr. KENNEDY. This is the ordinary preamble giving the purposes of the law, Senator; that is correct.

Senator MONRONEY. There is no law actually involved in it?

Mr. KENNEDY. No.

Senator MONRONEY. The Court, whatever it decided on the scope of the interstate commerce clause, or on the constitutional right inherent in American citizenship that Senator Pastore was discussing, would base its decision on the other sections of the bill, and this is merely, I guess, what the Court would call obiter dicta.

Mr. KENNEDY. That is correct.

Senator MONRONEY. If, as Senator Pastore rather emphatically brought out, there are inherent in American citizenship certain rights, all rights, perhaps, and this bill in effect gives the enforcement of those rights to the Attorney General, do you run into any constitutional problem by limiting the scope of these rights to hotels, motels, and other public places—eating houses, motion-picture houses, et

cetera; and by not including barbershops or bowling alleys or hospitals. I think we agreed yesterday that barbershops, except in terminals, were not covered by the bill; that bowling alleys were not covered by the bill; and, of all places, hospitals were not.

Mr. KENNEDY. Senator, I would like to try to point out that they might be rights, some of these matters, but they are not constitutional rights at the present time, under the Constitution.

It is one thing, Senator, if we are going to go back into this again, it is one thing, in a railroad terminal, bus terminal, or an airport, but it is something far different if there is no State involvement in it whatsoever and it is a privately owned establishment. You do not, at least at the present time, have constitutional rights to be served at a privately owned establishment. It is not a violation of your constitutional right at the present time if you are deprived of your right to go into a barbershop.

I mean the courts have never extended it that far, that you have a constitutional right.

In my judgment it is a serious, a very serious question of whether you have a constitutional right that is written into the Constitution, understood in the Constitution, to be served at a privately owned hotel or motel, for instance.

Senator PASTORE. I thought you said the question wasn't whether or not you have a right to do it.

Has anyone the right to deny you because of your color?

Mr. KENNEDY. Yes.

Senator PASTORE. A constitutional right?

Mr. KENNEDY. No; not at the present time.

Senator PASTORE. Can anyone deny you because of your color, constitutionally?

Mr. KENNEDY. Yes; thus far.

Senator PASTORE. I don't believe that. That is fundamental in the law, because we are all entitled under the Constitution equal protection of the law and the same rights and privileges and amenities under the law. That is given to you by the Constitution. You don't have the right to be served, but you do have the right not to be denied service because of your color.

Mr. KENNEDY. Senator, if you owned a small establishment and you just didn't happen to like Negroes—let's say you owned a cigar shop and you just didn't want to sell cigars to Negroes or Irish or red-headed secretaries: You may have a constitutional right to refuse to serve those individuals. At least there has been no court decision, Senator, at the present time.

Let me say this: This was all gone into in great detail in the decisions that were handed down by the Supreme Court this spring. Justice Douglas was the only one who held forth strongly that you have a constitutional right to be served in any of these institutions, any of these places. All the other Justices handed down their decisions based on the fact that there had to be some State involvement; that if there wasn't a State involvement then you didn't have a constitutional right.

It might be clear to you, Senator, but I just say that, as far as the courts have held at the present time, you do not have a constitutional right to be served. That is why this law, the statute, as the Senator pointed out, is necessary.

Senator LAUSCHE. And that is why 1983 is not applicable, or is not available to the ordinary man who feels he has been offended.

Mr. KENNEDY. For these kinds of establishments; that is correct.

There are establishments, Senator, where you get into State involvement. For instance, there was a restaurant, in Maryland, and the owner of the land had leased it from the State, and an individual had been denied the right of service there. The Supreme Court said that he had a constitutional right to be served there because the State was involved.

The sit-in cases that have been decided last spring were decided on the basis that there was State involvement, there was a local ordinance. The State, in some degree, was involved. But they didn't pass on the question of whether, for instance, in Boston, or Rhode Island, you could discriminate against an individual because he was a Negro.

What we are attempting to do is for Congress, which clearly has the authority to pass a law, to make sure that it is completely understood. It may not be written into the Constitution; it may not be a basic constitutional right; but Congress can pass a law based on the Constitution ensuring that those rights are present.

That is what we are attempting to do through this legislation.

The CHAIRMAN. The Senator from Oklahoma.

Senator MONRONEY. Since the authority, then, to do this resides strictly in the interstate commerce clause, and only in things legitimately affecting interstate commerce, would it be a valid action of the Federal Government to order the Attorney General to enter into a suit or other matters? Have you ever given any thought to an amendment perfecting the 14th amendment that clearly specifies constitutionally that citizenship rights shall be obtainable in all walks of American life regardless of race or color or previous condition of servitude?

Mr. KENNEDY. I think that based on the commerce clause and based on the 14th amendment, I think that we have already authority to——

Senator MONRONEY. But you are basing it, you say, on the commerce clause. And yet there are many, many people in this country who doubt the wisdom of stretching the commerce clause that far, because if you can exert police powers against discrimination in the States, which is for a good purpose, you can exert police powers to require licensing of every line of American life under the same interpretation of the interstate commerce clause.

You are not basing it on citizenship rights, you say; you are basing it on public good. But the flow of interstate commerce can be justified in almost every walk of life to the extent that it can be identified in these particular areas that you specify.

Therefore, where is the stopping place? Where is the cutoff?

The CHAIRMAN. The stopping place is how far Congress in its wisdom wants to go. We can't change the commerce clause. That is there, like all the other constitutional provisions.

Just how far do we want to go? Conceivably under the commerce clause if things are purely in interstate commerce you can do many more things than we have done.

Senator MONRONEY. Let's get the Attorney General to agree to that, then.

Anything, as the chairman says, that Congress declares to be interstate commerce, is within the powers today of the Federal Government and the Congress to enact; is that correct?

Mr. KENNEDY. Congress can enact a law and the Supreme Court, or courts, can find it didn't affect interstate commerce, and therefore it is not effective.

Senator MONRONEY. This is just what I am arguing about; that we have to look at least to the courts, and have to look at the common-sense application of the movement of goods in interstate commerce, and the burden on interstate commerce.

Mr. KENNEDY. That is correct.

Senator MONRONEY. And determine whether it is a legitimate extension of Federal powers for the constitutional purposes of regulating and directing and protecting the flow of commerce between the several States.

Mr. KENNEDY. Yes.

Let me say that I don't think there is any question. If you look at the statistics and talk to the businessmen of our Southern States, or northerners who have business in the South, you'll find that this has had an adverse effect on the flow of goods in interstate commerce.

Senator MONRONEY. On those who were interstate; right.

Mr. KENNEDY. Right.

Senator MONRONEY. Kress and Woolworth had trouble because they were discriminating at their lunch counters in the South, and they were picketed in New York City. There is no question about that.

That is the point I was trying to make yesterday. There is no question in my mind that if there are interstate operations, Congress has authority to regulate.

To put a "Mom and Pop" hamburger stand in a small town in Arkansas or Tennessee under interstate commerce simply because they serve hamburger meat that comes across the State line I think is stretching the Constitution.

Senator THURMOND. Mr. Chairman.

The CHAIRMAN. Just a moment.

Of course when we talk about the Constitution, we can't stretch it; we can't restrict it or do anything. It is there.

We are not amending the Constitution.

The Court has held over and over again that the power of Congress over interstate commerce is not confined to the regulation of commerce between States; it extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Congress can go a long way under the interstate commerce clause. But this is the wisdom, I hope the wisdom, of Congress——

Mr. KENNEDY. That is correct.

The CHAIRMAN (continuing). Not to abuse, let's say, the power that exists and is there under the interstate commerce clause.

Mr. KENNEDY. That is correct.

The CHAIRMAN. It is there. We can't change it.

Mr. KENNEDY. I think it has been established, as discussed before, it has been established that the commerce clause extends over these

kinds of establishments that we suggest and recommended be covered, Senator. I think it is quite clear.

If you and other members of the committee feel that it shouldn't extend that far, that you don't want to have this bill extend that far, that is up to you. There is no question that we have the constitutional authority to do it.

Congress has done it in the past, has covered these kinds of establishments. You have the right and the authority to cover them at the present time.

And it is clear that the discrimination that has been practiced in these establishments has had an adverse effect on interstate commerce. There is no question but that the Supreme Court would uphold the constitutionality.

But if this committee, as I said before, if you feel that you don't want to go that far, as you have on other bills—you have had cutoff lines on minimum wage, or whatever it might be on other pieces of legislation—certainly that is the right of Congress.

But there is no question, Senator, that you have the authority to pass this law under the commerce clause. And you are not stretching the Constitution, and you are not establishing any new principle that hasn't been established long, long ago.

Senator MONRONEY. It evidently was the intent when this administration recommended the increasing of the wages under the Wage and Hour Act to put, as I recall, a million dollar volume limit on the act. Under that bill a firm was not to be considered in interstate commerce unless its volume of business exceeded $1 million a year. This was a precaution based on size. I didn't agree that it was a proper limitation. But anyway the administration felt some limitation was there.

Mr. KENNEDY. That is correct.

Senator MONRONEY. Yet in this bill you have no limitation as to whether they are actually in interstate commerce, and give no weight to the desire of the business owner to serve interstate customers or effect interstate commerce in any way.

This is why I find it possible to understand that 50 or 60 percent of these facilities covered by this bill which are legitimately connected by multi-State ownership, by servicing and meeting transportation requirements on interstate highways, by providing service to buses that are in interstate, and various things like that, could be properly judged to be in interstate commerce.

But to blanket them all in, without regard to the service that the individual operation renders, seems to me to be going farther than the interstate commerce clause was intended to cover.

Mr. KENNEDY. Let me just say, Senator, that the decisions that have been handed down show quite clearly that you have that authority. I can give you innumerable decisions.

Senator MONRONEY. You did yesterday, on oleomargarine.

Mr. KENNEDY. It shows quite clearly that you have the authority.

This committee and Congress decided that they wanted to cut the minimum wage off to a million dollars. They didn't have to do that. I think for various other reasons you didn't want to require some of the smaller establishments to pay $1.25 an hour.

Maybe you are going to decide here, in this committee, and in the Congress, that you don't want to prevent smaller establishments from

discriminating. Maybe you want to permit them to discriminate, if they want to discriminate. That can be decided by the committee.

But you have the authority, Senator, quite clearly, from all the Supreme Court decisions, innumerable decisions; you quite clearly have the authority.

Maybe you don't want to exert that authority and exert that power; but you certainly have it.

Senator MONRONEY. Many of these you recited yesterday were valid because they were under the Pure Food and Drug Act. Obviously, if you are going to allow improper drugs to be sold in a big establishment you are going to have to permit it in a small establishment.

Mr. KENNEDY. You are not going to let big establishments discriminate, and small establishments you are going to allow to discriminate?

Senator MONRONEY. This is because the establishment moves no product in interstate commerce. It serves people perhaps moving in interstate commerce.

Mr. KENNEDY. But you cover——

Senator MONRONEY. Therefore, the test of interstate commerce would be whether they are serving local people or whether they are serving people from other states.

Mr. KENNEDY. But you applied it to the smaller establishment for the Pure Food and Drug.

Senator MONRONEY. That's right. That is a health matter.

Mr. KENNEDY. But you said you had the authority to do it for that.

Senator MONRONEY. I think you would have to if you are going to have an effective drug bill, to make it apply to the safety of the Nation. I think that is a police power.

Senator LAUSCHE. Will the Senator yield?

There is a definite principle in constitutional law that your right to protect your safety and your health is one absolute in Government. And many of these decisions cited by the Attorney General involve that principle: when health or safety is involved, there is an inherent right in the Government to deal with it. And that principle is the one that was applied in declaring constitutional the zoning laws which allegedly stole property rights from owners. The court says you may reasonably zone, providing it is related to the maintenance of safety and health. You cannot zone if your purpose is to improve the esthetic and scenic environment in a zoned area.

That is a well-established principle, and the Senator from Oklahoma is correct when he says that you have the principle of safety and health involved.

Mr. KENNEDY. I just say, Senator, this has nothing to do with safety and health, with all due respect. It has to do with the commerce clause.

Senator LAUSCHE. I understand that.

Mr. KENNEDY. Those laws were passed under article I, section 8 of the Constitution. And to cover those institutions, the smaller institutions under the commerce clause, you have to say that they have an effect on interstate commerce. That is my only point.

I don't disagree with your point about zoning laws, which are local. But the reason you passed some of these other laws, and the reason

this committee approved of them, was because they had an effect on interstate commerce.

The CHAIRMAN. This is a question of public policy and how far Congress wants to go under the authority of the commerce provision of the Constitution.

Mr. KENNEDY. That is correct.

The CHAIRMAN. We don't necessarily need to go too far. The clause is there.

Mr. KENNEDY. That is correct.

The CHAIRMAN. When you use the commerce clause for a social objective there is plenty of precedent for that, too. We did that in the Mann Act; we did that in the Pinball Act, and the gambling regulations for social reasons. We don't have to do this. It is a matter of public policy.

The commerce clause is there. We can't stretch it, restrict it, or do anything with it. It is there. The Constitution will not change unless we have a constitutional amendment.

Now it is a question of public policy, and there will be some differences of public opinion in the committee as to how far we should go as a matter of public policy under the authority we have in the commerce clause.

Mr. KENNEDY. That is correct. And that is I think Senator Monroney's point.

The CHAIRMAN. I don't know how I could put it more simply.

We had two on this side, so I won't be accused of some partisanship or something like that.

The Senator from New Hampshire.

Senator COTTON. I won't take but 1 minute.

The CHAIRMAN. You can take two for one.

Senator COTTON. I think the majority side of the committee ought to have these last minutes. But I think perhaps, Mr. Attorney General, there is one matter that you and I both would like to clear up.

I read yesterday's record and I was a little bit disturbed. Whatever may be our approach to these delicate questions, I for one, and I am sure everybody on this committee, want to help in making sure we know exactly what is in this bill.

You and I had a colloquy, for instance, about what was covered with reference to barbershops. And I remember that you mentioned the matter of how many interstate travelers were served in barbershops, and a barbershop near a State line might be in a different category than one in the interior of a State.

We are both forgetting something.

For instance, every time I go into a barbershop I see a whole row of bottles in front of me. I have never had a haircut when the barber didn't try to sell me four kinds of hair tonic. I can understand your overlooking that because most of the Kennedy brothers don't need any hair tonic, I don't believe.

But the point is that all these supplies in barbershops, in beauty parlors, are in interstate commerce.

I just want to know if perhaps you wouldn't want to clear this record up a little bit. It strikes me that in its present form the bill covers a large number of these establishments about which you at least implied some doubt yesterday.

Do you care to clear that up further?

Mr. KENNEDY. I would be glad to give you a memorandum on it, Senator. I think that the pertinent passage here is 3(i), that—

goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers.

It is a question also of whether you apply (ii), which says:

A substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce.

It was our purpose that, if the primary point of a particular establishment is one of service—which is true of a barbershop, for instance—it should be covered by (i) but not because it might also do on the side a little bit of what is covered under (ii).

Senator COTTON. Would you say now that barbershops are in or out on this bill in the present form?

Mr. KENNEDY. I will give you the same answer I gave you yesterday. The point that you are making, I believe, is that a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, has moved in interstate commerce. I believe that is your point.

Senator COTTON. My main point is that I would express the hope you might see fit perhaps to give us a further memorandum that would aid to clarify this.

Mr. KENNEDY. That would be fine.

Senator COTTON. I don't believe we should be passing a bill that would leave people in doubt.

Would you agree with that?

Mr. KENNEDY. I would be glad to do that.

Senator COTTON. Would you agree as a matter of principle that we ought, as far as possible, to have whatever law is passed, if one is passed, to leave people clear, understanding whether they are in or out?

Mr. KENNEDY. I agree with you.

Senator COTTON. Thank you.

The CHAIRMAN. The Senator from South Carolina.

Senator THURMOND. Mr. Attorney General, I want to say that I agree with you when you say that a person does not have a constitutional right to service in a private restaurant.

Mr. KENNEDY. Senator, what I said was that the Court hasn't yet passed on that question.

I was asked I think specifically by a member of the committee on whether I felt that that individual had a constitutional right to service, and I said that I would rather not pass on that at the moment; that we are preparing a brief on that point, which we might very well submit to the Supreme Court.

Senator THURMOND. Even if this bill is passed, then there would still not be the constitutional right to service in a restaurant or hotel, merely a legislatively created right; is that not right?

Mr. KENNEDY. What you would establish by the passage of this bill.

Senator THURMOND. Would be a legislative right?

Mr. KENNEDY. That is right.

Senator THURMOND. And not a constitutional right?

Mr. KENNEDY. Unless you passed an amendment to the Constitution, or unless it was held to be covered under the 14th amendment.

Senator THURMOND. Of course our position is that if you attempted to pass legislation that would create this legislative right, that this would violate the 5th and 14th amendments which provide that a person cannot be deprived of his life, liberty, or property without due process of law.

We feel that to have the Government come in and direct the use and the control of a person's private property and the taking of their property, is depriving him of the use of that property and is a violation of the constitutional provisions.

Mr. KENNEDY. Could I ask, Senator: Was that point raised—and I do this in all deference—was that point raised when South Carolina had their legislation and laws and ordinances which ruled that an establishment could not serve a Negro?

Senator THURMOND. In South Carolina many of the ordinances have been repealed. But it is a voluntary situation in which to serve them. There is no prohibition in most places, if not all places, in South Carolina. That is a voluntary right. If they wish to serve, OK. If they do not wish to serve, then we feel they cannot be required to serve.

Mr. KENNEDY. Senator, it was specifically written in a number of ordinances at least in South Carolina that you could not serve Negroes. Was that question——

Senator THURMOND. Those I think, most of them, have been repealed. One was repealed in Greenville recently.

Mr. KENNEDY. I was just wondering——

Senator THURMOND. You referred to the one in Greenwood, I believe yesterday. It has been repealed.

Mr. KENNEDY. I was questioning whether this same point was raised at the time those ordinances were passed?

Senator THURMOND. I don't believe those ordinances have been checked. I don't believe that they have.

While we are speaking on this general subject, I would like to ask you: A great many people are concerned about this Black Muslim movement. I have seen a film and I have read about their taking target practice, judo practice, and other things, showing that they are getting ready for combat and violence and trouble. I am just wondering, Mr. Attorney General, if you have looked into this movement, and if you consider them a threat, and if anything is being done about it?

Mr. KENNEDY. We are aware of their activities, Senator, and where there is an indication that they might threaten the security or violate the laws of the United States we are making investigations.

Senator THURMOND. So they have been looked into. And you are aware of the situation?

Mr. KENNEDY. I would say that wherever we have found that a particular individual or group is advocating violation of Federal laws, or activity involved in what might be a violation of Federal law, we are making an investigation.

Senator THURMOND. Have you seen any similarity between them and the Nazi Party, so to speak?

Mr. KENNEDY. The what?

Senator THURMOND. The Nazi Party that we have in this country, with headquarters in Virginia I believe.

Mr. KENNEDY. I don't believe so.

Senator THURMOND. Have you seen any similarity between their preparations for combat such as judo training and target practice, and so forth, and the same kind of training that the Nazi Party members I understand receive?

Mr. KENNEDY. I think that in principle, and in motivation, that they are perhaps closer to the Ku Klux Klan, Senator. I don't think the Nazi Party is a good simile.

Senator THURMOND. Mr. Chairman, I believe under the rules we have to suspend now, since the Senate is going into session. So I will discontinue.

The CHAIRMAN. Under the rules if any member makes the rule, since the Senate is in session, we will have to suspend.

I hope that the Senator from South Carolina will allow me just a minute here.

Off the record.

(Discussion off the record.)

The CHAIRMAN. We will recess until tomorrow morning at 10 o'clock.

There are three Senators who wanted to be heard today. We had to postpone them—Senator Hart, Senator Cooper, and Senator Keating. They have been here and are anxious to testify. We will try to do that tomorrow morning.

The Attorney General will come back tomorrow morning. So we will recess until 10 o'clock tomorrow morning.

(Whereupon, at 11:58 a.m., the committee was recessed, to reconvene at 10 a.m., July 3, 1963.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

WEDNESDAY, JULY 3, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 10 a.m., in room 318, Old Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order.

There are several Senators that will be here in just a minute or two. But we would like to conclude this portion of the hearings this morning if possible. So we will begin right on time and the Attorney General is back this morning.

When we recessed last evening, the Senator from Ohio evidenced a desire to ask the Attorney General some questions on this matter.

So we will be glad to hear from the Senator from Ohio.

Senator LAUSCHE. I will proceed first with a discussion of the various parts of the bill intending to ascertain whether the provisions in this bill are in substantial comparison with the provisions of the bill of the act of 1875.

Now, directing the Attorney General's attention to the bill, it is declared that this bill shall be known as the Interstate Public Accommodations Act of 1963. That is on the very first page of the document. And in the preamble there are set forth the wrongs, the alleged wrongs which are sought to be rectified by the bill. Now on page 2 in paragraph (b), the bill deals with the purpose of providing for Negroes and members of minority groups the right to lodging in places that hold themselves out to provide service. Am I correct in that?

FURTHER STATEMENT OF HON. ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

Mr. KENNEDY. Well, (b) outlines the desire that Negroes and other members of minority groups have in traveling interstate.

Senator LAUSCHE. And then paragraph (c) outlines the desire that Negroes have in obtaining services in restaurants. Am I correct in that?

Mr. KENNEDY. That is correct.

Senator LAUSCHE. And paragraph (d) outlines the desire which they have in procuring equal accommodations and services in places of public entertainment, served primarily by actors and others who cross State lines.

Mr. KENNEDY. That is correct.

Senator LAUSCHE. And then paragraph (e) outlines the desire which they have in obtaining service in retail establishments such as department stores and others in certain places.

Mr. KENNEDY. That is correct, Senator.

Senator LAUSCHE. Then paragraph (f) describes the situation that many cities desiring to obtain conventions find it impossible because those who are holding the convention refuse to go to areas where discriminatory prejudicial practices are in effect against minority groups. Is that correct?

Mr. KENNEDY. That is correct, Senator.

Senator LAUSCHE. Then paragraph marked (g) declares the difficulty of certain communities in achieving economic growth because they are unable to obtain skilled employees who do not go to the area.

Mr. KENNEDY. That is correct, Senator.

Senator LAUSCHE. Now, paragraph marked (h) describes that in certain areas of the country there is governmental participation and encouragement in the practice of discriminatory prejudicial methods against minority groups.

Mr. KENNEDY. That is correct, Senator.

Senator LAUSCHE. Now we come to paragraph (i), the statement is contained in it that to remove these inequalities there is authority in the Congress under the provisions of the 14th amendment and an article of the Constitution known as the interstate commerce clause.

Mr. KENNEDY. That is correct.

Senator LAUSCHE. Am I correct in saying that all of the material down to the end of page 4 is a sort of a preamble?

Mr. KENNEDY. That is correct, Senator. It gives the basis on which the bill is predicated.

Senator LAUSCHE. Now, then, I take it that the Office of the Attorney General when it was told by the President what wrongs he wanted corrected by law proceeded to make a study of the existing decisions, if any, applicable to similar situations in the past.

Mr. KENNEDY. Well, that is one of the steps we took; yes, Senator.

Senator LAUSCHE. In making this study of how you carry into effect the President's recommendation, one of the important pronouncements of the Supreme Court was found in the *Civil Rights Cases* of 1883.

Mr. KENNEDY. That is correct, Senator.

Senator LAUSCHE. And I take it you had your staff members examine the context of that decision?

Mr. KENNEDY. That is correct, Senator.

Senator LAUSCHE. And when you concluded you found that the Supreme Court of the United States declared that the effort of Congress to compel a strictly private businessman to render service to all in pursuance to the authority contained in the 14th amendment could not be done.

Mr. KENNEDY. Had been declared unconstitutional in this 1883 case.

Senator LAUSCHE. We now get down to this decision again of 1883. What is its present status? What is its effect and impact upon the law?

Mr. KENNEDY. It is presently the law of the land, Senator.

Senator LAUSCHE. It is the law of the land?

Mr. KENNEDY. That is correct.

Senator LAUSCHE. The law of the land therefore is that no businessman holding himself out to sell services or goods can be compelled to accept as patrons all who wish to be accepted, but may discriminate. Is that correct?

Mr. KENNEDY. No, it really isn't.

Senator LAUSCHE. You say it is the law of the land. Now what is the law of the land with regard to the ability of any court of the United States to compel a businessman to render service to all who come to his establishment?

Mr. KENNEDY. Well, there is a Supreme Court decision which you mentioned that rules that legislation passed by Congress 80 years ago or 90 or 95 years ago to require hotels, motels, variety stores, eating establishments, restaurants, if they open their doors to the general public that they must serve one and all alike. Legislation passed to require these establishments to open their doors to all alike based on the 14th amendment is unconstitutional.

Senator LAUSCHE. We agree on that, and that is that the Supreme Court says that the efforts of the Congress to pass legislation in pursuance to the 14th amendment compelling businessmen to open their doors to all equally is unconstitutional and invalid. Is that it?

Mr. KENNEDY. Now, may I just add something?

Senator LAUSCHE. Is that a correct restatement of what you said?

Mr. KENNEDY. Yes. But may I add something to that?

Senator LAUSCHE. Yes, you may.

Mr. KENNEDY. That is the law of the land at the present time based on a decision 80 years ago.

Senator LAUSCHE. Well, I will get to that.

Mr. KENNEDY. But I want to get in there that the situation has changed.

Senator LAUSCHE. We are now speaking about the 14th amendment as it was looked upon in 1883.

Mr. KENNEDY. Thank you, Senator.

Senator LAUSCHE. The other day when I questioned you, you read at great length from the dissenting opinion of Justice Harlan; is that correct?

Mr. KENNEDY. I read from it. I didn't know it was at great length.

Senator LAUSCHE. How many judges were on the Court at that time?

Mr. KENNEDY. I believe there were nine.

Senator LAUSCHE. Well, there were 9 for a long time back and there are 9 today, except that there might have been more in 1936 if the law had been passed to make it 15. How many judges joined in the dissenting opinion of that decision?

Mr. KENNEDY. I think it was 8 to 1.

Senator LAUSCHE. So there were eight on the majority side and one on the minority; is that correct?

Mr. KENNEDY. That is correct.

Senator LAUSCHE. I observe that the Chief Justice of that Court at that time was a Mr. Waite who came from Toledo, Ohio, and was appointed by Rutherford V. Hayes, also an Ohioan, the President. I observed also that Justice Matthews who was on that majority group came from Cincinnati, Ohio, and in studying it I couldn't help but think that Grant and Hayes and Garfield all from Ohio were trying

to do for Ohio what the Kennedys are trying to do for Massachusetts.

Mr. KENNEDY. I don't know whether to say thank you or not, Senator.

Senator LAUSCHE. Well, now, then, at least based upon means of communication, means of transportation in 1883, eight judges declared the act of 1875, which in substance is similar to the act of 1963, as being unconstitutional.

Mr. KENNEDY. Senator, if I may say so, you left out an extremely important point.

Senator LAUSCHE. On the basis of the 14th amendment?

Mr. KENNEDY. Adding that.

Senator LAUSCHE. Do you consider the 1875 act now invalid?

Mr. KENNEDY. Yes.

Senator LAUSCHE. That is I haven't checked to see whether it was repealed. It would seem to be invalid.

Mr. KENNEDY. It was declared invalid.

Senator LAUSCHE. On the basis of the Supreme Court's pronouncement?

Mr. KENNEDY. That is correct, Senator.

Senator LAUSCHE. Well, if it is invalid I saw something in it, something most interesting. It provided that any Attorney General who failed to prosecute for the violation of this act would be guilty of a crime subject to sentence by way of monetary fine and imprisonment. I now want to get down to it.

Mr. KENNEDY. Could I add something about that bill? There is one other difference which is that in the bill of 1875 there were criminal sanctions which are not contained in the legislation we have offered. So there are those two important differences.

Senator LAUSCHE. You take the position that it was only under the 14th amendment action that this decision can be taken as determinative that no such law could be passed?

Mr. KENNEDY. That's correct.

Senator LAUSCHE. But you now think that using two means of achieving an objective one, the VIII article, the commerce clause and, two, the 14th amendment, that with the present composition of the Court you may succeed in having declared valid that which was declared invalid in 1883?

Mr. KENNEDY. Could I say what I think about an answer to that question?

Senator LAUSCHE. Answer "Yes" or "No" and then say it.

Mr. KENNEDY. It's difficult. I would rather put in in my own terms.

I think you could make a strong argument, Senator, about the laws passed in 1875 and declared invalid under the 14th amendment in 1883 that the Court would still find them invalid and unconstitutional at the present time. It's my personal judgment that they would find them constitutional. They would find this legislation based purely on the 14th amendment, constitutional because of the great changes that have occurred in the United States over the period of the last 80 years—not because of the change in Court, but because of the changes that have transpired in the United States.

But I think also you can make a very valid and reasonable argument on the other side that they might find it unconstitutional.

However, I don't think you could make a valid argument that they would declare these laws unconstitutional under article I, section 8, not just on the makeup of the Court at the present time but on decisions that have been handed down in the Court over the period of the last 50 years.

I think it is quite clear this legislation would be declared constitutional under article I, section 8. There is a very good chance it would be declared constitutional under the 14th amendment, but I can see and recognize an argument on the other side.

In view of the fact that there was a Supreme Court decision of 1883, we would add an extra burden to this legislation if we put it under the 14th amendment.

Senator LAUSCHE. In your personal opinion, you think that the present Court would even, under the 14th amendment declare the pending bill and also the act of 1875 as valid?

Mr. KENNEDY. Well, I think that they would, on the pending bill. Now whether the fact the law of 1875 had criminal sanctions, whether that would make the burden even more difficult, I don't know. I think that they would declare the present bill unconstitutional, however.

Senator LAUSCHE. That is your view?

Mr. KENNEDY. That's correct.

Senator LAUSCHE. But you do say that there is great strength in the argument and that the Court might not approve now——

Mr. KENNEDY. That's correct.

Senator LAUSCHE. This bill?

Mr. KENNEDY. That's correct.

Senator LAUSCHE. In pursuance to the reasoning contained in the 1883 decision?

Mr. KENNEDY. That this is not sufficient State action under the 14th amendment. I think that is one problem, Senator.

Senator LAUSCHE. Yes.

Mr. KENNEDY. The second problem I think in the legislation that has been offered under the 14th amendment is that States could avoid its effect by removing all State action. For instance, where there are various establishments licensed, I think a State could remove the licensing requirement and therefore there would be even less State action than there is at the present time and it would make 14th amendment legislation difficult to enforce.

Senator LAUSCHE. I wonder if you would explore another thought and I'll declare my definition of the proposition before I enter into a discussion:

When the Supreme Court said that those to whom service was denied in 1883 had no constitutional right or no right that could be created by Congress in pursuance to the Constitution, it also implied that the businessman by congressional action could not be compelled to render service to all and open his doors to all. Now my question:

If the Supreme Court held that the Congress could not give the general individual the right to demand service, it in effect also said the Congress cannot compel the businessmen to render service. Is that correct?

Mr. KENNEDY. Compel the businessmen to end discrimination and therefore serve?

Senator LAUSCHE. Yes.

section 8 as well as the 14th amendment. But I would think basically without going through it provision by provision I would concede that otherwise it is similar.

Senator LAUSCHE. Thank you very much.

Now in this section 8, there are four conditions that must be provided as set forth in subparagraphs marked (i), (ii), (iii), and (iv).

Mr. KENNEDY. That's correct.

Senator LAUSCHE. Do those four conditions apply to subparagraphs (1), (2), and (3).

Mr. KENNEDY. No, they just apply to paragraph 3.

Senator LAUSCHE. Therefore, it must be concluded that subparagraphs (1) and (2) on page 5 are absolutes without any conditions attached?

Mr. KENNEDY. That is correct.

Senator LAUSCHE. Am I correct in stating that subparagraphs marked (i), (ii), (iii), and (iv) and containing conditions are only applicable to subparagraph (3)?

Mr. KENNEDY. That is correct.

Senator LAUSCHE. Now let us read subparagraph (3):

> Any retail shop, department store, market, drugstore, gasoline station, or other public place which keeps for sale, any restaurant, lunchroom, lunch counter, soda fountain, or other public place engaged in selling food for consumption on the premises, and any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire.

Why did you make the service in those businesses enumerated in subparagraphs (1) and (2) absolute and those enumerated in subparagraph (3) conditional?

Mr. KENNEDY. Because I thought the establishments in subparagraphs (1) and (2), were clearly per se affecting interstate commerce and I thought there might be some question as far as (3) was concerned.

Senator LAUSCHE. Well, what about, let's say, the motel within the State that has transient guests and they are substantially in number all from within the State. Why would the absolute right or obligation be imposed there?

Mr. KENNEDY. Well, because I think a motel or a hotel that opens its doors to the general public, whether it takes transient guests from outside the State or in large numbers still has an effect on interstate commerce. The guests they take might affect some other hotel or motel that might handle a greater number of transient guests from outside the State.

Senator LAUSCHE. With regard to restaurants and lunchrooms and lunch counters and soda fountains and other public places engaged in selling food under subparagraph (3), to which four conditions are attached, I now get to the conditions: Condition 1—these are my own words—He shall be obliged to serve and to sell if—now the condition (i)—the goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers.

What is your definition of "substantial"?

Mr. KENNEDY. More than minimal.

Senator LAUSCHE. Not very strong, is it? "More than minimal." That is, it then could be less than balance or equal as between transients and domestics?

Mr. KENNEDY. Yes.

Senator LAUSCHE. Is that right?

Mr. KENNEDY. Yes.

Senator LAUSCHE. To be a "substantial" part of the business you wouldn't have to show that he served more than a majority?

Mr. KENNEDY. No.

Senator LAUSCHE. Just so that it is more than minimal?

Mr. KENNEDY. That is correct.

Senator LAUSCHE. Wouldn't that mean that practically all would come within that definition?

Mr. KENNEDY. Well, any time that it affected interstate travelers to a substantial degree, it would be covered.

Senator LAUSCHE. You are referring to a different subsection now. I'm directing it to section (i) only.

Mr. KENNEDY (reading):

The goods, services, facilities, privileges, advantages, or accommodations offered by any such place——

Senator LAUSCHE. No, no. Subparagraph (i) on page 6.

Mr. KENNEDY. I thought that is what I just read.

Senator LAUSCHE. That is:

He shall be obliged to serve and sell if the goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishments are provided to a substantial degree to interstate travelers.

Mr. KENNEDY. Senator, I read subparagraph (i). You have 10 words that you add at the beginning which is perfectly all right with me. But I still read the paragraph you were referring to.

Senator LAUSCHE. You read what paragraph?

Mr. KENNEDY. The paragraph you're referring to I read. You have got about seven or eight words at the beginning that you have added.

Senator LAUSCHE. Oh, yes. That is right.

Well, the words that I added were in order to give a connection.

Mr. KENNEDY. I don't object to it. I say we are talking about the same thing.

Senator LAUSCHE. That is, I put it in compact terms: Any businessman who sells services or goods shall be bound to accommodate all equally, if—and I added that.

Mr. KENNEDY. That way you should say that any businessman or establishment that opens its doors to the general public shall not discriminate based on race, color, creed, or national origin if the foods, services, and so forth.

Senator LAUSCHE. That is a different way of putting it.

Now under subparagraph (i), if it is shown that the establishment was attended more than in a minimal degree by transients it would be understood to be engaged in interstate commerce?

Mr. KENNEDY. Now where are you reading from?

Senator LAUSCHE. Page 6, subparagraph identified with numeral (i).

Mr. KENNEDY. Yes.

Senator LAUSCHE. All right.

Now going to the second condition:

If—

and this is reuse of the word "if"—

a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce.

With regard to this condition you have the modern approach to what constitutes interstate commerce as distinguished from the orthodox and established definition which declared that goods shall be considered to be in interstate commerce when they are put in transit and are in transit until they reach their ultimate destination and have assumed a static local state.

Am I correct in that?

Mr. KENNEDY. Well, I'm using here, which I expect the committee——

Senator LAUSCHE. Well, what does the word "substantial" mean?

Mr. KENNEDY. May I just answer the last question which is a little bit different from that?

I'm using here the definition of "interstate commerce," the whole concept of interstate commerce, based on the Supreme Court decisions of what interstate commerce is at the present time.

Senator LAUSCHE. What is your definition of the word "substantial" in this second condition?

Mr. KENNEDY. More than minimal.

Senator LAUSCHE. Wouldn't that practically cover everything?

Mr. KENNEDY. It is going to cover a good deal.

Senator, may I go through the explanation which I have already gone through? I think there are a lot of phrases and clauses in the Constitution of the United States, in bills that have been passed by this committee and sent on to the Senate and House of Representatives, bills that have been passed by the Congress of the United States, which are difficult to define mathematically and I used as examples before, when I appeared before this committee, such clauses as "due process of law," or "equal protection of the laws."

How does anybody know exactly what that means? In my judgment, 99.9 percent of the people know whether they are or are not covered. Now the small group——

Senator LAUSCHE. I'm not arguing with you.

Mr. KENNEDY. May I finish, please?

Senator LAUSCHE. I'm trying to find out what the bill means.

The CHAIRMAN. Let the witness finish.

Mr. KENNEDY. There is going to be an extremely small percentage who will not know whether they are covered. So what is going to happen with them, they are ultimately going to have a court case and the worst thing that can happen to them is that they have to stop discriminating.

Senator LAUSCHE. I will talk to you on ultimately having a court case but let's finish this subject here.

Now going to the condition identified with the numeral 3, that is the third one, if the activities or operations of such place or establishment otherwise substantially affect interstate travel, what definition do you ascribe to the word "substantially" in that subparagraph marked (iii).

Mr. KENNEDY. Again, more than "minimal."

Senator, may I also add there, what we are attempting to do is try to avoid covering the very smallest of establishments, where the individual lady or man runs his own establishment and lives on the premises.

Senator LAUSCHE. I understand. I heard that yesterday and the day before.

Now may I ask you, do you contend that if you wanted to, you could also reach the little establishment but that it is through grace that you are disinclined to do so now.

Mr. KENNEDY. Well, I think that we would not have to have the wording "substantial" in this legislation. We do not require it. It is not required that we have the word "substantial." We added the word "substantial" so it would be clear that we did not intend to cover the very smallest establishments where it becomes a personal relationship, or where it is a social matter rather than a business matter. So, therefore, we put in the word "substantial" although it is not required. If the committee wants to take out the word "substantial," that is fine with us. We put in "substantial" because we didn't want to cover the smallest establishments. I cannot give you, Senator, as you say you have heard, a mathematical definition of that. I would say it is more than minimal.

Senator LAUSCHE. But, now based upon what you have said, I construe that it is out of good grace so as not to bring in the small enterpreneur that you put in the word "substantial." Is that right?

Mr. KENNEDY. I don't know if it is good grace. It is what we thought was the proper way to handle it.

Senator LAUSCHE. Well, you felt that it might be wrong to bring in the little boardinghouse keeper and so on.

Mr. KENNEDY. You have described it as good grace. I say we thought this was the proper way to proceed.

Senator LAUSCHE. Then you take the position that, under the Constitution, you can practically cover everybody, small and large?

Mr. KENNEDY. We can cover anybody whose establishment affects interstate commerce, Senator.

Now, if you want to find out what kind——

Senator LAUSCHE. This is the last subject I will explore.

Senator PASTORE. We were mostly worried about the last question, not the last subject.

Mr. KENNEDY. Go ahead, Senator.

Senator LAUSCHE. What is your definition, as now constituted, of the term "interstate commerce?"

Mr. KENNEDY. Commerce between the States.

Senator LAUSCHE. Oh, well, it must be more than that.

Mr. KENNEDY. Senator, you are a lawyer.

Senator LAUSCHE. Yes, I know it.

Mr. KENNEDY. Well, you tell me then.

Senator LAUSCHE. Well, I will tell you.

The orthodox and classical definition was interstate commerce shall embrace the movement of goods between States and shall be applicable from the time that the goods were put in transmittal until the time they were delivered to the ultimate destination and assumed a static condition for disposition to the public within the State.

That classical definition, however, has been modified in the last 10 years, and I would like you now to tell me how it has been modified.

Mr. KENNEDY. Well, I would give you the same answer I gave before, or I would give you the same answer that you gave, which I think is identical to my answer in some longer words without the "static condition."

Senator LAUSCHE. The new definition.

Mr. KENNEDY. Not new definition. You have to go based on what the courts have held and you pass laws in the Congress of the United States that go beyond the definition you gave, which I think went out about 30 years ago.

Senator LAUSCHE. Well, within the last 10 years the courts have held and partially in accord with the quotation that you have in your paper of presentation quoting Jackson; that is if there is the slightest impact by what is done within a State upon general commerce it shall be construed as a squeeze and therefore bringing the action within the definition of interstate commerce.

Mr. KENNEDY. But Senator, your definition doesn't really help or assist in this connection. It doesn't change it at all. We are arguing about an entirely different matter when we talk about whether the goods have come to rest or not.

Even under your definition, you are not getting any closer to it than I am. Still these are terms which are difficult to determine mathematically even using your definition, which is really basically no different than mine except on the question of whether something has become static or not. But that is not the problem involved here.

Senator LAUSCHE. But you may be arguing with me when I asked you to define interstate commerce, and you say commerce between the States. I would say it is not much help. I am pursuing this question trying to learn how far you can contend the Congress can ultimately go in bringing within this philosophy the businessmen of the country. That is the only purpose of asking that question.

Now there is a limitation that it must substantially affect. If you remove the word "substantially" then in my opinion you practically cover all and that is a subject that ought to be deeply meditated. That is all I have to say.

Mr. KENNEDY. Could I say on that, Senator, that you have passed legislation in the Congress of the United States which affects drugstores, which affects every restaurant. I have given some examples of it. You have already passed legislation dealing with it. You pass legislation here in the Congress of the United States that tells a restaurant in the United States how they should shape their piece of oleomargarine if they sell it to a customer. You have told them what they have to put on their menus.

You have told them what color they have to put in. You have told every drugstore in the United States how they are going to label the bottle of aspirin upon their shelves. So you have done a great deal here already. In other words, Senator, we are not coming in here with any new principle. You have a law in the State of Ohio that you have had for 60 or 70 years which bears on this very problem.

Senator LAUSCHE. What will happen to that law if this law is passed?

Mr. KENNEDY. It is still in effect.

Senator LAUSCHE. Will it be preempted?

Mr. KENNEDY. No; it will not.

You talk about Government affecting business. You have done that in Ohio for 60 years.

Senator LAUSCHE. Ohio has attempted to give business a square deal. It has not browbeaten it or threatened it with prosecution for the purpose of procuring the achievement of an objective and I think the Ohio citizens will not agree with you that it has attempted to shackle or impose restrictions.

Mr. KENNEDY. Senator, could I answer?

Senator LAUSCHE. Surely.

Mr. KENNEDY. Could I just say I am not saying that? All I am saying, Senator, is that you have already got this kind of law in the State of Ohio, that you have had it for many decades, and you were Governor of the State of Ohio with the responsibility of enforcing that law.

Senator LAUSCHE. The law we had in the State of Ohio was that any businessman who failed to serve equally and impartially a person who entered the business was subject to an action for damages.

Mr. KENNEDY. We do not even go that far, Senator. There are no damages in this case. We do not go as far as the State of Ohio.

Senator LAUSCHE. I understand. May I ask you——

Mr. KENNEDY. I just wanted to discuss it factually, Senator. There are a good number of smokescreens that are being built up about this. I wanted to discuss the bill and legislation factually. Maybe somebody is going to be against it based on the facts in the bill and what we are recommending but it should be on that basis, and not on something else about it, because that is not correct.

Senator LAUSCHE. I concur with all that you said in your written document concerning the need of curing this wrong.

Mr. KENNEDY. Thank you, Senator.

Senator LAUSCHE. However, I want to make sure that to cure one wrong we may not be creating another.

Mr. KENNEDY. I appreciate that.

Senator LAUSCHE. By taking constitutional rights from other people.

Mr. KENNEDY. I appreciate that, Senator.

Senator LAUSCHE. All right. Now I have to stop. I would like to pursue this further. I have read your tabulation on pages 4 and 5 of the acts that were passed and I find that practically all of them have involved safety, health, and the prevention of fraud. Those are different questions than that involved in this bill today.

That is all I have.

The CHAIRMAN. The Chair wants to state that the Attorney General said that he would be available to come back at any time during the course of the hearing on some of these matters.

I might help clear up some of this about minimal and substantial. The classic plea of those who are in interstate commerce cases was that when the goods came to rest they were not interstate commerce and the Court ruled on that in the *Bolton* case and then the *Meatcutters* v. *Fairlawn Meats* (353 U.S. 20), 1957, when the Court held the act applicable to a retailer operating three meat markets in and around Akron, Ohio, even though all of its sales were intrastate and

That classical definition, however, has been modified in the last 10 years, and I would like you now to tell me how it has been modified.

Mr. KENNEDY. Well, I would give you the same answer I gave before, or I would give you the same answer that you gave, which I think is identical to my answer in some longer words without the "static condition."

Senator LAUSCHE. The new definition.

Mr. KENNEDY. Not new definition. You have to go based on what the courts have held and you pass laws in the Congress of the United States that go beyond the definition you gave, which I think went out about 30 years ago.

Senator LAUSCHE. Well, within the last 10 years the courts have held and partially in accord with the quotation that you have in your paper of presentation quoting Jackson; that is if there is the slightest impact by what is done within a State upon general commerce it shall be construed as a squeeze and therefore bringing the action within the definition of interstate commerce.

Mr. KENNEDY. But Senator, your definition doesn't really help or assist in this connection. It doesn't change it at all. We are arguing about an entirely different matter when we talk about whether the goods have come to rest or not.

Even under your definition, you are not getting any closer to it than I am. Still these are terms which are difficult to determine mathematically even using your definition, which is really basically no different than mine except on the question of whether something has become static or not. But that is not the problem involved here.

Senator LAUSCHE. But you may be arguing with me when I asked you to define interstate commerce, and you say commerce between the States. I would say it is not much help. I am pursuing this question trying to learn how far you can contend the Congress can ultimately go in bringing within this philosophy the businessmen of the country. That is the only purpose of asking that question.

Now there is a limitation that it must substantially affect. If you remove the word "substantially" then in my opinion you practically cover all and that is a subject that ought to be deeply meditated. That is all I have to say.

Mr. KENNEDY. Could I say on that, Senator, that you have passed legislation in the Congress of the United States which affects drugstores, which affects every restaurant. I have given some examples of it. You have already passed legislation dealing with it. You pass legislation here in the Congress of the United States that tells a restaurant in the United States how they should shape their piece of oleomargarine if they sell it to a customer. You have told them what they have to put on their menus.

You have told them what color they have to put in. You have told every drugstore in the United States how they are going to label the bottle of aspirin upon their shelves. So you have done a great deal here already. In other words, Senator, we are not coming in here with any new principle. You have a law in the State of Ohio that you have had for 60 or 70 years which bears on this very problem.

Senator LAUSCHE. What will happen to that law if this law is passed?

Mr. KENEDY. It is still in effect.

Senator LAUSCHE. Will it be preempted?

Mr. KENNEDY. No; it will not.

You talk about Government affecting business. You have done that in Ohio for 60 years.

Senator LAUSCHE. Ohio has attempted to give business a square deal. It has not browbeaten it or threatened it with prosecution for the purpose of procuring the achievement of an objective and I think the Ohio citizens will not agree with you that it has attempted to shackle or impose restrictions.

Mr. KENNEDY. Senator, could I answer?

Senator LAUSCHE. Surely.

Mr. KENNEDY. Could I just say I am not saying that? All I am saying, Senator, is that you have already got this kind of law in the State of Ohio, that you have had it for many decades, and you were Governor of the State of Ohio with the responsibility of enforcing that law.

Senator LAUSCHE. The law we had in the State of Ohio was that any businessman who failed to serve equally and impartially a person who entered the business was subject to an action for damages.

Mr. KENNEDY. We do not even go that far, Senator. There are no damages in this case. We do not go as far as the State of Ohio.

Senator LAUSCHE. I understand. May I ask you——

Mr. KENNEDY. I just wanted to discuss it factually, Senator. There are a good number of smokescreens that are being built up about this. I wanted to discuss the bill and legislation factually. Maybe somebody is going to be against it based on the facts in the bill and what we are recommending but it should be on that basis, and not on something else about it, because that is not correct.

Senator LAUSCHE. I concur with all that you said in your written document concerning the need of curing this wrong.

Mr. KENNEDY. Thank you, Senator.

Senator LAUSCHE. However, I want to make sure that to cure one wrong we may not be creating another.

Mr. KENNEDY. I appreciate that.

Senator LAUSCHE. By taking constitutional rights from other people.

Mr. KENNEDY. I appreciate that, Senator.

Senator LAUSCHE. All right. Now I have to stop. I would like to pursue this further. I have read your tabulation on pages 4 and 5 of the acts that were passed and I find that practically all of them have involved safety, health, and the prevention of fraud. Those are different questions than that involved in this bill today.

That is all I have.

The CHAIRMAN. The Chair wants to state that the Attorney General said that he would be available to come back at any time during the course of the hearing on some of these matters.

I might help clear up some of this about minimal and substantial.

The classic plea of those who are in interstate commerce cases was that when the goods came to rest they were not interstate commerce and the Court ruled on that in the *Bolton* case and then the *Meatcutters* v. *Fairlawn Meats* (353 U.S. 20), 1957, when the Court held the act applicable to a retailer operating three meat markets in and around Akron, Ohio, even though all of its sales were intrastate and

only slightly more than $100,000 of its annual purchases of almost $900,000 came from outside Ohio.

So there the Court has ruled on a particular case where they got down to some mathematics and they said:

> We do not agree that the respondent's interstate purchases were so negligible that its business could not be said to affect interstate commerce within the meaning of the act.

There are many cases where the Court has defined that.

Does anyone else have questions of the Attorney General at this time?

Senator THURMOND. Mr. Chairman, I just have a couple of questions. I don't want to delay him from his Cabinet meeting.

Mr. KENNEDY. I will go after you finish.

Senator THURMOND. If you wish to go ahead I won't delay you.

Mr. KENNEDY. Thank you, Senator. I am at your disposal.

Senator THURMOND. Mr. Attorney General, since this bill, S. 1732, says that this is the subject of regulation by Congress under the commerce clause then under the previous decisions of the Court the 50 States will no longer be able to regulate it because they have absolutely no power over interstate commerce.

Do you agree?

Mr. KENNEDY. Could I have the first part of it again, please?

Senator THURMOND. Since this bill, S. 1732——

Mr. KENNEDY. Yes.

Senator THURMOND (continuing). Says that this is a subject of regulation by Congress under the commerce clause then under the previous decisions of the Court the 50 States will no longer be able to regulate it because they have absolutely no power over interstate commerce.

Mr. KENNEDY. No; the States still will be able to regulate. They will not be able to enforce a law which is contrary to the law that has been passed by Congress and the law that is written into the Constitution of the United States. But they will be able to regulate the situation. In fact on page 9, section 6(b), we specifically set it forth.

Senator THURMOND. Under the Constitution, however, interstate matters are under the jurisdiction of the Federal Government.

Mr. KENNEDY. That is correct.

Senator THURMOND. And if you are going to pull these accommodations and services under the commerce clause, then the States would have no jurisdiction.

Mr. KENNEDY. No, no; they could still have jurisdiction within the State, Senator.

Senator THURMOND. How would they have jurisdiction then if the National Government has jurisdiction under the interstate commerce clause.

Mr. KENNEDY. Because we specifically set it forth.

Senator THURMOND. But can you set forth in an act of Congress something that would violate the Constitution?

Mr. KENNEDY. It would not violate the Constitution.

Senator THURMOND. It would abrogate the Constitution.

Mr. KENNEDY. You have many of those at the present time. An individual steals an automobile and travels across the State line. It is a violation of State and Federal law. There are many, many, many acts.

Senator THURMOND. Have those been tested?

Mr. KENNEDY. Yes; they have.

Senator THURMOND. Well, I would suggest that you look a little further into this question because I think this is a serious question that I am raising now. I would suggest you read the cases dealing with the extensiveness of the commerce clause beginning with *Gibbon* v. *Ogden* in conjunction with the cases dealing with the exclusive powers of the National Government, beginning with *Cooley* v. *Board of Port of Wardens of Philadelphia*, down through *Pennsylvania* v. *Nelson* and I am inclined to feel that you might then agree that if this bill is going to be based on interstate commerce where the States have no jurisdiction—then if that is the theory that you are proceeding on, the States would be deprived of jurisdiction and the National Government would preempt the field as was held in the *Steve Nelson* case some time back.

Mr. KENNEDY. Let me just say, Senator, I deal with these matters daily and, if I may say so, in all due respect, that that is not accurate, because a State can have a law as all of you know, a State have a law and the Federal Government can be involved in the same matter and it does not affect the State laws unless the Congress specifically writes it in, specifically set it forth or where the two laws are opposed to one another to some extent. Then the Federal law takes precedence over it.

Senator THURMOND. Well, in the *Steve Nelson* case they tried to put verbiage in there that would preserve the State laws and in spite of that the Supreme Court struck down the State law and stated that when the National Government entered the field that the National Government preempted the entire field on the question of sedition and that is the law today, is it not?

Did not the National Government preempt the field?

Mr. KENNEDY. In specific instances, that is accurate where there is a State law which is opposed to the Federal law or where it is quite clear that the Federal Government intends to take complete and absolute jurisdiction over the subject matter. But in the vast majority of cases, that is not correct, and specifically in this bill we set forth that that is not correct. I call your attention to page 9 where it says, "This act shall not preclude any individual or any State or local agency from pursuing any remedy that may be available under any Federal or State law, including any State statute or ordinance requiring nondiscrimination in public establishments or accommodations."

I will be glad to furnish you a memo on that, Senator.

Senator THURMOND. In the *Steve Nelson* case the Congress even took precautions to try to preserve the State law and there was nothing that was said in that law that was intended to indicate that it would strike down the State law. Nevertheless, the Supreme Court held that the National Government had preempted the entire field of sedition and it seems to me that if you are proceeding here on the basis of the commerce clause, the interstate commerce is the more correct term, the interstate commerce clause, article I, section 8, of the Constitution that if you have jurisdiction on that field, on that point then how can the States have jurisdiction because the States have no jurisdiction except in intrastate matters and not in interstate matters. So I do think it is worth your time to look into this.

Mr. KENNEDY. Fine; I will be glad to furnish a memo.

The CHAIRMAN. The Attorney General may be excused from the committee and he has gladly consented to come back here if we should want him on any specific matter as the hearings proceed. He will be available. There may be some other points that we might want to cover.

If there is no objection from the committee, we will excuse you at this time and on behalf of the committee, I want to thank you for your testimony on this very important matter.

Mr. KENNEDY. Thank you and members of the committee for their courtesies.

(Following is the information requested:)

MEMORANDUM

Re possibility that enactment of S. 1732 would preempt or supersede State or municipal laws requiring nondiscrimination in State public establishments or accommodations

The question has been raised whether enactment of S. 1732 would be regarded as preempting the field and superseding State or municipal laws requiring nondiscrimination in public establishments or accommodations, despite the express disclaimer of congressional intention to do so contained in section 6(b) of the bill. The Department of Justice believes it to be clear that the bill would not have that effect.

The Commerce Clause of the Constitution (art. I, sec. 8, cl. 3), vests in Congress the power to regulate interstate and foreign commerce. This power, however, does not necessarily operate to exclude all State power over commerce. The States, by virtue of the police power and other regulatory authority, may enact laws affecting commerce within the States. When the Federal and State laws affecting commerce overlap, the question arises whether the State law is valid or must give way to the Federal law.

It has long been settled that there are certain areas of interstate commerce which, by their very nature, require consistent and uniform national regulation, and in these areas the regulatory power of Congress is exclusive, *Cooley* v. *Board of Wardens*, 12 How. 298, 319. No State or local law is permitted to regulate or interfere with these areas of commerce. On the other hand, there are areas of commerce in which Federal and State power overlap and in which there is concurrent regulatory jurisdiction. In these areas, nonconflicting State legislation is permitted unless Congress, in exercising its power over interstate commerce, clearly indicates that it intended to preempt the field and to supersede State legislation in the same area, *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230; cf. *Pennsylvania* v. *Nelson*, 350 U.S. 497. Thus, in considering the validity of State laws affecting interstate commerce, two problems must be considered: (1) Is the area of commerce involved within the exclusive jurisdiction of the Federal Government; or (2) if the area is one of possible concurrent jurisdiction, did Congress expressly or impliedly preempt the field, thus superseding State and local laws in the same area?

I

It is the view of the Department of Justice that the requirement of nondiscrimination in public establishments and accommodations affecting interstate commerce does not require a single national regulatory scheme within the exclusive jurisdiction of the Federal Government. In an analogous situation, the Supreme Court has recently indicated that there is concurrent Federal and State jurisdiction to prohibit discrimination, *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714.

The *Continental Air Lines* case involved a complaint by an applicant for a pilot position that he had been discriminated against because of his race, contrary to the Colorado antidiscrimination law. The antidiscrimination commission found the facts stated in the complaint to be true and ordered the airlines to give fair consideration to the application. The Colorado courts set the order aside, however, on the grounds that the Colorado law did not apply to the airlines. The court reasoned that it would be an undue burden on interstate commerce to apply a State antidiscrimination law to an interstate carrier and

that "the field of law concerning racial discrimination in the interstate operation of carriers is preempted by the Railway Labor Act, the Civil Aeronautics Act of 1938, and Federal Executive orders." 372 U.S. at 717 (footnotes omitted).

In deciding that the Colorado laws did not apply to interstate carriers, the Colorado Supreme Court had relied upon *Cooley* v. *Board of Wardens*, *supra*, for the principle that States have no power to act in areas of interstate commerce which by their nature require uniformity. The court read *Hall* v. *De Cuir*, 95 U.S. 485, and *Morgan* v. *West Virginia*, 328 U.S. 373, as indicating that the field of racial discrimination in interstate commerce was subject to the exclusive jurisdiction of the Federal Government. In *Hall* a Louisiana law prohibiting racial discrimination on Mississippi river boats was found to be an undue burden on interstate commerce, and in *Morgan* a law requiring segregated seating on interstate buses was found to constitute an undue burden. Both decisions noted that State laws on the subject were varied and conflicting, and pointed out that chaos would result if interstate passengers were repeatedly required to change seats in order to comply with the different State laws.

In reversing the Colorado court's decision, the Supreme Court pointed out that under the Cooley decision the Federal Government has exclusive jurisdiction in those areas of commerce which require uniform regulation. The Court emphasized that Hall and Morgan were decided at a time when State laws relating to racial discrimination were in direct conflict with each other, thus constituting a burden on interstate commerce. Since it is no longer constitutionally permissible for State laws to require segregation in interstate commerce, the Court noted, the danger of conflicting State laws burdening interstate commerce no longer exists. Accordingly, the regulation of this aspect of interstate commerce no longer requires a single uniform system. The Court found that this area of regulation was not within the exclusive jurisdiction of Congress and that concurrent jurisdiction rests with the States.

It is our view that the reasoning of the Continental decision applies with equal force to the question whether the requirement of nondiscrimination in public establishments and accommodations is within the exclusive jurisdiction of Congress or whether it is an area of concurrent jurisdiction. On the basis of Continental, we have concluded that the States have concurrent jurisdiction in the absence of specific congressional intent to preempt the field.

II

Congressional intention to preempt the field in a particular class of legislation is determined from the language of the legislation itself or from external evidence of intent. On occasion, Congress specifies that the States have concurrent jurisdiction, see, e.g., 15 U.S.C. 77r. Ordinarily, courts will recognize such a declaration of intent in the statute, *Pennsylvania* v. *Nelson*, 350 U.S. 497, 500. We have no doubt that the courts would construe section 6(b) of S. 1732 as recognizing the concurrent jurisdiction of the States and negating any intention to preempt the field.

Even if the language of section 6(b) were not as clear as it is, we are confident that S. 1732 would not be interpreted as preempting the field and superseding existing State laws. In *California* v. *Zook*, 336 U.S. 725, 729, the Court noted that the intention of Congress is not always expressed in the statute, "[b]ut whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the State action conflict with national policy." We think it is clear that State antidiscrimination laws would not conflict with national policy, but would, in fact, complement the national policy as expressed in S. 1732. This conclusion is supported by the decision in the *Continental Air Lines* case:

"Continental argues that Federal law has so pervasively covered the field of protecting people in interstate commerce from racial discrimination that the States are barred from enacting legislation in this field * * *.

"To hold that a State statute identical in purpose with a Federal statute is invalid under the supremacy clause, we must be able to conclude that the purpose of the Federal statute would to some extent be frustrated by the State statute. We can reach no such conclusion here" (372 U.S. at 722).

The Court held that State laws were neither superseded nor preempted by the Federal laws, even though the Federal laws were silent with respect to congressional intent.

Where Congress has specifically denied an intention to preempt the field, as in S. 1732, we are confident that courts would find concurrent Federal and State

jurisdiction to prohibit discrimination in public establishments and accommodations in interstate commerce. Thus, S. 1732 would not be interpreted as preempting the field or superseding similar State or local laws.

The CHAIRMAN. All right. The Senator from Michigan wants to be heard. Although he is a member of the committee he wants to be heard as a witness in this matter.

STATEMENT OF HON. PHILIP A. HART, U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator HART. Mr. Chairman, I appear in support of legislation which would assure to all Americans equal access to those goods, services, and accommodations which are part of interstate commerce in this Nation.

This goal President Kennedy has called upon the Congress to achieve by enactment of appropriate legislation.

In his first message on civil rights to the Congress in February of this year, the President most eloquently spoke of the issue before this committee:

> No act is more contrary to the spirit of our democracy and Constitution—or more rightly resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from restaurants, hotels, theaters, recreational areas, and other public accommodations and facilities.

Facts which illustrate the problem are commonplace but demand brief recall:

The American soldier traveling from his home to an oversea assignment refused a cup of coffee at a lunch counter.

An American family driving along our Federal highways unsure whether the restroom facilities are open to their children.

A diplomat from Ghana turned away when seeking night lodgings.

A teacher, a graduate of the finest of our universities, unable to attend the theater in her hometown.

Before this committee are three bills. S. 1732 which the administration has proposed and which I join in supporting. S. 1622, which Senator Humphrey and others joined with me in introducing on May 27 of this year. This would apply to all facilities, services, or accommodations affecting commerce. And S. 1217, introduced by Senator Javits, which deals with the subject of accommodations only at lodging places. These bills, in whole or in part, use the broad powers available to the Congress under the commerce clause of the Constitution to reach and make unlawful patterns of racial segregation and discrimination.

Other bills are before the Judiciary Committee of the Senate. They seek the same general legislative objective utilizing powers derived from the 14th amendment to the Constitution.

It is important that we have the most careful analysis of the appropriate constitutional powers which are available on which to base our legislative proposals.

For that reason a number of weeks ago I requested the American Law Division of the Legislative Reference Service to prepare for my use a memorandum on "The Power of the Congress To Prohibit Racial Discrimination in Privately Owned Places of Public Accommodation."

I suggest this memorandum be read by all who wish a better understanding of the very broad powers available under the Constitution to the Congress if we are to find—as we must—legislative solutions for this national question.

The CHAIRMAN. I have that memorandum and it will be made available to the members of the committee.

Senator HART. Whether we act, the scope of our actions, the reach of the actions, these indeed are appropriately debatable. But I do not believe a serious challenge can be presented to the question of whether or not the Congress has authority to reach racial discrimination in business and services subject to the powers of the commerce clause.

SCOPE AND REACH OF THE POWER OF THE CONGRESS TO LEGISLATE UNDER THE COMMERCE CLAUSE

The power vested in the Congress "to regulate commerce with foreign nations, and among the several States" is broad and far reaching. It is a specific grant of positive power to the Federal Government. As stated in the Legislative Reference Service memorandum, the power of Congress to regulate commerce—

is a plenary power under which Congress can regulate and prohibit activities which would in no way violate the Commerce Clause in the absence of an act of Congress.

Students of the Constitution agree that this is the most sweeping and significant direct source of power available to the National Government, excepting only the power granted to the Federal Government in the event of war or national emergency.

Throughout our history, the Congress has moved in many and varied ways to meet the changing nature of our Nation's life and economy, using as the basis for such legislation power derived from this authority under article I, section 8, clause 3.

One can find the use of this power in promoting the growth, advancing the cause, and protecting the flow of goods and services moving in interstate commerce.

Obstacles and restrictions to the flow of commerce have been removed when they have arisen as a result of State legislation or conditions within the States.

The Congress has relied on these powers to stimulate commerce.

Intrastate activities which interfere or obstruct in a substantial way the freedom of commerce between the States have been prohibited.

Under the commerce clause, the Congress has legislated—and the courts have upheld—the amount of wheat a farmer can grow on his farm, even if none of the wheat is to be sold and all will be consumed on the farm where it is grown.

Surely, if the control of growing and pricing of peanuts, cotton, tobacco, cheese, and milk can be justified as matters of sound national policy, under the commerce clause, the right of an American citizen to consume or purchase these same commodities without restriction as to his race can be justified.

The Supreme Court has in fact upheld the use of the power to regulate commerce in prohibiting racial discrimination. The Interstate Commerce Commission, established by the Congress, issued regulations prohibiting racial discrimination in restaurants operated in fa-

cilities owned by interstate carriers. These regulations have been held to be constitutional. The Congress, through the Interstate Commerce Commission, has resolved and outlawed racial discrimination in facilities in interstate commerce, under powers granted by the Commerce Clause.

USE OF 14TH AMENDMENT POWERS TO REACH DISCRIMINATION IN PUBLIC ACCOMMODATIONS

In the law as it stands today, we find that the 14th amendment has not been interpreted to give the Congress power to prohibit purely private acts of racial discrimination. The Congress can prohibit State actions which would condone or support racial discrimination. Acts of discrimination done under the color of State law can be reached. But it is not clear that the Congress, basing its legislative action solely on the power to prohibit State actions under the 14th amendment, can today effectively bar many of the acts of discrimination in private businesses serving the public.

The memorandum on the law to which I have referred elaborates on the difficulties in relying solely on the authority available under the 14th amendment.

A CHANGING AND INTERDEPENDENT NATIONAL ECONOMY

Investors, manufacturers, and workers in every State of our Union are affected by the expansion or contraction of the sales of goods and services in every State.

No better illustration is available than that drawn from the impact of the national economy on my State of Michigan. When the country works and sells, we work—and sell cars.

When goods and services can be freely acquired, when full access to the markets by all American consumers is assured, there is no part of the Nation that does not benefit—autoworker, lumberman, farmer, broker—I know of no meaningful exception.

But when the sale of goods moving among our States, or services for traveling individuals, are in part limited to 20 million Americans, the full potential of our economy is not being realized for the rest of the 160 million Americans.

Where State law, or local practice, effectively restricts the markets and places of entertainment and accommodations for many Americans, there is, I submit, a very real and evident restraint of trade and commerce affecting other Americans throughout the Nation.

When State laws require segregation and limit equal access, or when local practices give such prohibitions almost the effect of law, Negro citizens have at times voluntarily boycotted stores selling goods that were made in other States. On other occasions, white customers undertake boycotts because stores begin to serve or hire Negroes. When this occurs the effect on commerce takes on an additional dimension.

Hopefully, Mr. Chairman, before these hearings are complete, this committee will have testimony showing the size and volume of accommodations, entertainment, wholesale and retail businesses, selling goods and services moving in, or affected by, interstate commerce in those States where access to these goods and services is today limited by racial discrimination.

It is my belief the dollar amount of this business—yes, this commerce—will be staggering.

Senator PASTORE. May I ask a question? The phrase has been used here that we are shackling the businessman. As a matter of fact, we are trying to unshackle the businessman and open up this new world of business activity.

Senator HART. The Senator from Rhode Island is always effective—in a very few words, to put either his thumb in the eye, if that is what he wants, or the light on the answer. In this case his comment dramatizes the underlying motivations behind much of this legislation. This will enhance the economy across the country and indeed, the business community will be the better for not having to restrain itself, I suspect many times against its own moral sensitivity.

The CHAIRMAN. The Senator from Michigan doesn't intend to limit this to only 20 million people.

Senator HART. That figure captures the imagination at the moment. But you and I can find ourselves inhibited in certain regions perhaps.

There is one other point of expert testimony that I would think the committee might like to see developed as it bears on the legislation that we are seeking to write.

The CHAIRMAN. There is a recent study that shows the purchasing power of the Negro—this is limited to the Negro—is $20 billion a year which exceeds the full purchasing power of the Dominion of Canada.

Senator HART. I think business would not regard it as punishment if we made available $20 billion in commerce.

Senator SCOTT. Automobiles—Negroes own more automobiles in America than are owned in all of Soviet Russia.

Senator HART. From a very parochial standpoint, any single automobile sale we can make in addition to what we make, I am in line for.

Senator SCOTT. I thought the Senator would be interested in automobiles. There is one additional point of expert testimony we may find helpful and that would deal with the changing complexion and control and ownership of the shops and stores along Main Street.

Senator HART. One additional point on which expert data may well be worth seeking would be the changing complexions of control and ownership of the shops and stores along Main Street, U.S.A.

We have heard a good deal about Mrs. Murphy's roominghouse—and I will want to consider her in a minute—but along Main Street the past 25 years have seen changes we should consider.

Let's walk down Main Street, U.S.A.—Paramount Theater owned and controlled from outstate—A. & P. grocery selling over half the groceries in town—leased Texaco and Gulf Oil stations—radio stations affiliated with a national network—national chain dress shop—J. C. Penney—Sears—a Rexall store—a national shoe chain—a regional farm supply store owned by a farmer cooperative operating in 10 States—MacDonald's hamburger—a national candy chain—at the edge of town, a Howard Johnson's or a Holiday Inn.

Senator PASTORE. May I interject at this point, and I think this is a very, very important point. I think much of this trouble is psychological reaction. I am one of those who feels that when the day comes that we have a law that applies to everyone, not only will we get used to the idea and become accustomed to it, we will learn to live with it.

If we are going to have exceptions then I think that psychological restraint will still prevail which I think will do a lot to impede our acceptance of this which I think must happen if we are to hold this as a society of one people.

Does the witness agree with me on this?

Senator HART. Completely, sir. And leaving the exception leaves the irritation there, too. It is not alone the fact that it would limit the experience and therefore delay the day when there is an acceptance, but it would leave alive one of these irritations which causes the pressures which concern all of us, too.

Indeed, the point the Senator from Rhode Island makes is true across this whole civil rights field. You say you can't legislate against prejudice. Nobody claims you can. But you can learn from a law that requires you to expose yourself to something which you think you will find disagreeable and with knowledge you find otherwise.

Senator PASTORE. Would you make a distinction on the so-called *Murphy* case on the grounds that there is a semblance of semiprivacy because it happens to be the home of the individual and is used as a home?

Senator HART. I certainly would consider an exception in the case of the roominghouse where Mrs. Murphy lives in or Mrs. Olson lives in, and if I may, I would like to comment on it. I think a proper distinction could be made when we come to this question of the tourist rooming accommodation, even one opened for travelers in interstate commerce.

A woman lives in her own house and rents three or four rooms to tourists. Here you have, I think, properly a question about residential privacy; it is quite different from a business establishment opened and serving the public.

I know that in the proposed "open occupancy," if that is what they called the District of Columbia requirement, this proper distinction is made. If other specific exceptions are considered, I think we ought to look at some of the guidelines contained in the many statutes, these 30-odd State statutes.

I would hope that would not be the bill that we report out burdened by exception. As the Senator from Rhode Island says, you just ask for trouble, you don't cure problems.

Senator PASTORE. You would not put it on a business volume basis, you would not have a motel doing a million-dollar business included under the law and have a motel across the street doing $100,000 a business year exempt from the law. You would not create that atmosphere in the same neighborhood.

Senator HART. Indeed not. I could see the neon sign going up saying "Our sales are only $50,000 a year."

Senator PASTORE. As a matter of fact, I think we would cause more trouble than we would eliminate.

Senator HART. I am convinced we would. It would be the same problem of the diner. Do they send a 10-year-old boy up to the window and count the stools and estimate what the value of that business is before deciding it is safe to go into? This kind of thing we should avoid.

I agree with the Attorney General, we are not just discussing whether the canned goods packed in California are sold in North

Carolina, or the dress made in New York is sold in Alabama. We are now considering who in fact owns, controls, buys the line of goods, sets the advertising policy, finances the store and leases most of Main Street, U.S.A.

Main Street is no longer "Mom and Pop" stores, or Mrs. Murphy's dress shop. Main Street, U.S.A. is in the middle of the flow of national commerce as never before in our history.

On the question of the change in Main Street we need only turn to the records of the Senate and House Small Business Committees. The facts are fully documented in their studies.

CAN A PROPER CUTOFF BASED ON SIZE OR VOLUME OF BUSINESS BE FOUND?

There has already been discussion by the Attorney General as to what might be a proper cutoff beyond which the proposed statutes would not reach. S. 1732 uses the word "substantial" and specifies the kinds of businesses, services, and accommodations.

There are several points to be considered in seeking the right answer.

First, if we are to reach the activities of the Safeway Food Store on Main Street because it is a national chainstore, how would such a requirement affect the Safeway Stores. A nonuniform requirement of serving all customers without regard to race might well cause unfair discrimination against the owners whose store was part of an interstate chain.

I contend the Congress is dutybound, in such an instance, to reach those additional businesses which would "affect" other businesses in interstate commerce. The statutes should extend to the independent-owned stores as well. This seems to be only fair and equitable treatment. It will, as the Attorney General has said, prevent very difficult problems from arising with different treatment within a single city.

It has been suggested there should be a dollar volume or annual sales figure used as a cutoff. This I would oppose. It would be most difficult along the highway to say that Joe's Diner, which does $50,000 worth of business, is not required to serve all travelers, but that the large drive-in, with a dining room grossing $250,000, shall serve all customers.

Under such a formula, income figures for the previous year could be put in large neon lights, and then travelers would be able to make their choice. Or pehaps the Negro family can send the 8-year-old up to the window to count the number of stools at the lunch counter and make a guess on business income.

MRS. MURPHY'S ROOMINGHOUSE

A proper distinction, one which I believe might be justified, is suggested when we come to the question of tourist or rooming accommodations for travelers in interstate commerce.

For Mrs. Murphy, who lives in her own house and rents three or four rooms to tourists, there is properly a question of residential privacy that seems to me quite different from a business establishment open and serving the public.

I certainly would consider an exception to rooming houses or tourist homes where the owner has his residence in the same establishment and rents only three or four rooms.

If specific guidelines are needed in specific areas, beyond those which will be set by court interpretation of the world "substantial," let us seek such logical guidelines in drafting this statute.

WE ARE NOT LEGISLATING IN A FIELD WHERE THERE IS NO LAW

As this committee knows, some 31 States have taken action to prohibit racial discrimination in accommodations or service in various forms. These should be reviewed if additional guidelines are sought.

There is much statutory law affecting equality of access to accommodations, goods, and services. If you will, this is already an "invasion" of the privacy of one who would sell or make services available to the public. An "invasion" is involved whether the State requires such services or goods to be available to all, or prohibits the entrepreneur from treating all alike and requires a distinction on the basis of color.

It has been rather curious to me that the debate and opposition to the President's board civil rights proposals have tended to center so fully on this question of fair access to public accommodations—when in fact we are a nation with very many laws on this subject today.

I agree with the Attorney General—a civil rights bill this year without a sound public accommodations provision would be a very serious omission. For myself, I hope it is not burdened by exceptions.

Enactment of a Federal public accommodations statute would be the most direct and immediate action we can take to show citizens long denied such rights that we have not let their protests go unnoticed, and that we are not unconcerned.

Education, voting, employment, conciliation, all other proposals will require time and years before a sizable impact can result. Not so with a sound public accommodations and services statute.

We need only think back a few years to the opening of theaters, hotels, and restaurants to all citizens in the District of Columbia. The results were immediate and tangible—and good for America and all Americans. Let us extend the example in this area of the Nation's Capital and the great majority of the States to the entire Nation.

You will note that in the bill I introduced (S. 1622) there is no cutoff based on dollar volume or on number of rooms; there are no exceptions. "Any business affecting commerce" must not refuse access because of race, religion, color, or national origin. Admittedly, I like this approach above all others, but as this record is made, I hope all of us will seek the sound and right answer.

Mr. Chairman, I suppose a difficulty one encounters in drafting any bill of this nature is insuring that the language used will prevent persons from devising ways to circumvent and frustrate the purpose of the act. Often, the more specific and detailed the language, the easier it is to circumvent the act's purpose.

One point in S. 1732 where the problem arises is with respect to the definition of "public places" and "private clubs." I note that section 3(b) provides that it shall not apply to bona fide private clubs. But, what is and what is not bona fide is not spelled out.

I assume, although the Attorney General has not addressed himself to this subject, that the Department of Justice chose to leave particular fact situations to ad hoc determination by the courts. All

in all, this is probably the correct approach. The law, after all, is not incapable of distinguishing between fact and fiction.

Since, however, the creation of private clubs out of public business—perhaps by issuing membership cards and charging modes dues—is a rather obvious way for restaurants, theaters, and other businesses to attempt to circumvent the intent of S. 1732, I believe we should make clear in the legislative history that when the bill says "private club," it means private in fact and not private in form only.

There are virtually countless varieties of private clubs. Certain guidelines or common elements can be distinguished, however, which will assist the courts in determining whether or not a club is, in fact, private.

For example, the court will want to consider whether a club is run solely for the convenience of its members, or on the other hand, for profit.

Another indicia of bona fide privateness is whether sponsorship by present members is required for admission of a new member.

Is a responsible board required to pass on each application, or can membership be obtained simply by signing a form?

Are membership dues substantial relative to the charges for the club's services?

Is there a delay between the time application is made for membership, and the time it is passed upon by the club?

Is the size of the membership limited?

Does the club advertise?

I am certain that many other guidelines can be discerned in particular fact situations. The ones I have suggested, however, make apparent what our intent is in section 3.

No single point that I have mentioned is, in itself, necessarily sufficient to distinguish a truly private club from a public place. But, taken together, these kinds of considerations will make it possible for the courts to prevent so-called private clubs from being used as a device to frustrate the act—that is, as a device to discriminate against Negroes.

I do hope that this point will be discussed at some length when we get to the floor debate. It is important, I believe, for Congress to make absolutely clear that by using the words "public places," it does not intend that "private clubs" which are not really private can become a tool of discrimination.

Mr. Chairman, thank you very much for the chance to appear.

The CHAIRMAN. Any questions of our colleague?

Senator PASTORE. Only that I congratulate the distinguished Senator from Michigan for a brilliant presentation and I shall consider it an honor to be associated with everything he has said.

The CHAIRMAN. Of course, the Senator from Michigan will have ample opportunity when the committee discusses the provisions of the bill to set forth his ideas in this matter.

Senator PASTORE. Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from Texas.

Senator YARBOROUGH. I have one question of the witness. Senator, there are some States that have prohibition laws that have private clubs that were not founded for the purpose of having anything to do with racial discrimination.

You think clubs of that type might not have existed except for the prohibition laws, would come under the prohibition, the definition you have in mind?

Senator HART. Right off the top of my head I would react this way. The purpose of the clubs you describe, Senator Yarborough, was not to raise racial or religious barriers. It was to encourage the sale of Kentucky's favorite product, I suppose, and this being the case such clubs would not immediately occur to one as the device that I am concerned about. But each one would be a fact situation.

I would not want by my answer to suggest that we might not have to give very serious thuoght to the particular club you are talking about.

Senator YARBOROUGH. Thank you, Senator. I note from your statement and the brief you have obtained from the legislative service that you have given very close study to this question and this problem. I commend you for the amount of time, work, and effort you have put into the study.

Senator HART. Thank you.

The CHAIRMAN. The Senator from Kentucky.

For the purpose of the record there is before the committee S. 1591 which is a similar bill that was introduced by Senator Cooper and many other Senators and maybe at this point it would be well to put this bill into the record preceding your testimony.

(The bill follows.)

[S. 1591, 88th Cong., 1st sess.]

A BILL To prohibit discrimination against any person on account of race or color in the furnishing of the advantages, privileges, and facilities of any business or business activity affecting the public which is conducted under State license

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Accommodations Act of 1963."

SEC. 2. The Congress finds and declares that—

(a) many persons have been denied, on account of race or color, the advantages, privileges, and facilities of businesses and business activities affecting the public, conducted under State license;

(b) businesses and business activities, holding their facilities out to the public for sale or use and conducted under the authority of a State license, are clothed with a public interest when operated so as to affect the community at large;

(c) Congress has the right under the fourteenth amendment to prohibit discrimination, on account of race or color, by businesses or business activities affecting the public which hold their facilities out to the public for sale or use, and are conducted under the authority of a State license.

SEC. 3. As used in this Act—

(a) the term "business or business activity affecting the public" includes any business or business activity which holds itself out as offering for sale or use to the public, food, goods, accommodations, facilities, or transportation, including services connected with the sale or use of such food, goods, accommodations, facilities, or transportation.

(b) The term "State license" includes, with respect to any business or business activity, any license (by whatever name designated) which is required, under the laws of the State in which such business or business activity is conducted or under rules or regulations of any agency or instrumentality of such State, as a condition for conducting such business or business activity in such State.

(c) The term "State" includes the political subdivisions of a State, and the District of Columbia.

SEC. 4. Any person who, acting as a proprietor, manager, or employee of any business or business activity affecting the public which is conducted under a

State license, denies or attempts to deny to any other person the full and equal enjoyment of any accommodation, advantage, privilege, service, or facility of such business or business activity, on account of race or color, shall be subject to suit by the injured party in an action at law, suit in equity, or other proper proceeding for damages or for preventive, declaratory, or other relief.

SEC. 5. Any person who, acting under color of law or otherwise, denies or attempts to deny to any other person the right of such other person to the full and equal enjoyment of any accommodation, advantage, privilege, service, or facility of any business activity affecting the public which is conducted under a State license, on account of race or color, shall be subject to suit by the injured party in an action at law, suit in equity, or other proper proceeding for damages or for preventive, declaratory, or other relief.

SEC. 6. Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by section 4 or section 5 of this Act, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

SEC. 7. (a) The district courts of the United States shall, with respect to civil actions or proceedings instituted pursuant to this Act, exercise the jurisdiction conferred upon them by section 1343(4) of title 28 of the United States Code, without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

(b) The provisions of subsection (f) of section 2204 of the Revised Statutes (42 U.S.C. 1971) shall apply with respect to any person cited for an alleged contempt under this Act, and the provisions of section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995) shall apply in all cases of criminal contempt arising under the provisions of this Act.

STATEMENT OF HON. JOHN SHERMAN COOPER, U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator COOPER. Thank you, Mr. Chairman. Senator Magnuson and members of the committee, I have a statement which I will read but, before I do so, I would like to outline the points that I desire to make.

First, I would like to say that I am a cosponsor of the administration bill because I believe that discrimination in businesses held out for public use and patronage must be ended. I believe the administration bill, based on the Interstate Commerce approach, is constitutional, and if it is the measure on public accommodations which ultimately comes to a vote in the Senate, I will support and vote for the administration's proposal.

But I must say to this committee that I believe the "public accommodations bill" (S. 1591) based on the 14th amendment which Senator Thomas Dodd, of Connecticut, and I introduced on May 23, several weeks before the administration bill was submitted, is a more direct and comprehensive approach to the practice of discrimination in public accommodations than the administration's bill, S. 1732. I am very glad that over 30 Members of the Senate of both parties joined as cosponsors of the bill which Senator Dodd and I introduced.

The administration's public accommodations bill is based on the proposition that discrimination may be prohibited in businesses which are in interstate commerce because discrimination is a burden on interstate commerce. The Cooper-Dodd bill is based on the proposition that discrimination in the use of businesses licensed by a State or its subdivisions and held out for public use denies the equality of privileges

and immunities and the equal protection of the laws which the 14th amendment guarantees to all citizens.

I do not suppose that anyone would seriously contend that the administration is proposing legislation, or the Congress is considering legislation, because it has been suddenly determined, after all these years, that segregation is a burden on interstate commerce. We are considering legislation because we believe, as the great majority of the people in our country believe, that all citizens have an equal right to have access to goods, services, and facilities which are held out to be available for public use and patronage.

If there is a right to the equal use of accommodations held out to the public, it is a right of citizenship and a constitutional right under the 14th amendment. It has nothing to do with whether a business is in interstate commerce or whether discrimination against individuals places a burden on commerce. It does not depend upon the commerce clause and cannot be limited by that clause, in my opinion, as the administration bill would do.

Despite its defects I joined as a cosponsor of the administration's bill because I think it is constitutional. Further, it would bring about advances against discrimination in the use of public accommodations.

I have noted that many questions have been asked about the extent of the interstate commerce clause and what businesses would be affected. In my judgment, the administration bill would reach a great many businesses because, under the decisions of the courts, it has been held that the Congress can regulate not only commerce which actually moves between States, but intrastate commerce when it substantially affects interstate commerce. It can regulate even intrastate commerce where a single transaction does not substantially affect interstate commerce, but where the accumulation of like transactions throughout the country would substantially affect interstate commerce. So I believe the administration bill would have broad application to businesses throughout the country.

Nevertheless, it is clear that the administration bill would grant only partial relief. It would declare legislatively that in some public accommodations, not affecting interstate commerce, discrimination can be practiced.

The consequences of the interstate commerce approach are apparent, and would be avoided by the bill which Senator Dodd and I have introduced.

I emphasize that the interstate commerce approach would grant only partial relief; it would declare legislatively that the equal right of all citizens to use public accommodations is only applicable to businesses affecting interstate commerce, and would thus admit discrimination in other businesses.

It would legislate inequalities among the owners of businesses themselves. Some would fall under the legislation passed by the Congress, and others would not. It would legislate discrimination, because individuals could be discriminated against in certain businesses while in other businesses discrimination would be invalid.

It would, I believe, cause interminable litigation until the Congress finally prescribed by legislative enactment or the executive branch by regulation, standards to determine which businesses are in interstate commerce—as has been done in the case of the Fair Labor Standards Act, the Taft-Hartley Act, and many other types of legislation.

I noticed that in the hearings the question has been asked again and again: What business would fall under the administration bill? Only regulations or litigation would answer the question. There would be interminable litigation, in my opinion, and in the end we would find that the administration would be coming back to the Congress asking it to establish regulations to determine what businesses are in interstate commerce; or to authorize some governmental agency to fix regulations as has been done in many, many other types of legislation which are based on the interstate commerce clause.

The administration approach would, in my view, bring about a very extensive and new type of regulation of business.

So, for these reasons, I hold that the bill which Senator Dodd and I introduced, and which over 30 Senators have joined, is superior to the administration bill. It would cover all businesses which are licensed by the State—in which the State by its regulatory power is involved—and which are held out for public use. It would not cover professions or private associations. Perhaps it would not cover some types of very small businesses such as the famous Murphy Boarding House, but not upon the ground of their effect, or lack thereof, upon interstate commerce. It would be upon the ground that some businesses are not held out to general public use.

The question has been asked, and it has to be determined, whether there is any right under the 14th amendment to the equal use of public accommodations. I recognize that the Supreme Court held, in the *Civil Rights Cases* of 1883, that a public accommodations statute enacted by the Congress in 1875 did not fall within the terms of the 14th amendment.

The courts have held—and this is the standard of the 14th amendment—that private conduct abridging individual rights does no violence to the equal protection clause of the 14th amendment, unless to some significant extent, the State in any of its manifestations has been found to have become involved in the discrimination.

I would like to make a few comments on the decision of the Supreme Court in the *Civil Rights Cases* of 1883, which I do not believe have been brought out before the committee. It is generally stated by many who have now become interested in that famous case that decided firmly that the equal use of public accommodation was not a right guaranteed under the 14th amendment. I would like to say that anyone who reads the opinion will discover that the Court never made such a finding.

I would like to read to you from the decision. The Court said precisely that it was not making any finding upon that subject at all. The Court said this:

> We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodations and privileges, public conveyances and public amusement is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right or not is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

So I make the point to this committee that the Court did not find in any way that the right of access to public accommodations was not a right guaranteed by the 14th amendment. It left that question open.

What it did find was that the act which had been written by the Congress in 1875 did not, in its language, show any action of the State,

or apprehended action—and I am using their words—which would bring it within the scope of the 14th amendment requirement that in some way a State action had to be manifested.

I make these points to support my belief that the 14th amendment approach is constitutional. The 14th amendment, as you know, declares that all persons born or naturalized in the United States are citizens of the United States and the State wherein they reside. And it further provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deny to any person within the State the equal protection of the laws.

The issue is whether equality of access to public accommodations is a right which is protected under the 14th amendment. If it is not, the Congress could not legislate upon it.

I have already made the point that the *Civil Rights Cases* of 1883 never passed upon the question of whether or not it was a right. It simply said the language enacted by the Congress in 1875 did not in any way show any connection with State action which is prohibited under the 14th amendment.

I would point out since that time—and I will be brief—that the courts have implied, and in some cases directly held, that the concept of State action falling within the purview of the 14th amendment applies to a wide variety of situations. The courts have held, for example, that a restaurant licensed by a State in a bus terminal cannot discriminate.

The point I make is that the bill which Senator Dodd and I have introduced is based on the premise that in the licensing of a business which is held out to the public, the State has manifested its interest significantly and in such a way as to bring discrimination in such private businesses under the prohibition of the 14th amendment. When a State licenses, it has then the power to enforce safety regulations, health and sanitation regulations, fire regulations, and all other police power regulations, and thereby asserts the public interest. I would go further and say that when it gives a license to a company or private business which holds itself out to public use, it confers upon that business the opportunity to discriminate. I believe that it would be found that a business which is licensed and which is held out to the public comes within the purview of the 14th amendment.

I make another point. In the sit-in cases decided a few weeks ago by the Supreme Court (*Peterson* v. *City of Greenville; Lombard* v. *Louisiana; Wright* v. *Georgia; Avent* v. *North Carolina; Gober* v. *Birmingham;* and *Shuttleworth* v. *Birmingham*)—cases where persons were claiming service in various types of "public accommodations" and it was shown that the State had intervened by law or ordinance or proclamation of its officials—the courts held the States could not enforce discrimination by trespass prosecutions. I think it is logical that if they could not enforce discrimination, the individuals had a right to be where they were. Otherwise, the right of property could have been asserted and protected by criminal prosecutions.

If we are going to deal with this question of the use of public accommodations, I think it imperative that Congress should enact legislation which would meet it fully and squarely as a right under the 14th amendment, and not indirectly and partially as the administration's approach would do.

Rights under the Constitution apply to all citizens, and the integrity and dignity of the individual should not be placed on lesser grounds such as the commerce clause.

The CHAIRMAN. Thank you, Senator Cooper.

Any questions?

Senator Morton?

Senator MORTON. First I want to commend you, Senator Cooper, on a very comprehensive presentation.

Now when the Attorney General was here he, in pointing out the advantages as he sees them of the administration's approach as contrasted to your approach, made much of the fact that the States could do away with the licensing provisions which they have. I notice that you have on page 3 of your bill, in both sections 4 and 5 of the bill you mention the license as determining the business that would come under the purview of your bill. Would you have any comment on his position?

Senator COOPER. Yes. I think it would be absolutely foolish to believe that States would do away with their licensing powers. If they did that, they would lose their police powers—the power to control safety regulations, health regulations, fire regulations, etc. They would lose their control over business. Anyone could go out and set up a saloon on a street corner. That kind of argument is foolish and impractical.

But even if some States or communities were foolish enough to do it, the courts have held that devices to escape constitutional requirements must be struck down. If in fact the equal right of a person, Negro or otherwise, to use a private business held out for public use is a constitutional right, the courts would not let a State or community by such a device find a way to escape or avoid the law. There have been decisions to this effect.

Senator MORTON. I am in agreement with you on that, but I think that point should be made for the record.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. No questions.

Senator HART. Mr. Chairman, just one question. When you suggest that the 14th amendment, the old *Civil Rights* cases, would not be applicable today, do you not feel that the Court would not take the position the 14th amendment is regarded no longer as applicable only to State action? Perhaps I can phrase it more directly.

Senator COOPER. I do not say that. The Court in 1883 did not pass upon whether there was a constitutional right of equal access to public accommodations.

Since that time, the decisions of the Court have shown that their definition of State action has been broadened. If it is not State action, I would agree, it would not come under the 14th amendment.

Senator HART. Thank you.

The CHAIRMAN. Your contention is that in the recent sit-in cases that the Court got a little bit away from the 1883 case when they said that there is a right; otherwise they couldn't have decided the way they did in the sit-down cases.

Senator COOPER. That is correct. In the 1883 case they pointed out that the act which the Congress enacted in 1875 had nothing in it at

all about the State prohibiting or State acting to support discrimination. Since that time their holdings that the State cannot enforce such discrimination seem to me to imply logically that this constitutes a type of discrimination within the terms of the 14th amendment. I think it will be much simpler for the Congress to enact legislation prohibiting discrimination in public accommodations held out for public use and which are connected with the State through its regulatory powers. The 14th amendment approach would be clearer, would affect equally all persons who claimed the right of use, and would affect equally all businesses—than to rely upon the interstate commerce clause. Moreover, I think the commerce approach will continue discrimination to some extent, and provoke litigation and further trouble.

The CHAIRMAN. You suggest further that the matter, if you go into any type of exemption at all under the interstate commerce clause that there might be a tendency to create discriminations trying to get away from some of the practical problems involved in this situation.

Senator COOPER. That is perfectly obvious. One restaurant, under this bill, would be enjoined against discriminatory practices, while its neighbor would be legislatively endowed with the power to practice discrimination. The commerce approach will create inequality and discrimination between businesses, as well as condone discrimination by some businesses.

I would vote for this bill, for it is a bill which will advance nondiscrimination. But I see it creating difficulties, and I think the Congress will be called upon later to set up regulations and prescribe, or try to prescribe, what businesses will be affected, or authorize a Government agency to set up its regulations—which will bring the Federal Government more and more into the regulation of businesses. That is one of the reasons I believe the 14th amendment approach is better.

I will make one other point as this will probably be my last chance.

The CHAIRMAN. No; you are welcome anytime.

Senator COOPER. There is also a question of enforcement. Under the interstate commerce approach, enforcement will be centered in the Federal Government. I think the Federal Government does need authority to enforce its provisions. We have waited too long in attempting to solve these questions wholly by negotiation, and not set them in the framework of law. But in vesting law enforcement in the Federal Government, it reduces the incentive of the local governments to also participate. The bill which Senator Dodd and I have introduced properly gives the Attorney General and the Federal Government the power of enforcement. But because the 14th amendment covers State action, it would make it incumbent upon the State, its legislature, and its enforcement officials to adhere to the law, and thereby they would be brought more closely into the support and enforcement of the law.

The CHAIRMAN. Thank you.

Senator HART. Mr. Chairman, would it not follow, and I ask Senator Cooper so that all of us would have a chance to evaluate, if we take the position that we should report a bill out based on the 14th amendment, reasoning as you do, Senator Cooper, that there is a constitutional right to be accommodated equally in any business that has either a direct license from the State or that you reason is State regulated because of public services that are made available to it, it

would be impossible to provide any exemption, Mrs. Murphy or anybody else wouldn't that be true?

Senator COOPER. No.

Senator HART. Wouldn't you say we are trying to legislate against the Constitution?

Senator COOPER. The exemption would be much more limited, but the exemption in my reasoning would be tied to the question of whether the business was held out to public use. By its nature, a small rooming house or small boarding house where people live for months or years in a personal kind of relationship would not be held out to the public generally. But I will say that this would be a much more limited exemption than that under the interstate commerce clause.

I make this point, also. If we pass the interstate commerce bill, and the court finally rules that equal protection in the use of public accommodations fall under the 14th amendment, any law we pass on the commerce clause will go right out the window. I think you will agree.

Senator HART. It would follow then, if the 14th amendment approach to the Cooper-Dodd bill is added, and I for one would like to see just the broadest possible reach attempted by any bill we report out, but if that is added does it not follow that anything which is required in any region of the country to be licensed, whether by State or local, including a 2-room house, if there is a city ordinance that requires that to be licensed, that no exemption could be written into the bill that would be constitutional.

Senator COOPER. That is right, but it could be declared by the Congress that the bill does not apply to businesses not held out generally to the public. It is a difficult thing to do. But it is difficult from the interstate commerce approach, also, and I think there is a distinction.

I will close now by saying this: We know how difficult these problems are, and how difficult it will be to enact any kind of legislation. We also know that even after it is enacted, it will be difficult to secure full support for a time. There will be difficult problems of enforcement, and many people in this country will not like what we do. The time has long passed for action. The Congress and the country cannot delay a decision on this national question—a constitutional and moral question—upon the basis of our emotions, prejudices, or biases, or whatever they may be. We are faced with a national issue, a constitutional issue, and a moral issue. We have been faced with these issues for a long time. I believe the failure to meet them squarely will perpetuate the divisions and encourage the violence which is beginning to come into play. It is not the tradition of this country or of our free system to have its governmental issues decided by force or by compulsion. These are the basic reasons I believe that the Congress now must come to full grips with this issue. If we believe that there is an equal right of all our citizens to use accommodations held out for public use, then we ought to decide once and for all that it applies to all businesses which fall within the scope of the 14th amendment.

The CHAIRMAN. Well, I want to say this: I don't think that the past Congresses are wholly at fault in this matter.

Senator COOPER. I agree.

The CHAIRMAN. Because we did think the best way to do this—and I have heard this talked over and argued many times—was that the States themselves should do the job.

Senator COOPER. Yes.

The CHAIRMAN. The country proceeded at a fairly fast pace on State laws or Executive orders or local ordinances. Now, 32 States have done what this bill suggests here.

But it got to that slowup point where the Congress, in effect, is saying, "Well, if all 50 States won't do it, or apparently they are dragging their heels in this matter, then I guess it is incumbent upon us to act." But there was rapid progress in this field, and I can see why some of the Congresses would say that this looks like a good way to do it and the States have good laws.

When you say some people in the country won't like it, what we do here, no matter what we do, you are correct. But people in the States that have these laws have found that they are not what they have feared.

I do not recall in my State, offhand, having any trouble with the law at all and it is similar to this, almost identical.

Senator COOPER. I agree with you that the States have had the power to legislate.

The CHAIRMAN. A lot of people, if we can get this passed and get it over and behind us, will look back and say, "Some of the things we feared didn't exist in this matter at all, and the beneficial results will be much greater."

Senator COOPER. We, in our State of Kentucky, do not have some of the problems which exist in the deep South. After the Brown case, and an initial flurry of opposition, it all ended.

The CHAIRMAN. And the problem of discrimination in certain cases, the times themselves have increased the problem of discrimination due to the movements of people in these United States in the past very few years. So the past Congresses, I think, were cognizant of this thing and I think they felt a responsibility, but times and conditions have brought us up to a different point.

We thank the Senator from Kentucky.

Senator COOPER. Thank you.

The CHAIRMAN. The Senator from New York has been waiting for about 2 days, too.

We will be glad to hear from Senator Keating at this time.

STATEMENT OF HON. KENNETH B. KEATING, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator KEATING. Mr. Chairman, and members of the committee, most of the public controversy about the President's civil rights program has concerned the public accommodations provision contained in the bill, S. 1732, before this committee.

I strongly support the objectives of this bill, and consider it one of the most important provisions in the civil rights package. While I intend to suggest some amendments, I have joined as a cosponsor of S. 1732 because, in my judgment, legislation to provide equal access to places of public accommodation is essential to any meaningful civil rights program.

There has been speculation that the public accommodations provision of the President's omnibus bill may be scrapped to avoid a filibuster against the whole civil rights package. I would regard this as a major tactical error and hope that these reports are unfounded. The Senate followed a similarly misguided strategy when it struck part III—the civil injunctive provision—from the President's 1957 civil rights bill.

I speak of that with some feeling, because I was, at that time, the ranking minority member of the House Committee on the Judiciary, and my stalwart chairman, Congressman Celler, and I fought hard to keep in that provision. In my judgment, had it not been taken out in the Senate, we would not be faced with many of the problems confronting us today.

The Nation has paid dearly in the intervening years for this compromise with the opponents of civil rights legislation, and I would predict even more awesome consequences if we repeat our error this year.

It has become commonplace to point out that it is now over 100 years since the adoption of the Emancipation Proclamation, and to read from that historic document the fundamental premises upon which the struggle for civil rights is still based. Certainly the Emancipation Proclamation and the Constitution itself do provide the foundation of law and principle on which every legislative proposal to advance civil rights must be erected. However, I would like to read two less familiar passages to the committee today—one, a decade short of a century in vintage; and the other, more than two centuries old—which, in some ways, have even more direct relevance to the public accommodations problem.

The first comes out of the debate in the House of Representatives on the Civil Rights Act of 1875. This act provided that—

all persons, within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

It took 5 years for this proposal to go through Congress, from its introduction by Senator Charles Sumner of Massachusetts, on May 13, 1870, to its enactment on March 1, 1875, during which period it was subject to all the delaying tactics that the rules of procedure permitted.

It was in the second session of the 43d Congress, during consideration of the bill in the House, that Representative John Lynch of Mississippi, one of the seven Negro Representatives then in Congress, made this statement:

Think of it for a moment; here am I, a Member of your honorable body, representing one of the largest and wealthiest districts in the State of Mississippi, and possibly in the South; a district composed of persons of different races, religions, and nationalities; and yet, when I leave my home to come to the Capital of the Nation, to take part in the deliberations of the House and to participate with you in making laws for the Government of this great Republic * * * I am treated, not as an American citizen, but as a brute. Forced to occupy a filthy smoking car, both night and day, with drunkards, gamblers, and criminals; and for what? Not that I am unable or unwilling to pay my way; not that I am obnoxious in my personal appearance or disrespectful in my conduct, but simply because I happen to be of darker complexion * * *

Mr. Speaker, if this unjust discrimination is to be longer tolerated by the American people * * * then I can only say with sorrow and regret that our boasted civilization is a fraud; our republican institutions a failure; our social system a disgrace; and our religion a complete hypocrisy.

This was a powerful plea and had a dramatic impact on the House, although it took superhuman effort, including one session that lasted for 46 continuous hours, to permit the will of the House to be expressed in the face of the obstructionist tactics of the opposition. If we change "smoking cars" in Representative Lynch's plea to hotels and restaurants, it could serve today as an equally compelling statement of the need to deal with the situation Negroes still face in some areas of our Nation.

Of course, the Nation has not stood still since 1875, even though the Federal Government has enacted nothing since that day as far reaching as the Civil Rights Act of that year.

Three States, Massachusetts, New York, and Kansas, had equal accommodations laws even before the act of 1875, and 27, have followed suit since then. This alone would indicate that the proposal we are now considering is in no sense novel or radical. But its roots really go back even further, to the English common law from which the legal system of the United States is derived.

This brings me to the second quotation which I would like to read to the committee; a passage from an opinion in an English case decided 262 years ago (*Lane* v. *Cotton*, 12 Mod. 372 (1701)):

Whenever any subject takes upon himself a public trust for the benefit of the rest of his fellow subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him * * * If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. If the innkeeper refuse to entertain a guest, when his house is not full, an action will lie against him; and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier.

Today it isn't blacksmiths, or wagon trains that concern us but other businesses established to serve the public, but the obligations, the public trust, these new businesses have assumed are no different from those of their common law predecessors. Centuries of legal history expose as sheer nonsense charges that the public accommodations proposals reflected in bills such as S. 1732 are an unprecedented interference with private property rights.

The CHAIRMAN. There is an interesting case. At one time it required the King who had a ferryboat across the Thames to accept public passengers.

Senator KEATING. Yes, this is nothing new and screams of anguish from those who say this is an effort to establish some devastating new principle simply are not borne out by history.

Where were those who rail against attempts to impose constitutional standards on the operations of such businesses, when States and communities were imposing far more restrictive and detailed restrictions of another sort on these same businesses—restrictions such as those in the city of Greenville, S.C., which are referred to in the Supreme Court's opinion in the sit-in cases (*Peterson* v. *City of Greenville* decided May 20, 1963).

The Greenville City ordinances made it unlawful for—

any person owning, managing, or controlling any hotel, restaurant, cafe, eating house, boarding house, or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter—

except where separate facilities are furnished.

Separate facilities, the ordinance solemnly recites, must include, "separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise"; a "distance of at least 35 feet * * * between the area where white and colored persons are served"; and separate facilities "for the cleaning of eating utensils and dishes furnished the two races."

No one has ever proposed a bill in Congress in favor of civil rights which would interfere nearly as drastically with private property rights as does this Greenville ordinance directed against civil rights. A storekeeper or restaurant owner faced with this kind of restriction on how he can operate his business isn't making a free choice as to whom to admit to his property, he is forced to exclude Negro patrons (unless he can comply with the incredible provisions for separate facilities) or face criminal prosecution by the local constabulary.

An equal accommodations law is no more an interference with private property rights than an unequal accommodations law. There is one crucial difference, however—equal accommodations requirements find sanction in centuries of legal history and in the Constitution of the United States, whereas enforced racial discrimination in such places is repugnant to the whole spirit of our heritage and the fundamental law.

Now Mr. Chairman, I turn to three suggested amendments: The findings contained in section 2 of S. 1732 spell out clearly the conditions which require Federal action to eliminate discrimination in public accommodations.

Negro citizens are—

subjected in many places to discrimination and segregation, and they are frequently unable to obtain the goods and services available to other interstate travelers.

Negro citizens who travel interstate are—

frequently unable to obtain adequate lodging accommodations during their travels, with the result that they may be compelled to stay at hotels or motels of poor and inferior quality, travel great distances from their normal routes to find adequate accommodations, or make detailed arrangements for lodging far in advance of scheduled interstate travel.

And Negro citizens who travel interstate are—

frequently unable to obtain adequate food service at convenient places along their routes, with the result that many are dissuaded from traveling interstate, while others must travel considerable distances from their intended routes in order to obtain adequate food services.

These findings, and others in the bill, express coldly and factually the injustices and indignities against which this legislation is directed. Just consider for a moment the effect on a Negro veteran or serviceman who is told that a restaurant which purports to serve the public is off limits to him and his children. These are not just legal problems, they are human problems with a devastating impact not only on these

who are the particular victims of discrimination, but on the noble inheritance we all share as Americans.

The CHAIRMAN. I am sure the Senator from New York will agree with the chairman. Where the big problem is, is the great number of Negroes in this country, because there are other discriminations that we want to eliminate.

Senator KEATING. There is no question about that, Mr. Chairman.

The CHAIRMAN. These discriminations create some peculiar cases and this sort of thing. The approach that we are trying to take here we hope will cut across the board on all these things.

Senator KEATING. Of course, this bill is limited to discrimination based on race, color, creed, or national origin, but I understand the chairman's point.

The findings recited in the bill include a statement that the discriminatory practices against which the bill is directed are—

> in all cases encouraged, fostered, or tolerated in some degree by the governmental authorities of the State in which they occur, which license or protect the businesses involved by means of laws and ordinances and the activities of their executive and judicial officers * * *.

They also include a declaration that these practices—

> can be best removed by invoking the powers of Congress under the Fourteenth amendment and the commerce clause of the Constitution of the United States * * *.

These statements, in my judgment, are sound and certainly we should draw on all of the provisions of the Constitution which support this legislation.

(1) The substantive provisions of the bill, however, are not as broad in scope as the declarations on which they are based. In every instance specified in section 8 of the bill, reliance is placed solely on the commerce power rather than the power of Congress to enforce the equal protection clause of the 14th amendment.

I believe that this is a mistake and would urge the committee to give serious consideration to an amendment which would make the bill applicable to cases involving denials of equal protection as well as cases involving interstate commerce. The result I have in mind could be accomplished by combining the provisions of Senator Cooper's public accommodations bill (S. 1591), which was cosponsored by a substantial number of Senators from both parties, with the provisions of the President's bill.

Senator Cooper's bill, based on the 14th amendment power, is applicable to any "business or business activity affecting the public which is conducted under a State license." This would reach many places excluded by reliance solely upon an interstate commerce test.

On the other hand, the interstate commerce test conceivably would reach some places not covered by the State license test. Obviously, we can give this bill its broadest coverage consistent with the Constitution by incorporating both standards, and, in my judgment, we should take this step.

We should include both standards in the substantive part of the bill as we have in the recitals in section 2. I am preparing appropriate language which I will submit to the committee before your hearings terminate.

The CHAIRMAN. The committee will be glad to entertain that suggestion and, as a practical matter, Senator Cooper is still here. Your bill was referred to the Committee on the Judiciary.

Senator COOPER. That is correct.

The CHAIRMAN. Obviously any action in this particular matter will come with our deliberations on these bills we have before us now, because the other bills on public accommodations have all come here. We have two or three others. Senator Hart and others have a bill.

So, if Senator Cooper, Senator Keating, or both of you would prepare for us an amendment to S. 1732 embodying the pertinent parts of the so-called Cooper bill, it would then come to our committee without this referral.

Senator KEATING. I will be very glad to work with Senator Cooper.

Senator COOPER. May I say that Senator Keating is also a sponsor of the bill which Senator Dodd and I introduced? I think once you have assumed jurisdiction that an amendment such as Senator Keating proposes should be considered.

The CHAIRMAN. Then we will have a chance to discuss it. Otherwise we would not.

Senator KEATING. As a member of the Committee on the Judiciary, as I know Senator Hart will agree, it is my belief that the chances of such a bill emanating from this committee are much better than a bill emanating from the Committee on the Judiciary.

(2) Our experience under State public accommodation laws suggests the desirability of another change in the language of the bill. The courts have tended to construe narrowly the coverage of these State laws, one case holding, for example, that "restaurants and lunchrooms" were not included under a statute prohibiting discrimination at any "inn, hotel, or boardinghouse, or any place of entertainment or amusement for which a license is required by the municipal authorities," even though a State license was required for the operation of restaurants and lunchrooms.

As a result of such decisions, the State laws have necessitated frequent amendment and the list of covered establishments has grown larger and longer. The New York law, for example, lists almost 50 specific places to which it is applicable in addition to containing a general prohibition against discrimination "in places of public accommodation, resort, or amusement." The specific places listed include music halls, skating rinks, and public elevators, none of which are expressly referred to in S. 1732.

I am not recommending that the committee write into the law the same list as is contained in the New York statute, but rather than it include language which would make it clear that the places which are listed in section 3 of S. 1732 are not intended to exclude application of the law in appropriate cases to other places of public accommodation. I believe that this is important to avoid unduly technical construction of the act which might defeat its basic objectives, and hope that the committee will approve an amendment for this purpose.

(3) Finally, I would suggest to the committee that it also give serious consideration to an amendment to S. 1732 which would include discriminatory advertising among its prohibitions. Such a provision is contained in the New York civil rights law and has been upheld by our highest court as necessary "to forbid the accomplishment of the

discrimination barred by the statute, not only by direct exclusion, but also by the indirect means specified." (*Woolcott* v. *Shubert*, 217 N.Y. 212 (1916).)

The States of Colorado, Illinois, Maine, Massachusetts, Michigan, New Jersey, Oregon, Pennsylvania, Washington, and Wisconsin have similar statutes banning discriminatory advertising as well as discriminatory selection of patrons. Ironically, but significantly in terms of the justification for such a provision, Virginia, which does not have a State equal-accommodations law, is one of the States that bans advertisements that express any religious discrimination.

Undoubtedly other amendments to S. 1732 will be suggested during the committee's hearings and study of this legislation. I am confident that these will receive the committee's careful consideration, but I hope that the committee will reject any amendments designed to water down the provisions of this bill or to make its enforcement more difficult and uncertain.

This legislation and other measures proposed by Members of Congress of both parties before the President's package was unveiled, needs no apologies. If it strikes some as far reaching, it is because we have condoned for too many years practices which have no sanction or justification either in law or morality. A combination of circumstances has presented us now with an opportunity to deal boldly and decisively with this situation. This is an opportunity which we must accept not reluctantly, but boldly and decisively.

I thank you, Mr. Chairman, for this opportunity to appear before your fine committee of which I was once very proud to be a member.

The CHAIRMAN. When you talk about discriminatory advertising—and I haven't checked it in our State—do they refer to on-premise advertising or advertising in say, travel magazines?

Senator KEATING. Any advertising would be covered.

The CHAIRMAN. Not necessarily on premise.

Senator KEATING. No, I think not. In the New York statute it says:

> Directly or indirectly publish, circulate, display, post, or mail any written or printed communications, in advertising or advertisements.

It is very broad. I am not sure about the Washington statute.

The CHAIRMAN. I think it must be the same.

Senator KEATING. I am sure it is right up to date.

The CHAIRMAN. But it seems in accommodations you have on the premises a sign in which they suggest they want a certain type of figure. But nowadays I guess when you travel along the highway, 50 miles before you get to the establishment, somebody suggests you come in or tells you what the accommodations are and this would include all of that.

Senator KEATING. I think it should be broad enough to cover all kinds of advertising.

The CHAIRMAN. So much of this advertising, particularly in the resort areas is by direct mail.

Senator KEATING. Yes, that is right.

The CHAIRMAN. Now, some one asked me the other day if our bill, or the Cooper bill, or any other bill here, covered bathing beaches or fishing places not run by the public but by a private individual inviting the public. I know that some State laws do this but what I want

to ask is, in New York if it is a public beach run by the State or by a city, it is open, isn't it?

Senator KEATING. That is right. It is open. If it is a private premise, it's not covered by the statute.

The CHAIRMAN. But you have so many of those almost private areas in New York where they advertise a great deal or where people go and they hold themselves open to the public as such, but they are still private. I don't know whether it comes under that, but we will look into it.

All right. We thank the Senator from New York and the committee will recess until 10 o'clock on Monday, July 8. We are going to move to room 1202, the New Senate Office Building, instead of this room and we will proceed as many days as necessary next week. But we will have to proceed in the mornings only.

We will print S. 1622 also in the record.

(The bill follows:)

[S. 1622, 88th Cong., 1st sess.]

A BILL To prevent certain discriminatory practices by persons engaged in businesses affecting commerce

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever a person engaged in any business affecting commerce refuses or denies to any other person, or withholds from another, equal treatment in the facilities, services, or accommodations afforded by one in such business on the ground of race, religion, color, or national origin of such other person, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

SEC. 2 (a) When used in this Act, the term "business affecting commerce" includes those engaged in transporting goods in commerce, in selling goods or services in commerce, in purchasing goods in commerce for resale, in purchasing services in commerce, or in advertising in commerce or through the use of the mails or by radio or television.

(b) The term "commerce" includes trade, traffic, commerce, transportation, or communication among the several States; or between any State or Commonwealth or possession of the United States or the District of Columbia any place outside thereof; or within the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States; or between points in the same State but through any point outside thereof.

(The three admendents introduced by Senator Keating to the bill, S. 1732, appear on p. 6.)

(Whereupon, at 12:45 p.m., the committee adjourned to reconvene at 10 a.m., on Monday, July 8, 1963, in room 1202, New Senate Office Building.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

MONDAY, JULY 8, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 10 a.m., in room 1202, New Senate Office Building, the Honorable Warren G. Magnuson, chairman of the committee, presiding.

The CHAIRMAN. The committee will come to order.

This morning we are pleased to have with us the Head of the Civil Rights Division, Assistant Attorney General Burke Marshall.

In addition to his prepared statement, I hope the witness will go on and discuss, if he wishes, some other phase of this problem, the recent demonstrations, what further ones can be expected, and the Justice Department's role in these events, which has been considerable, and how this bill, 1732, could be helpful in these situations.

We will be glad to hear from you at this time, Mr. Marshall.

STATEMENT OF BURKE MARSHALL, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. MARSHALL. Mr. Chairman, I appreciate this opportunity to appear before the committee to testify in support of S. 1732, a bill to prohibit discrimination and segregation in places of public accommodation.

Discrimination in education, in employment, and in other phases of American life is morally wrong and it has now and has had very serious economic consequences. Yet our experience during the last few years and particularly during the last few weeks has demonstrated that no problem is of greater immediate importance than discrimination in places of public accommodation. That is why this portion of the President's civil rights program is essential.

The establishments covered by S. 1732 are in business to serve the public. This is their purpose and their livelihood. Yet countless members of the public—citizens of this country guaranteed equality of treatment by our Constitution—daily suffer the humiliation of being denied service for no reason other than the color of their skin. Nor is this discrimination sporadic or incidental, but, where it exists, for the most part, it is systematized and complete. It is not directed against certain Negroes as individuals; all Negroes are totally excluded from virtually every restaurant, from every hotel, from every lunch counter in the entire area.

Events of recent weeks and months have underscored the intensity with which millions of our citizens resent this treatment. Beginning

in 1960, when the first lunch counter sit-ins occurred in North Carolina, the protest movement against discrimination has spread to many cities in many States.

The following is just a partial list of localities in which demonstrations protesting this kind of discrimination and other kinds have occurred:

Birmingham and Gadsden, Ala.; Sacramento, Calif.; Stamford, Conn.; Daytona Beach, St. Augustine, Tampa, Palm Beach, and Tallahassee, Fla.; Washington, D.C.; Atlanta, Albany, Columbus, and Savannah, Ga.; Chicago, Ill.; Marion, Ind.; Des Moines, Iowa; Kansas City, Kans.; Baton Rouge, La.; Baltimore and Cambridge, Md.; Jackson, Clarksdale, and Biloxi, Miss.; St. Louis, Mo.; Englewood, N.J.; Philadelphia, Pa.; Buffalo, N.Y.; Durham, Chapel Hill, Fayetteville, New Bern, Greensboro, Williamston, Raleigh, and Lexington, N.C.; Chattanooga, and Nashville, Tenn.; Charleston and Beaufort, S.C.; San Antonio, Tex.; Danville, Va.; Detroit and Grosse Pointe, Mich.; Denver, Colo.; Oklahoma City, Okla.; and Beloit, Wis.

Some of these protests involved grievances other than the denial of service by a place of public accommodation, but in many others, discrimination in such places was a major target and for obvious reasons.

A traveler seeking a place to sleep or to eat who is turned away by one establishment after another solely because of his color understandably becomes exasperated. So is a Negro who is invited to purchase goods in a department store but is rejected when he seeks to sit down for a sandwich or a soft drink.

There are some who have said that these problems can be solved by means of persuasion and mediation. We have attempted this approach, with some success, but we also recognize its limitations. Persuasion will not solve the problem in a locality where all establishments but one want to desegregate, but cannot do so for fear of giving a competitive advantage, in increased white trade, to the one exception. It cannot solve the problem in a locality where feelings of racial supremacy are so ingrained that voluntary action is impossible.

Thus, the need for legislation is plain. Equally plain, it seems to me, is the authority of Congress to enact such legislation. In my judgment, such authority exists by virtue of the commerce clause, the 13th amendment, and the 14th amendment. For the reasons the Attorney General developed in detail last week, it is our view that, while the Supreme Court might well ultimately uphold a public accommodations statute based on the Civil War amendments, this is by no means a certainty. I shall not repeat the reasons which have led us to that conclusion. But I do wish to discuss additional aspects of the commerce clause basis for the bill and the reasons for our belief that legislation enacted pursuant to that clause would be clearly constitutional.

Let me dispel at the outset a possible misconception concerning the scope of S. 1732. We do not propose to regulate the businesses covered merely because they are engaged in some phase of interstate commerce. Discrimination by the establishments covered in the bill should be prohibited because it is that discrimination itself which adversely affects interstate commerce.

Section 2 of the bill describes in detail the effect of racial discrimination on national commerce. Discrimination burdens Negro inter-

state travelers and thereby inhibits interstate travel. It artificially restricts the market available for interstate goods and services. It leads to the withholding of patronage by potential customers for such goods and services. It inhibits the holding of conventions and meetings in segregated cities. It interferes with businesses that wish to obtain the services of persons who do not choose to subject themselves to segregation and discrimination. And it restricts business enterprises in their choice of location for offices and plants, thus preventing the most effective allocation of national resources.

Clearly, all of these are burdens on interstate commerce and they may therefore be dealt with by the Congress.

Another question which has been raised concerns the propriety of congressional regulations of a business activity where the regulation would affect both interstate and intrastate commerce. As long ago as 1911, however, in *Southern Railway Co.* v. *United States* (222 U.S. 20), the Supreme Court held that the congressional power to regulate interstate commerce is not to be defeated or diminished merely because as a result of such regulation intrastate commerce was also being regulated. This was made explicit in the celebrated *Shreveport Rate* case (*Houston, East & West Texas Ry. Co.* v. *United States*, 234 U.S. 342) and in *United States* v. *Darby* (312 U.S. 100) in which the Supreme Court said that Congress may regulate intrastate transactions which—

> are so commingled with, or related to, interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled.

There is, of course, no means for determining precisely whether a person is or is not an interstate traveler. Many travelers move by automobile and do not carry tickets or other means of identifying themselves as interstate travelers. And the courts have established that to require a Negro to prove that he is an interstate traveler while not imposing a similar requirement on others is in itself a prohibited form of discrimination (*Baldwin* v. *Morgan*, 287 F. 2d 750 (C.A. 5)).

Acting upon similar general principles, the Supreme Court has many times sustained the exercise of congressional power to regulate intrastate activities where they have an impact upon interstate commerce. In *United Mine Workers* v. *Coronado Co.* (259 U.S. 344 (1922)), the Court said that if—

> certain recurring practices, though not really a part of interstate commerce, (are) likely to obstruct, restrain, or burden it, (Congress) has the power to subject them to national supervision and restraint.

This rule has been applied to the regulation of such diverse objects as wheat grown for home consumption (*Wickard* v. *Filburn*, 317 U.S. 111); intrastate milk production (*United States* v. *Wrightwood Dairy*, 315 U.S. 110); and wage rates for employees locally producing lumber ultimately intended for interstate shipment (*United States* v. *Darby*, 312 U.S. 100). No reason is apparent why it should not also be applicable to establishments practicing racial discrimination.

The bill before this committee is based on sound constitutional principles. It constitutes vitally needed legislation. It would remedy what patently is an injustice and it would do so by the normal processes of law. I urge its enactment.

Thank you, Mr. Chairman.

(Discussion off the record.)

The CHAIRMAN. On the record.

I am going to have to leave for a very important engagement at the White House. I am going to turn the meeting over to the Senator from South Carolina.

Senator THURMOND. Since the Senator from South Carolina may have more questions than the average Senator, I will call on the other Senators first. I regret many of the Senators have other engagements and I don't wish to delay them.

Senator Lausche?

Senator LAUSCHE. Will you restate your present position with the Government, please?

Mr. MARSHALL. I am Assistant Attorney General, Senator, in charge of the Civil Rights Division in the Department of Justice.

Senator LAUSCHE. You are of the opinion that this bill is constitutional in all respects under either the 13th amendment, the 14th amendment, or the commerce clause. Is that correct?

Mr. MARSHALL. That is correct, Senator.

Senator LAUSCHE. Have you studied the decision of 1883?

Mr. MARSHALL. Yes, Senator.

Senator LAUSCHE. Could you tell me what constitutional right the Court felt was violated of the person operating a place of entertainment and restaurant when the Congress passed the act of 1875 making obligatory the rendition of service and the sale of goods?

Mr. MARSHALL. I don't believe the Court held that any constitutional rights of the proprietors of business establishments were being violated. The Court held the Congress was without power to enact that statute and the statute was therefore unenforcible and invalid. But I don't recall that the Court held that any constitutional rights would have been infringed by it, if it had been within the power of Congress to enact the statute.

Senator LAUSCHE. The Court did hold it was not within the power of Congress to compel a proprietor to render services or sell goods under the 14th amendment of the Constitution.

Mr. MARSHALL. That is correct, Senator.

Senator LAUSCHE. Now, then, you are of the belief that the Court by implication did not declare that there were constitutional rights violated when the Congress passed a law making mandatory the sale of goods and the rendition of services?

Mr. MARSHALL. That is correct, Senator. I do not believe the Court impliedly held that.

Senator LAUSCHE. Well, it said that the patrons did not have the right to that service; didn't it?

Mr. MARSHALL. That is right, Senator.

Senator LAUSCHE. So when it said the patrons did not have the right to that service, didn't it by implication state that the proprietor, under the Constitution, could not be compelled to sell the product or render the services?

Mr. MARSHALL. Senator, the Court certainly held that in its view Congress did not have the power under the 13th or 14th amendment to compel the proprietors to render service to Negroes. They certainly held that, Senator.

Senator LAUSCHE. Now, then, I want to explore at this time whether you know of any other law on the statute books of the United States which gives a right to a citizen to call upon the Attorney General of the United States to institute legal proceedings for him, except

the one involved in this bill or such other civil rights bills as we might have?

Mr. MARSHALL. Well, Senator, I think that a great many statutes are administered to some extent in that way. For example, the antitrust laws are administered a good bit from complaints from individuals who feel that they have been hurt by something they think was an antitrust violation by another company. The Antitrust Division of the Department of Justice has always worked that way. The Federal Trade Commission has always worked that way. So I think there are laws that are administered to some degree in that way. But I don't know of any offhand which has written into it the requirement of this kind of a written complaint to the Attorney General from individuals.

Senator LAUSCHE. That is, do you think that the antitrust violation might have some semblance to what is intended in this bill?

Mr. MARSHALL. Well, Senator, I don't mean to imply they are to same. I say they often originate with a complaint from a private citizen. But of course the suit that is brought by the United States is to protect and vindicate the interests of the United States, not just the interests of the private citizen.

Senator LAUSCHE. Do you know whether or not, when the Kennedy-Ives bill and the Kennedy-Ervin bill, the labor bills, were before the Congress it was suggested that there be included in those bills a provision giving the right to an offended member of a labor union to call upon the Attorney General to institute proceedings against the officials of the labor union to procure rights?

Mr. MARSHALL. Senator, I am not acquainted with the history of that bill; no.

Senator LAUSCHE. Would you concede this is at least a novel approach of having the Attorney General called upon to institute proceedings for the procurement of private rights?

Mr. MARSHALL. Senator, the matters that are covered by this bill, the substance of the legislation, is not just a question of private rights. The economy of this Nation as a whole, and other interests that are national interests, are hurt by the cumulative practices that are sought to be prohibited by the bill. So it is not just a question of vindicating private rights and giving the Attorney General the power to initiate action to compel compliance with the substantive provisions of the act. I would not accept, Senator, the premise of your question.

Senator LAUSCHE. Well, do you think it will create a precedent under which, in various other subjects, requests will be made to require the Attorney General of the United States to institute legal proceedings which normally, under our system, have to be instituted by the aggrieved individual?

Mr. MARSHALL. Well, Senator, I think that Congress could enact a bill that was limited to giving private individuals the right to sue. I think that Congress could do that. I think, as I say, that the problem that the bill deals with——

Senator LAUSCHE. You haven't answered my question. My question is do you think it will create a precedent under which subsequently, in other fields, similar provisions will be added?

Mr. MARSHALL. I don't see why it should, Senator; no.

Senator LAUSCHE. All I wanted was an answer.

Now getting down to the commerce clause—do you have a copy of the bill in front of you?

Mr. MARSHALL. Yes, sir.

Senator LAUSCHE. Turn to page 5 of the bill, if you will. I am reading section 3:

All persons shall be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the following public establishments.

And now specifically (1):

Any hotel, motel, or other public place engaged in furnishing lodging to transient guests, including guests from other States or traveling in interstate commerce.

Under this language that I just read, "other public place engaged in furnishing lodging," don't you cover the whole field of operations in which rooms are given out for lodging, whether it be a motel, hotel, a roominghouse or any other accommodation for sleeping purposes and lodging?

Mr. MARSHALL. No, Senator.

Senator LAUSCHE. Will you explain why you think it doesn't cover all?

Mr. MARSHALL. Because in addition to the requirement that the place be public, which I think excludes some roominghouses, there is also the requirement that the lodging be furnished to transient guests.

Senator LAUSCHE. That is a roominghouse that holds itself out to the public, holds itself out both to transients and to domestic customers. Wouldn't that mean that every place that holds itself open to accept either transients or domestics, would be covered?

Mr. MARSHALL. Yes, Senator.

Senator LAUSCHE. And didn't the Attorney General last week say that under paragraph (1) he would not have to be a transient from another State but could be a domestic transient?

Mr. MARSHALL. That is correct, Senator.

Senator LAUSCHE. Now you agree that the language in paragraph (1) is supposed to be absolute and that there shall be no discretion in the court in determining whether that particular business affected interstate commerce?

Mr. MARSHALL. That is correct, Senator. It covers all places that are covered by the definition.

Senator LAUSCHE. And it covers them without question. *Per se* they are deemed to be engaged in interstate commerce?

Mr. MARSHALL. No, Senator. I would be glad to explain that.

Senator LAUSCHE. Go ahead and explain it.

Mr. MARSHALL. Well, I think engaged in interstate commerce, Senator, is a term of art, in a constitutional sense. This statute covers establishments that may not be necessarily engaged in interstate commerce because their activities affect interstate commerce cumulatively. So I think there is that difference.

Senator LAUSCHE. I concur with that. Now, then, you go to the places of entertainment:

Any motion picture house, theater, sport arena, stadium, exhibition hall, or other place of amusement or entertainment, which customarily presents motion

pictures, performing groups, athletic teams, exhibitions, and other sources of entertainment, which move in interstate commerce—

these all would be absolutely covered; is that a fact?

Mr. MARSHALL. Yes, Senator.

Senator LAUSCHE. Now we go to paragraph (3) and it reads:

Any retail shop, department store, market, drugstore, gasoline station, or other public place—

which would cover everything—

which keeps goods for sale, any restaurant, lunchroom, lunch counter, soda fountain, or other public place engaged in selling food for consumption on the premises, and any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire.

That covers all places, doesn't it, as I have read now from paragraph (3)?

Mr. MARSHALL. Senator, of course that is qualified.

Senator LAUSCHE. Yes; but up until now it covers everything?

Mr. MARSHALL. That is right, Senator.

Senator LAUSCHE. You can't mention anything that is excluded until you get to the conditions?

Mr. MARSHALL. Of the kinds of establishments; that is correct.

Senator LAUSCHE. Then you would answer that paragraph (3), in the absence of conditions, covers everything?

Mr. MARSHALL. Every business named, Senator.

Senator LAUSCHE. Now you get to the conditions and there are four of them. I will read Roman numeral (i):

The goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers.

What is your definition of "substantial degree?"

Mr. MARSHALL. More than minimal, Senator.

Senator LAUSCHE. More than minimal?

Mr. MARSHALL. Yes, sir.

Senator LAUSCHE. Can you reconcile the meaning of "substantial" harmoniously with the description more than minimal?

Mr. MARSHALL. Well, Senator——

Senator LAUSCHE. When you say "substantial," can it be said that substantial means more than minimal?

Mr. MARSHALL. Yes, Senator.

Senator LAUSCHE. Doesn't the word "substantial" ordinarily connote essence, the full body, the base?

Mr. MARSHALL. Senator, I believe this about the use of that word in the statute: I think that it is a word that has a legal background from other statutes and from constitutional decisions of the Supreme Court and that those decisions taken as a group, make the word "substantial" mean more than minimal, not insignificant. Something of what sort. I am seeking a definition.

Senator LAUSCHE. I have Webster's Dictionary here and the word "substantial" is defined:

1. Of, pertaining to, or having substance; not seeming or imaginary; not illusive; real; true. Having substance or body.

It is my understanding that the Latin base of substance is sub, under, and stance, standing on a foundation. "Strong, stout, solid; firm."

Your definition, however, is more than minimal. What does minimal mean according to your understanding?

Mr. MARSHALL. An insignificant amount, Senator, or sporadic or incidental sales.

Senator LAUSCHE. Insignificant? I will take a look and see what they say in here about that word.

Minimal:

Constituting a minimum; hence, lowest or least attainable.

You say it is insignificant. Now can you reconcile more than minimal, meaning insignificant, with substantial, which means the body, the base, the strength? Can you reconcile the two?

Mr. MARSHALL. Yes, Senator.

Senator LAUSCHE. Will you do it, please?

Mr. MARSHALL. I think that by more than minimal or not insignificant, we mean something that is substantial; something, for example, which if done by a whole lot of businesses taken together, has a substantial impact on interstate commerce. Now I think that is true of the activities that are proscribed by this bill. Taken together, without question they have a substantial impact on interstate commerce.

Senator LAUSCHE. Well, I am not trying to have you accept my views. I am merely trying to learn the meaning of these terms. The public should then understand that if this bill is passed, the word "substantial," which is used in three of the subparagraphs constituting the conditions, would mean that all proprietary places open to the public would be covered if they did more than a minimum of interstate business?

Mr. MARSHALL. That is correct, sir.

Senator LAUSCHE. I think that is all I have, Mr. Chairman.

Senator MONRONEY (presiding). Senator Morton?

Senator MORTON. Thank you. Mr. Marshall, would you, for the benefit of the committee, briefly describe the procedures and procedural steps involved in requesting and obtaining civil action for relief under section 5 of the bill?

For example, would there be preliminary hearings and notice to the other party, right of appeal and so forth?

Mr. MARSHALL. Well, Senator, are you referring to paragraph (c) of section 5?

Senator MORTON. Well, it is the whole section, Civil Action for Preventive Relief. I am just wondering what the procedures were.

Mr. MARSHALL. Well, there are two procedures, Senator. One is that the person aggrieved can bring a suit himself against the establishment which he claims refuses to serve persons because of their race. And if he does that, then of course, it is his own litigation.

It proceeds in court, Federal court, under the rules of civil procedure, like any other lawsuit. Now, if he does not do that himself, but instead files a complaint with the Attorney General, then the Attorney General has first to make a determination whether the person who made the complaint is or is not able to initiate a suit on his own. And secondly, if he determines the person who made the com-

plaint is not able to bring a suit on his own, whether the purposes of the act will be materially furthered by the filing of an action by the Attorney General.

That second provision, Senator, is meant to avoid having the Attorney General thrust into situations which are really not important enought to warrant using the time and effort of Department lawyers.

If the Attorney General makes those two determinations in a particular case, then he will normally refer the matter to the Community Relations Service, which is provided for in the bill. That service will attempt, by taking it up with the establishment or the establishments concerned, to get the matter safely resolved by voluntary action.

And, if it is unable to do that and if there is no adequate procedure under State law, then the Department of Justice would bring a suit and that would go through the courts in a normal fashion.

Senator MORTON. In a case under this bill that comes before the court, would the burden of proof be on the defendant to prove he does not discriminate?

Mr. MARSHALL. No; I don't think so. I think the burden of proof would still be on the plaintiff. Now, as in the cases which we file under the 1957 act on voting, we have a burden of proving that the registration official denies people the right to register because of their race. And that means we have a heavy burden of proof, really, to show that there is a pattern of exclusion on account of race.

So, I would think it doesn't shift the burden of proof.

Senator MORTON. On page 5 of the bill, section 3(a)(1), what does transient guest mean? How long does a person have to stay or live in a hotel or rooming house to cease being a transient guest?

Mr. MARSHALL. I think, Senator, I wouldn't be able to cover all possible situations with a definition of it, but I think places generally either furnish rooms or apartments to permanent residents or they hold themselves out to people that come for maybe a week at a time or maybe in the case of a summer establishment, for the summer.

But I think that in almost every case you could tell the difference between a place that rents from month to month with the intention of the people that rent from it of staying there and a place that caters to people that move in and out.

Senator MORTON. What effect, if any, do you think the passage of this bill would have on the 30 States that now have antidiscrimination statutes? Does this imply that State authorities are not enforcing the law in these 30 States?

Mr. MARSHALL. No, Senator. I don't think it would have any effect. It would put the Federal Government, perhaps, into the position of cooperation with them.

Senator MORTON. On page 4, subsection (h):

> The discriminatory practices described above are in all cases encouraged, fostered, or tolerated in some degree by the governmental authority of the States in which they occur, which license or protect the business involved by means of laws and ordinances and the activities of their executive and judicial officers.

Don't you think this language might be regarded as rather severe indictment of the Government and law enforcement officials in many of our States?

Mr. MARSHALL. No, Senator. I think the words are "encourage, foster, tolerate."

Senator MORTON (reading):

Discriminatory practices described above are in all cases, encouraged, fostered, or tolerated in some degree by governmental authorities in the States in which they occur.

Mr. MARSHALL. Senator, I think there is no question about that.

Senator MORTON. Thank you.

Senator MONRONEY. Senator Thurmond?

Senator THURMOND. Mr. Chairman, I have a good many questions and I am willing to wait until the others finish.

Senator MONRONEY. Senator Scott?

Senator SCOTT. Thank you, Senator Thurmond. I will be brief. Mr. Marshall, going back to your statement on page 2, listing a partial list of localities in which demonstrations have occurred, can you give me the period of time covered by these demonstrations beginning with Birmingham and ending with Beloit?

Mr. MARSHALL. These demonstrations, Senator, have all taken place within the last 60 days.

Senator SCOTT. Were there similar demonstrations which occurred earlier, elsewhere in the United States or in any of these same places?

Mr. MARSHALL. Yes, Senator; there have been, but the frequency and heat and tempo throughout the country has stepped up to a very considerable degree, since the middle of May.

Senator SCOTT. Some of these lunch counter demonstrations, for example, in some American cities go back 2 years or more, don't they?

Mr. MARSHALL. Yes, Senator; they go back about 3 years, although I have noted that there were some sit-in's in 1871, I believe in Louisville, Ky.

Senator SCOTT. Senator Morton was a very young man at that time. Then, I go back to your first page of your statement where you state:

No problem is of a greater immediate importance than discrimination in places of public accommodation.

I agree with your statement, but I call your attention to the fact that legislation has been suggested by me and by other Senators in regard to such matters as the old title 3, FEPC, and other approaches, which were designed to meet the causes which lead to these lunch counter demonstrations, sit-in's and other evidences of discrimination.

Up to a week or two before this bill was sent up, some Senators, including myself, were being told by representatives of the Justice Department, that you were in Birmingham—I would say this occurred about a month before the bill was sent up—it was not believed that title 3 or any other legislation was necessary at that time because they counted on your powers of persuasion, and the powers of persuasion of other members of the Department.

My question is, If this has been going on a long time, and they counted on your powers of persuasion up until shortly before introducing the bill, why then do you say that no other problem is of greater immediate importance, when you might as truly have said that 2 years ago?

Mr. MARSHALL. Senator, I don't think that it was as true 2 years ago. I think that the need for curing this problem goes back a very long way. But the demonstrations themselves did not, 2 years

ago, have anywhere near the widespread character or support that they have had in the past few weeks.

Senator SCOTT. If this law had been on the books while you were in Birmingham, could you have made use of it and, if so, how and under what circumstances would you have been able to use it?

Mr. MARSHALL. Yes, Senator; we could have. In fact, if it had been on the books at that time the demonstrations would not have had to take place in Birmingham. The problem in Birmingham, the problem in all of the cities where demonstrations are concerned with this kind of discrimination, is that there is no legal remedy at the moment. There wasn't any then.

There was no action that the Government could take, there was really no action that individuals could take to bring about a desegregation of public facilities in Birmingham. The only way that it could be done at that time was by voluntary action by the businessmen of Birmingham. And they agreed, finally, to take that voluntary action and that ended the demonstrations.

But, there was no legal remedy. That is why the matter was in the streets, that is why this legislation is so urgently needed if this country is going to escape that kind of method of trying to resolve this matter and get rid of this injustice.

Senator SCOTT. What I am seeking is just what you have brought out. If this law had been in effect, as you state, the demonstrations would not have occurred in Birmingham, and yet while the demonstrations were occurring in Birmingham, nearly a month before this legislation was sent up, the Deputy Attorney General advised a number of Senators that the law was not needed, and they were relying on your powers of persuasion.

I don't want you to have to comment on what someone else in the Department said. I just wanted to establish if in your opinion had this law been on the books at the time of all of these demonstrations cited here, many of them would have been avoided.

Is that not so?

Mr. MARSHALL. Yes, Senator; I think we are in agreement on the urgency of the need for the law.

Senator SCOTT. I find no fault with the merits of the bill in this questioning. I would simply question why the phrase appears that there is no problem of greater immediate importance than discrimination in places of public accommodation, with the implication that the problem had just arisen, when as you say the problem has been with us since 1873. And that is a fact, isn't it? We have always had this problem.

Mr. MARSHALL. Yes, Senator; and it is not only in this area, but there are other areas in which Congress needs to legislate.

Senator SCOTT. So, this is of immediate importance, but it was also of immediate importance in 1961, wouldn't that be true, and 1962?

Mr. MARSHALL. And 1960, Senator.

Senator SCOTT. And 1962, too.

Mr. MARSHALL. And 1959, Senator.

Senator SCOTT. 1948?

Mr. MARSHALL. As you say, Senator, really since 1871.

Senator SCOTT. But you have no objection to my saying 1948 or 1938, have you, Mr. Marshall?

Mr. MARSHALL. No, Senator.

Senator SCOTT. That is all. Thank you.

Senator MONRONEY. Senator Prouty?

Senator PROUTY. Thank you, Mr. Chairman.

Mr. Marshall, on page 3 of your statement you say persuasion will not solve the problem in a locality where all establishments but one want to desegregate, but cannot do so for fear of giving a competitive advantage, and so forth. Now, has that been your experience that generally all business establishments wish to desegregate except for perhaps one or two?

Mr. MARSHALL. Senator, it is our experience, in discussing this with businessmen, over the past month and a half, in a large number of meetings, at the White House and with the Attorney General and businessmen, that in overwhelming numbers they want to get this problem behind them and that the reason that they don't do it voluntarily is because they are all fearful that they will have to move themselves alone, that someone else will lag back and it will result in loss of business to them, or they won't have the support of the rest of the business community or the support of the leadership in a city in which they do business.

But I think the overwhelming sentiment among the businessmen with whom we have discussed this—fairly overwhelming—is that they want to get it behind them, are seeking a way to get it behind them and it is largely a question of everyone moving at once, more than any other single thing.

Senator PROUTY. Now, you have had an opportunity, I am sure, to discuss this overall problem with Negro leaders in some of these communities, as well as with leaders of the white groups. Do you feel that there is a tendency or a desire on the part of both to avoid extremes, to find a common ground or approach which will work out eventually to the advantage of both groups?

Mr. MARSHALL. Among the Negro and white leaders?

Senator PROUTY. I mean among the people that you contacted who were not forced to take a public position.

Mr. MARSHALL. Yes, I think that is true of a very large number of people, Senator.

Senator PROUTY. That sometimes the statements made for public consumption by both groups take a more extreme position, or reflect a more extreme postition than actually existed?

Mr. MARSHALL. Yes, Senator. I think that the necessity of dealing with these problems in public, while they are undergoing negotiation, is one great problem and it prevents an accommodation on both sides.

Senator PROUTY. By the standards you have set forth in your statement, is there any form of commerce which does not have an impact or influence on interstate commerce, and which is outside of the scope of congressional power of regulation?

Mr. MARSHALL. Senator, I think Congress has the power under the commerce clause to deal with any practice, any commercial practice, which is engaged in any large numbers of businesses and which in a total sense affects the economy and interstate commerce. And I think that power, in dealing with that kind of a problem, gives Congress the power to deal, to regulate very small businessses.

Senator PROUTY. In effect the answer to my question then is "No"?

Mr. MARSHALL. Well, Senator, I think there has to be a substantive problem that Congress is dealing with. I don't think Congress can use the power of the commerce clause to deal with a problem that has nothing to do with commerce as such, that is it can't use the power of the commerce clause to deal with something totally unrelated to commercial realities of our national economy.

Senator PROUTY. Thank you, Mr. Chairman, that is all.

Senator MONRONEY. I don't believe this has been discussed this morning.

On page 9 of the bill, paragraph 5(e) provides that, in any case, where a complaint received by the Attorney General, including a case within the scope of subsection (d), the Attorney General shall, before instituting an action:

> Utilize the service of any Federal agency or instrumentality which may be available to attempt to secure compliance with section 4 by voluntary procedures if in his judgment such procedures are likely to be effective in the circumstances.

We have all read that there are in this bill certain powers that would give a cloak of authority to various Federal agencies to withhold service or to withhold benefits enacted by the Congress for education or for health purposes or otherwise.

Could you give the committee the benefit of your thinking about what agencies the Department contemplates utilizing to implement this subsection?

Mr. MARSHALL. Well, in this subsection, Senator, the only agency I think that is contemplated is the Community Relations Service, which is set up under another bill that is before another committee. I don't think the language of this is intended to imply anything else.

Senator MONRONEY. Is there anything in S. 1732 which would legalize the withholding of distribution of Federal funds or benefits for education or for health or otherwise, where there was noncompliance in a State or in a community with the abolishing of segregation?

Mr. MARSHALL. No, Senator, not in this bill.

Senator MONRONEY. This cloaks no one with any such power within the Federal Government?

Mr. MARSHALL. No, sir.

Senator MONRONEY. Is it in any of the other bills?

Mr. MARSHALL. It is in the bill that was introduced, I think S. 1731, which is Senator Mansfield's bill, entitled——

Senator MONRONEY. This is the omnibus bill which includes this section as one of its parts; is that right?

Mr. MARSHALL. That is right.

Senator MONRONEY. Therefore that portion of S. 1731 must be before the judiciary; is that correct?

Mr. MARSHALL. I believe that is correct.

Senator MONRONEY. But it is in that bill which will be considered as part of the big package?

Mr. MARSHALL. That is right, Senator. But that is unrelated to this section of this bill and it is also unrelated to the agency, the Federal agency that is contemplated to be used

Senator MONRONEY. If this is all this does, I think it is a very proper step to try to utilize voluntary procedures or conciliation

before there is court action, because the Attorney General and his staff are going to be pretty busy, I suspect, should this title of the bill pass.

You stated that the Department of Justice would not prosecute cases of small importance. It is the Department's intention to prosecute only class actions involving a large number of aggrieved persons?

Mr. MARSHALL. Well, Senator, the language of the bill is what will materially further the purposes of the act. Now the purposes of the act are to eliminate this discrimination that has an adverse effect on the economy of the country.

It may be in some particular case, because of the circumstances in the community, that a discrimination by a small establishment will create such a situation that that community is damaged and the State in which the community is located is damaged and then the Attroney General will take action despite the fact that originally just a few people were involved.

But in general, Senator, I would agree with what you said.

Senator MONRONEY. In other words, the Attorney General said last week there was no moral justification for allowing small businesses to discriminate, when large businesses are prohibited from doing so. But as a matter of trying to effectuate the maximum desegregation, the Justice Department intends to deal with those which affect large numbers at this time; is that correct? That is, unless there is some specific instance where it seems advisable to eliminate bias or discrimination in some particular place.

Mr. MARSHALL. That would be correct, Senator.

I think there will not be a large amount of litigation under this bill myself. I think it will be complied with.

Senator MONRONEY. In your statement you give the impression to me at least that the withholding of services to any potential customer, in almost any way, by stores, does have an effect on interstate commerce and as these build up to an important thing, in their totality, that anyone engaging in those practices, whether he serves one or a thousand people, becomes subject to this act. Is that correct?

Mr. MARSHALL. That is correct, sir.

Senator MONRONEY. In other words, have we moved, then, from our concept of interstate commerce, that a merchant or an entrepreneur in the saloon business, say, or in the amusement business or anything else, can choose by the scope of his operation whether he can remain under State law only and not be subject to interstate action?

I refer to the fact that while this puts a small eating place, perhaps, or a small motel under interstate commerce, our giant utilities, if they choose to operate solely within the State of New York, or the State of California, with their huge populations, would be exempted from the interstate commerce enforcement of power regulations and matters of that kind.

Mr. MARSHALL. Yes, Senator.

Senator MONRONEY. In other words, if they get a pound of hamburger meat, they can be in interstate commerce, but they can buy hundreds of millions of kilowatt-hours from interstate distributors, and so long as their distribution is intrastate, they are strictly regulated by the local State utility body?

Mr. MARSHALL. Yes, Senator. That is correct. But there are a couple of comments I would like to make.

Senator MONRONEY. I wish you would make them, because what troubles me is that this bill ignores the clear cutoff which we have observed historically in our interpretation of the commerce clause, that a person can remain within State laws if he chooses to tailor his operation in such a way that he doesn't cross State lines.

Mr. MARSHALL. Yes. I don't believe, Senator, that this is any departure of principle under the commerce clause.

The Attorney General went into this somewhat last week. Under the minimum wage law now a great many establishments are regulated by Federal law that are much smaller than the utilities that you are speaking of. All of these restaurants that are affected by this are also affected by the oleomargarine statute, the National Labor Relations Act, the Taft-Hartley Act, and Landrum-Griffin Act.

All of the matters that regulate the dealing between employers and employees affect a great many small businesses. And there are cases that hold those acts applicable to companies that are engaged solely in intrastate commerce, because the practice that Congress had to deal with could not be dealt with simply by regulating companies that are engaged in interstate commerce in a constitutional sense if the practice as a whole affects interstate commerce throughout the Nation.

So, Senator, I agree with what you say. I think it is not a departure. I think it is an established power of Commerce for many, many years. Some of these acts go back for a great many years. That is one comment.

The other comment about the utility regulation is that of course this was not a matter of constitutional restriction, but simply a matter of congressional choice. Congress has the power under the commerce clause, and it is up to Congress to decide however it wants to exercise that power.

Senator MONRONEY. In the act of 1883, however, the Court could have found the Congress had the right, under the commerce clause, to pass this act, could it not?

Mr. MARSHALL. Well, Congress didn't act under the commerce clause on those statutes, Senator. I think there is a question——

Senator MONRONEY. It was under the 14th amendment.

Mr. MARSHALL. Yes.

Senator MONRONEY. But even though the Congress mentioned the 14th amendment, could not the Court have said had they acted under the commerce clause, these power would have been available to the Congress to achieve that end?

Mr. MARSHALL. Yes. Well, the Court at least did not in my judgment say the contrary, Senator. In fact, there is language in the opinion that suggests that they did think there was some power under the commerce clause in Congress. But I think it would have been very unusual for the Supreme Court to rely on a power of Congress that Congress itself did not choose to rely on.

And in that connection, I think the question came up last week whether or not the Attorney General of the United States at the time did urge the commerce clause on the Court. So I had the briefs looked up and I'm informed that the briefs do not contain any reliance on the commerce clause.

Senator MONRONEY. Do you agree with the Attorney General that today the courts might, with the passage of time, be more impressed

by the powers of the 14th amendment than they were back in those distant days?

Mr. MARSHALL. Yes; I do, Senator.

Senator MONRONEY. There is a bill, of course, pending that does specifically seek to prevent bias and discrimination under the 14th amendment, which I believe was introduced by Senator Cooper or Senator Dodd. What is your feeling on that?

Mr. MARSHALL. Well, Senator, of course, if I could make this preliminary comment, this bill, S. 1732, also relies on the 14th amendment, as well as the commerce clause, so it is not the reliance on one to the exclusion of the other.

Senator MONRONEY. We haven't had much testimony yet on the 14th amendment, as I recall. It has always been the great power of the commerce clause. Many of us, I think, are disturbed that this will set a precedent which could ultimately result in the Federal Government licensing all types of business by making the commerce clause apply to matters far removed from bias or discrimination. If reliance were placed on the 14th amendment, it would be aimed strictly at bias and discrimination and would not enlarge upon the vast powers that would affect other types of commerce and change our whole pattern of State regulation for intrastate business contrary to the true concept of goods moving in interstate commerce.

Mr. MARSHALL. Well, of course, Senator, I don't agree that this bill would change any concepts of the commerce clause that haven't been fully developed by the courts in the past.

Senator MONRONEY. I said many of us fear. I certainly well realize the attitude of the Attorney General and Justice Department on that.

Mr. MARSHALL. Yes, Senator. I think the important thing is to deal with the substantive problems, the substantive evil, that is causing a great deal of turmoil, and is permitting to continue a system of injustice and racial intolerance in the country. I think the problem is to deal with that substantive evil, and if it can be dealt with under the 14th amendment, I think that would be fine. The difficulty, Senator, seemed to everyone in the Administration at the time that these matters were being considered is that in a bill that is based solely on the 14th amendment, you are faced squarely with the decision of the Supreme Court which was an 8-to-1 decision, saying that the Congress did not have the power to enact such a bill under the 14th amendment. And I think to press for a bill that relies solely on the 14th amendment, under those conditions, is to impose a very heavy burden on Congress, in asking Congress to deal with the problem. So that is my comment about the Dodd-Cooper bill and my comment about relying on the 14th amendment, to the exclusion of anything else.

Senator MONRONEY. Since it is bias and prejudice you are trying to wipe out, rather than to expand the concept of interstate commerce, has there been any discussion within the Administration about cleaning up or amplifying or clarifying the 14th amendment, through enacting a constitutional amendment by the various State legislatures?

Mr. MARSHALL. Senator, I think that this problem is very urgent for the country. I think that the Congress has the power to deal with it now, without any constitutional amendments. And I think Congress should do so.

Senator MONRONEY. Do you have in your studies—and I am sure you have—cases that you could submit to the committee as to whether the scope and extent of the commerce clause has been determined by the Supreme Court to have been exceeded in the objectives the Congress sought to apply in various types of legislation?

Mr. MARSHALL. Yes, Senator.

Senator MONRONEY. You gave us those that have stood up. I was asking, because I am sure in your research you have run into certain cases that have found Congress exceeded its scope of authority in stretching the interstate commerce clause beyond that which the Court felt was justified.

Mr. MARSHALL. We will deal with that. We are preparing for the use of the committee a rather full memorandum on the commerce clause and the powers of Congress under the commerce clause and I will see the memorandums include specifically a discussion of those cases.

Senator MONRONEY. I think it would help us before the hearings are terminated, because we have had the *Oleomargarine* case a number of times, but I am sure there are cases where the Court struck down congressional efforts to overexpand the commerce clause in areas which the Court felt were not legal.

Mr. MARSHALL. Senator, there are very few such cases, but I will see that they are supplied to the committee, and I expect the memoranda to be available to the committee this week.

Senator SCOTT. In the President's message, while he did not ask for FEPC legislation, he did say that he supported other proposed legislation before the Congress, as I understand it, including FEPC, did he not?

Mr. MARSHALL. Senator, he said in his message that he renewed his support of pending Federal fair employment practices legislation applicable to both employers and unions.

Senator SCOTT. My question is for the purpose of clarification. In the past FEPC legislation has frequently been proposed as a rider to other legislation and has been opposed by the President and by other Presidents, on the ground it would endanger the passage of the bill itself. Wherever such a rider appears, I believe, the Congressional Quarterly records a vote for the rider as a vote against the President's position.

Now, not for the purpose of posing a problem, but for the sake of clarification, is it the position of the Department of Justice that a vote for FEPC in a separate bill would be in accord with the President's position and a vote for FEPC as a rider to other legislation would not be in accord with the President's position?

Mr. MARSHALL. Senator, I couldn't answer that question. The FEPC legislation is, I think, before another committee of the Senate. The Secretary of Labor will testify on it, and he would be in a much better position to answer that. It is complicated with procedures in the Senate that I am not fully informed on. So I just can't answer that.

Senator SCOTT. Mr. Marshall, you see the dilemma which it poses for Members of Congress, because if we rely upon the President's position, that he favors FEPC legislation, and if we were to support an amendment to that effect, it would be helpful to know whether the President views such amendment as in support of his position or not

in support of his position, and would you make every effort to find out from the Attorney General what the answer to the question will be as a guide to Members of Congress with regard to the position of the President?

Mr. MARSHALL. Yes, I will, Senator.

Senator SCOTT. The other question is, following what the Senator from Oklahoma has said, in asking for new legislation, as a matter of policy, in the Department, do you consider yourself bound not to induce new legislation where there has been a Supreme Court decision some time in the past contra your position on such legislation?

Mr. MARSHALL. Well, I think that's—I think the direct answer to that, Senator, is that there is no policy that I know of in the Department of Justice one way or the other on that. I think—I don't know of any case in which the Department has advocated legislation under conditions where there is a Supreme Court decision saying Congress didn't have the power to enact it.

Senator SCOTT. In other words, you don't accept as static decisions by the Supreme Court in the 1880's as necessarily preventing you from offering and presenting legislation or bills, merely because the Supreme Court some 60 or 80 years ago took a position contrary to that which you think the Government should now take?

Mr. MARSHALL. No, Senator, not as precluding us. I think that it adds a very heavy burden to the bill.

Senator SCOTT. I am not arguing for the 14th amendment position. I am trying to determine whether or not this is a precedent, because it could be important in other matters. I am not concerned here, because I am glad this committee has jurisdiction over this bill.

Thank you very much.

Senator MONRONEY. Senator Thurmond.

Senator THURMOND. I will yield to the distinguished Senator from Ohio.

Senator LAUSCHE. In your experience in the post you occupy, have you found that many labor unions in the country bar the minority groups from becoming members?

Mr. MARSHALL. I think that is a serious problem, yes, Senator.

Senator LAUSCHE. Now then, do you know whether in any of the bills submitted by the Administration there are provisions declaring it to be a wrong to bar such minority individuals from membership and granting the offended person the power to call upon the Attorney General to bring action against the labor union leaders for their barring, let us say, colored people from membership?

Mr. MARSHALL. There is no provision like that; no.

Senator LAUSCHE. Why isn't there? Why has not that been included in any of the bills, if it is a great wrong?

Mr. MARSHALL. The President said in his message that he renewed his support for pending Federal fair employment practices legislation applicable to both employers and unions.

Senator LAUSCHE. That is true. But there is no language in any of the bills submitted by the administration that will legally and effectively try to cope with that problem.

Mr. MARSHALL. Well, Senator, in the omnibus bill there is a provision for equal employment opportunity.

Senator LAUSCHE. Can the offended person call upon the Attorney General to bring action to compel admittance of such workers?

Mr. MARSHALL. No, Senator, it does not.

Senator LAUSCHE. Would you favor such an amendment?

Mr. MARSHALL. Senator, I think there is a question whether the Department of Justice, rather than a Commission on Fair Employment Practices or the existing Commission on Equal Employment Opportunity headed by the Vice President, is the proper vehicle.

Senator LAUSCHE. I may point out to you that while I was Governor I carried on an intense fight trying to persuade labor leaders to admit Negroes and the barrier was almost insuperable. I think if we are going to cover every proprietor under this law, then labor leaders ought to be covered as well.

Thank you.

Senator MONRONEY. Senator Thurmond.

Senator THURMOND. I will be pleased to yield to the distinguished Senator from Michigan.

Senator HART. I wonder if the Senator from South Carolina would permit the Senator from Vermont to ask two brief questions?

Senator THURMOND. I will be glad to, Senator.

Senator PROUTY. Thank you.

Mr. Marshall, when the Attorney General was before the committee, I suggested that, or he declared that the Supreme Court in *Civil Rights Cases* did not determine the validity of the commerce clause. I assume you hold that same opinion from what you said this morning?

Mr. MARSHALL. Yes, sir.

Senator PROUTY. I would also like to call to your attention a quote from the then Attorney General, who said this:

Inns are provided for accommodation of travelers, for those passing from place to place. They are essential instrumentalities of commerce.

Now, didn't the Attorney General raise that question before the Supreme Court?

Mr. MARSHALL. Senator, I have not read the briefs submitted to the Supreme Court myself, but I am informed that the briefs submitted by the Department of Justice on behalf of the United States in that case did not rely on the commerce clause at all.

Senator PROUTY. They certainly made reference to it.

Mr. MARSHALL. Well, Senator, I accept what you say, but may I ask you, Senator, where is that quotation from?

Senator PROUTY. It came out of the third page of the brief.

Mr. MARSHALL. Senator, I will have to look at it then.

Senator PROUTY. I appreciate that. That is all I have. Thank you.

Senator MONRONEY. Senator Thurmond.

Senator THURMOND. I would be pleased to yield to the distinguished Senator from Michigan.

Senator HART. Thank you, Senator.

Thank you, Mr. Marshall. Speaking as one member of the committee, for this statement this morning. I apologize for not being here when you made it, but I have had an opportunity to read it.

Just one point, and it is one which you may not be able to develop in a setting such as this, but we are talking about what the Supreme Court may or may not do if presented with a fact situation and a

statute similar to the one that was presented in the 1883 *Civil Rights Cases*.

Could you express any reaction to the question? Would the Court overrule the decision or would the Court distinguish it?

Mr. MARSHALL. I would hesitate to predict that, Senator. I think the case could be distinguished in some sense. That is, I think the situation in the country is different, the degree to which States are engaged in regulation of these businesses is different. I don't think it could be distinguished in the sense that there is something different between the statutes as such, that is the statutes unquestionably are designed to get at precisely the same problem.

In fact, 1732 goes beyond the 1875 statute, which was declared unconstitutional in the *Civil Rights Cases*. But I think that the movement of history and the movement of State power, during the intervening years, and the fact that in many places these practices have been required or encouraged, not only tolerated, but required or encouraged by State officials and State laws and local officials and local ordinances, would make a great deal of difference.

Senator HART. Mr. Marshall, the Court would have to find, if we presented it with a statute based on the 14th amendment, that somehow the action prohibited was a State action. Assume the case of a business licensed by either State or some other level of government. Is it possible that an opinion, finding that action prohibited in the contemplated statute and finding it to be State action, might then be a precedent to find that any licensed business activity is the instrumentality of the State?

Mr. MARSHALL. I think it certainly is possible, yes, Senator.

Senator HART. Would this not be a very serious consideration which might act as a deterrent on the Court in its willingness to find it was in fact State action?

Mr. MARSHALL. Yes, it would, Senator. I think it would be very serious because, of course, if the Court did proceed under the 14th amendment and hold that, because of the licensing of an establishment, anything the establishment did was State action for the purpose of the 14th amendment, it might have a very, very far-reaching effect on what business establishments could and could not do.

Senator HART. There seems to be some sentiment which supports the 14th amendment approach, because it is a more restrained, a less encompassing reach of power.

It is altogether possible it could in the long run have a vastly greater effect and significance on the regulation of Government and business. Is this not true?

Mr. MARSHALL. That is correct, Senator. As an example, we are talking about racial discrimination, but the 14th amendment protects a great many other rights, such as the right of free speech. The State acting as a State cannot prevent free speech. It can control or regulate it, but it can't prevent it. So a question that would arise would be the right of someone to make a speech in a department store.

Senator HART. This is just one of several such examples.

Mr. MARSHALL. One of several, yes, Senator. I suppose that there are many others that might affect a business and conduct of a business.

Senator HART. A last question, Mr. Marshall.

Some weeks ago, Mr. Marshall, I introduced a bill based on the commerce clause which is S. 1622, seeking to require public accom-

modation to be made equally available to all. I think the Department has not expressed an opinion with respect to S. 1622, but is it reasonable to assume, since the bill which we are now discussing, to which we are directing our principal attention is S. 1732, and was submitted by the administration, that this in effect contitutes a suggestion that S. 1732 is a preferable approach to S. 1622?

Mr. MARSHALL. Well, I think S. 1732 is somewhat more explicit, so I think there are differences, Senator, that we think make it more effective.

Senator HART. Thank you very much.

I thank the Senator from South Carolina.

Senator MONRONEY. Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Marshall, when did you enter the Department of Justice?

Mr. MARSHALL. It was, I believe, in February of 1961. In any event, it was in the winter of 1961, February or March. I can't remember the date, Senator.

Senator THURMOND. What did you do prior to that?

Mr. MARSHALL. I was a practicing lawyer in a law firm here in Washington, private practice.

Senator THURMOND. Are you a Harvard graduate?

Mr. MARSHALL. No, Senator.

Senator THURMOND. How in the world did you ever get in there? Did you become the Chief of the Civil Rights Division immediately upon going there, or later become the Chief of that Division?

Mr. MARSHALL. I became the Chief of the Division, Senator, after the Senate confirmed the nomination of the President. So there was a period of time when I was in the Department, but was not a Chief of the Division.

Senator THURMOND. Who did you succeed as Chief?

Mr. MARSHALL. A man named Harold Tyler, who is now on the Federal bench for the Southeastern District of New York.

Senator THURMOND. Is this civil rights position a stepping stone?

Mr. MARSHALL. No, Senator.

Senator THURMOND. Are you aspiring to be a Federal judge?

Mr. MARSHALL. No, Senator.

Senator THURMOND. Are you interested in the rights of all of the citizens?

Mr. MARSHALL. Yes, Senator.

Senator THURMOND. White citizens, red Indians——

Mr. MARSHALL. Yes.

Senator THURMOND. Brown or yellow-skinned people; all people?

Mr. MARSHALL. Yes.

Senator THURMOND. You are interested in the civil rights of all people?

Mr. MARSHALL. Yes, Senator.

Senator THUMOND. Do you keep on the lookout to see that these rights are protected as much as you can?

Mr. MARSHALL. Yes, Senator.

Senator THURMOND. Well, if you learned that any one class of people were being placed above another, and their rights affected, you would take some action, I presume, regardless of their color?

Mr. MARSHALL. Yes, Senator.

Of course, we can only act if we have some legal authority to act. But the answer to that is "Yes."

Senator THURMOND. If any one agency of the Government attempted to employ people of any one race, white people, for instance, or any other race, you would take steps to correct such discrimination, would you, as Chief of the Civil Rights Division?

Mr. MARSHALL. Senator, my duties don't involve employment policies at all, except within my Division. There is a Presidential Executive order that prohibits any part of the executive branch from hiring or not hiring someone because of his race or color.

Senator THURMOND. Who would enforce that?

Mr. MARSHALL. That is supervised by the President's Committee on Equal Employment Opportunity, but is enforced by the heads of the various agencies of the executive branch.

Senator THURMOND. Well, you are representing the legal branch and if it had to go to court, would that fall in your category?

Mr. MARSHALL. Senator, I don't believe there is any aspect—I do not believe there is any aspect of the enforcement of that order which would involve my direct responsibilities. If there was a lawsuit over it, because of a civil service act or something like that, I think it would be handled by the Civil Division of the Department of Justice.

Senator THURMOND. If it is a discrimination of a civil right on the part of a citizen, whether he is black or white, would that fall in your jurisdiction if it went to court?

Mr. MARSHALL. Senator, my jurisdiction is confined to enforcing certain statutes that Congress has enacted, and I don't know what statute would be involved in the case that you put to me. Perhaps if you could be more explicit——

Senator THURMOND. I will give you a specific example, and let me see if this would fall in your jurisdiction. This is an article from a newspaper in San Antonio, Tex., an Associated Press article, which says—

San Antonio news columnist Paul Thompson, Friday quoted the district manager of the U.S. Social Security Office as telling the employees to fill vacancies with nothing but Negroes. In his column Thompson quoted the district manager, John D. Palmer, as telling 80 Social Security workers, at a staff meeting Monday, that most other Federal agencies got virtually the same orders last month and have put them in effect.

Would that fall in your category, to see that the civil rights of those people are not discriminated against? Are you going to protect the rights of the white people, too, or just the Negroes?

Mr. MARSHALL. Senator, we are interested in the protection of the rights of all people——

Senator THURMOND. Are you interested——

Mr. MARSHALL. So there is no question about that, Senator. I do not have any direct authority that deals with the employment policies of the U.S. Government. I do not know anything about that column. I question the accuracy of the facts stated, but I don't know anything about it.

But it would not, in any event, fall within my official duties.

Senator THURMOND. Assuming this man, John D. Palmer, is telling the truth—he is the district manager of the social security out there, it seems. Aren't you, as Chief of the Civil Rights Division, responsible to see that the civil rights of people are protected?

Mr. MARSHALL. Senator, I'm responsible for enforcing certain statutes. If there is any problem there, it would involve, I guess, the civil service regulations, which are under the Civil Service Commission, and not under the Department of Justice at all.

Senator THURMOND. Well, can the Civil Service Commission disregard the civil rights of employees in Government and can you ignore that if they do? Aren't your duties broad enough, as Chief of the Civil Rights Division in the Department of Justice, when a matter comes to your attention that discrimination is being practiced, to take some steps about it?

Mr. MARSHALL. Senator, I would be glad to find out the facts on that.

Senator THURMOND. I'm asking you, though, if you have that authority and if there is responsibiilty upon you to do that, if discrimination exists and it is called to your attention?

Mr. MARSHALL. Senator, I'm opposed to discrimination based on race, no matter what race is involved.

Senator THURMOND. You haven't answered the question. I don't want to interrupt you, but you haven't answered the question. Would you answer the question?

Mr. MARSHALL. Yes, Senator. The answer to your question is that I do not have authority to take action wherever there is discrimination based on race; no.

Senator THURMOND. Then where do you have authority?

Mr. MARSHALL. Where Congress has enacted a statute that gives me authority, Senator.

Senator THURMOND. Isn't there a statute on the employment of people? Why would you have authority, if we should enact this statute, to enforce it, if you don't have the authority to enforce statutes already on the book pertaining to civil rights?

Mr. MARSHALL. Senator, S. 1732, if enacted, would explicitly give the Attorney General certain duties and responsibilities for enforcing the statutes. Congress hasn't enacted any statute that gives the Attorney General specific duties with respect to the kind of thing you are talking about.

Senator THURMOND. Isn't the Attorney General the Attorney General for all of the departments of the Government?

Mr. MARSHALL. He is the Attorney General of the United States.

Senator THURMOND. Exactly, and doesn't that cover all agencies of the Government?

Mr. MARSHALL. Senator, each agency of the Government has its own general counsel, its own legal staff, and the Attorney General doesn't run the departments of the Government; no.

Senator THURMOND. But he is the Attorney General of the United States, for enforcement of the laws.

Mr. MARSHALL. That is correct, Senator.

Senator THURMOND. And if a matter is called to his attention, that discrimination exists, isn't there a duty upon him to investigate the matter and take such action as may be required, as the chief law enforcement officer of the United States?

Mr. MARSHALL. Senator, only if the discrimination involves a violation of some statute that the Attorney General has responsibility for enforcing.

Senator THURMOND. Is there a violation of statute for one class of people to be discriminated against in favor of others in the Government? Is that a violation of a statute?

Mr. MARSHALL. It might be under some circumstances, yes.

Senator THURMOND. As the Chief of the Civil Rights Division, don't you know whether it is or not? Aren't you interested in people's civil rights generally? Employees of the Government?

Mr. MARSHALL. Senator, I do not know of any statute that involves discrimination against employees of the Government as a general matter. Now there are lots of statutes that deal with employment policies of the Federal Government. It is contrary to the employment policies of the Federal Government to discriminate in employment or promotion on the grounds of race and that is either hiring because of race or refusing to hire because of race. So there is no question about that, Senator.

Senator THURMOND. And you don't think there is any obligation upon the Justice Department and the Civil Rights Division, even though it is called to the attention of the Justice Department that discrimination exists in the employment of people, to look into the matter at all?

Mr. MARSHALL. Senator, I would be glad to look into that particular matter.

Senator THURMOND. That is not what I asked you. If you will answer the question I asked you——

Mr. MARSHALL. Senator, it is not the responsibility of the Department of Justice to enforce the employment policies of the U.S. Government, so the answer to that is "No."

Senator THURMOND. Even though discrimination is called to the attention of the Justice Department, there is no obligation on the Justice Department—I want to get this clear now—there is no obligation on the Justice Department and none on the Civil Rights Division, to take any steps whatever, even though discrimination is called to the attention of the Justice Department?

Mr. MARSHALL. No, Senator; that is not correct.

May I tell you what our practice is, Senator?

Senator THURMOND. I will be pleased to have you say anything else you wish.

Mr. MARSHALL. When a matter of discrimination in Government employment is called to my attention, or to the attention of the Attorney General, it is referred to the Committee on Equal Employment Opportunity which is headed by the Vice President, and they have a procedure for investigating the complaints and finding out whether discrimination did or did not in fact occur and then taking action upon it. So that is the practice.

Senator THURMOND. Unless the law places a specific responsibility upon the Attorney General to protect the civil rights of people who are engaged in working for the Government, it would have to be done by the agency of the Government concerned and their attorneys and the Attorney General bears no responsibility?

Mr. MARSHALL. That is correct, Senator.

Senator THURMOND. All right.

Now this article goes on to say:

Thompson said as a result of the directive, the San Antonio Social Security office already has hired its first Negro employee. He said Palmer interviewed

eight other Negroes and will place them in jobs following a routine check of their backgrounds.

The newspaper columnist also quoted Percy Mimms, manager of the Veterans' Administration office, as saying he was directed to put extra emphasis on hiring Negroes, though not necessarily to the exclusion of whites. Mimms was reported as saying of the four persons who will be filling vacancies in his office in the near future, three will be Negroes.

Palmer was quoted by Thompson as telling his staff that the orders to hire only Negroes were verbal orders from Washington and were not in the form of a written directive.

Did your office issue any such verbal orders?

Mr. MARSHALL. No, Senator.

Senator THURMOND. Do you know what agency of the Government issued those verbal orders to hire only Negroes?

Mr. MARSHALL. Senator, I don't know that any such orders were issued.

Senator THURMOND. Well, I'm asking you, assuming this article is true, this man Percy Mimms is the manager of the Veterans' Administration, and unless this Associated Press wire has misquoted him, you heard what I read to you, what agency would direct him to hire only Negroes?

Mr. MARSHALL. Senator, I don't believe any agency gave out such a direction.

Senator THURMOND. I'm not asking you what you believe. I'm asking you what agency would give such orders?

Mr. MARSHALL. Senator, if it is a Veterans' Administration office, then any instructions about employment would come from the Veterans' Administration.

Senator THURMOND. Veterans' Administration. So that would be the office to whom we should make the inquiry as to whether they gave verbal orders to hire only Negroes?

Mr. MARSHALL. Yes, Senator; as I said, I would be glad to find out.

Senator THURMOND. Well, I can find out. I can make an effort to find out.

Now I want to ask you this: Although these two instances of the Social Security and the Veterans' Administration that I just quoted to you appear to have discriminated against people other than Negores, there is no responsibility on the Justice Department and none on you as Chief of the Civil Rights Division to protect the civil rights of those individuals who are being discriminated against?

Mr. MARSHALL. Senator, I don't like to say there is no responsibility, because I would take it up, any allegation of discrimination, I would assume the responsibility of seeing that it got to the appropriate place. And I would be glad to do that with this allegation.

Senator THURMOND. This article goes on to say:

Palmer was also quoted as telling his employees that there would be no nonsense or slipups in finding Negroes for vacancies arising and if they could not be found, Washington would send trained personnel to San Antonio for the purpose of finding a sufficiency of trained Negroes.

Do you have any further comment on it?

Mr. MARSHALL. Senator, I think it is very desirable that Negro citizens of the United States know they are welcome in the Federal Government.

Senator THURMOND. Well, they have learned that, haven't they? Do you think there is any doubt of their knowing that?

Mr. MARSHALL. I think there may be some doubt——

Senator THURMOND. Didn't the the Federal Government send agents or representatives to the Negro colleges, including South Carolina and other places, to tell the Negroes about vacancies in Government and encourage them to come in?

Mr. MARSHALL. I hope so, Senator. I don't know for a fact, but I hope so.

Senator THURMOND. Well, you hope they also sent them to the white colleges, too?

Mr. MARSHALL. Yes, Senator; I know they did.

Senator THURMOND. How is that?

Mr. MARSHALL. Yes, Senator.

Senator THURMOND. But none went to the white colleges, did they?

Mr. MARSHALL. Senator, I think the Federal Government sends representatives to all colleges continuously, white and Negro.

Senator THURMOND. Now, the authority which you claim as the base for this proposed legislation is the Interstate Commerce Clause of the Constitution. Is that correct?

Mr. MARSHALL. Yes, Senator. But also the Civil War amendments, the 13th and 14th amendments.

Senator THURMOND. Well, the 13th and 14th amendments were considered in the 1883 decision and the law that was passed then was thrown out, was it not?

Mr. MARSHALL. That is correct, Senator.

Senator THURMOND. And you still are basing it on the 13th and 14th amendments, although a similar law was declared unconstitutional.

Mr. MARSHALL. That is correct.

Senator THURMOND. You feel that the Court today then would take a different position.

Mr. MARSHALL. I think the situation is different today, Senator. And that might effect the decision of the Court on the constitutionality.

Senator THURMOND. How is the situation any different today, that would change the effect of construing the Constitution? Is the Constitution not modern enough? Do you feel it is outdated?

Mr. MARSHALL. No, Senator.

Senator THURMOND. How would that effect the interpretation of the Constitution?

Mr. MARSHALL. Well, because it is modern enough and it is not outdated and it deals with the facts of our present life and our present national existence, as well as it dealt with the facts as they existed in 1883. I think the facts are different now. The Constitution is a viable document and the Court could properly consider the changes in national life that have occurred since then. In addition, the changes in the concept of "State action," and the greater involvement in the regulation of these enterprises of States and local governments over the intervening years may bear on the constitutionality of the legislation.

Senator THURMOND. You feel the Constitution is flexible, and where the Supreme Court held an act similar to the one now being proposed unconstitutional in 1883, today they would hold such an act constitutional.

Mr. MARSHALL. I believe that the Court might do that, yes, sir.

Senator THURMOND. Even though the Constitution has not been amended.

Mr. MARSHALL. Senator, the Constitution hasn't been amended but the country has changed greatly and moved ahead and is different.

Senator THURMOND. Therefore, the Constitution should be construed differently?

Mr. MARSHALL. No, Senator.

Senator THURMOND. Then just what do you mean when you say the country has changed? The Constitution hasn't changed.

Mr. MARSHALL. No, the Constitution has not changed, Senator, but the country has changed, the degree to which the States regulate and control businesses, the degree to which these business establishments that we are concerned with in this bill are regulated and controlled and affected by their States and communities and official attitudes of their States and communities has changed.

Senator THURMOND. The Constitution is the same as it has been, though, isn't it, just like the bill?

Mr. MARSHALL. Yes, sir.

Senator THURMOND. And in fact, there are two ways to change it, and they are both set out in the Constitution and if you want to get through some legislation here, why don't you first attempt to amend the Constitution and then base your legislation on the Constitution as amended, instead of hoping the Supreme Court will reverse the interpretation of the Constitution.

Mr. MARSHALL. Senator, that isn't what we are doing.

Senator THURMOND. Now, this constitutional provision that you are basing these laws on reads this way—

to regulate commerce with foreign nations and among the several States and with the Indian tribes.

That is all there is in the Constitution on the interstate commerce clause, isn't there?

Mr. MARSHALL. That is correct.

Senator THURMOND. That is everything in the Constitution on the commerce clause and narrowing it down, you take away foreign nations and Indian tribes, it reads "to regulate commerce among the several States." That is all it says, isn't it?

Mr. MARSHALL. Yes, sir.

Senator THURMOND. Wasn't that intended to regulate goods from the time they leave one State until they arrived in the next State and not intended to regulate what happened to those goods after they got into that State?

Mr. MARSHALL. No, Senator. I don't agree with that.

Senator THURMOND. Just how, exactly, would the 13th amendment give any constitutional basis for this act? It deals with slavery, does it not?

Mr. MARSHALL. Yes, it does.

Senator THURMOND. Would you explain it?

Mr. MARSHALL. The 13th amendment abolished slavery and it also gave Congress the power to enact appropriate legislation to achieve the purpose of the amendment. Now, the Supreme Court, in the *Civil Rights Cases*, in the majority opinion, said they believed that that gave Congress the power, not only to enact legislation against the institution of slavery itself, as such, but against the badges, the remain-

ing badges left over from the previous condition of servitude. One of the badges, one of the remnants of the institution of slavery, based on race in this country, was the denial of access to these places covered by this bill. So that is why I think the 13th amendment positively gives the Congress power to move in this area.

Senator THURMOND. At that time, the 1883 statute on civil rights was taken to the Supreme Court, the 13th and 14th amendments both had been adopted.

Mr. MARSHALL. That is correct.

Senator THURMOND. And the Supreme Court held that a law, similar to the one proposed now, was unconstitutional and the 13th and 14th amendments did not apply.

Mr. MARSHALL. That is correct, Senator.

Senator THURMOND. Now, Mr. Marshall, on page 1 of your statement you make the comment, beginning on the third line in the third paragraph—

yet countless members of the public, citizens of this country, guaranteed equality of treatment by our Constitution and so forth.

Now, the Attorney General testified before this committee that there was no constitutional right to serve in these amendments. It seems to me that this statement contradicts the Attorney General's previous testimony. I would like you to elaborate on that.

Mr. MARSHALL. Senator, I think the Attorney General testified that the question of the constitutional right of everyone to be accorded service is a question which is possibly raised by a number of cases in the Supreme Court, that are now pending before the Supreme Court, and not that absolutely there was no such constitutional right. But the statement didn't mean to imply that this particular discrimination was covered by constitutional guarantee.

Senator THURMOND. Well, until the Supreme Court upholds the act that is pending under the present construction, there is no constitutional right for service in the establishments, as stated by the Attorney General, is there?

Mr. MARSHALL. That is right, Senator.

Senator THURMOND. Then, isn't your legislation premature? Shouldn't you wait and see what the Supreme Court does?

Mr. MARSHALL. I don't think so, Senator. I think whatever the Supreme Court does, there is a need for legislation on this problem, so that this country can get this form of discrimination behind it. I think that is the wish and the will of most of the citizens of the country and I think it is the will and wish of most of the businessmen that are affected by this.

Senator THURMOND. Mr. Marshall, at the end of that paragraph, on page 1, you make this statement—

it is not directed against certain Negroes as individuals. All Negroes are totally excluded from every restaurant, from every hotel, from every lunch counter in the entire area.

Then, on the next page of your statement you cite a partial list of localities in which demonstrations have occurred.

Mr. MARSHALL. Yes, Senator.

Senator THURMOND. Included in this list are such towns and cities as Sacramento, Calif.; Stanford, Conn.; Chicago, Ill.; Des Moines, Iowa; Philadelphia, Pa.; Detroit, Mich.; and Beloit, Wisc. Now, in

all these areas are all Negroes totally excluded from every restaurant, hotel, and lunch counter?

Mr. MARSHALL. No, Senator.

Senator THURMOND. Then, what did you mean by the statement you made?

Mr. MARSHALL. Senator, the list of demonstrators, the places in which demonstrations have taken place, is not confined to places where the demonstrations have been against this kind of discrimination in that locality. Some of the demonstrations in the cities that you have just read have been in sympathy with demonstrations in cities where that is true. For example, the demonstrations in Detroit, and to some extent the demonstrations in Washington, were concerned with sympathy toward the protest movement in other places where the Negroes are excluded from the hotels, restaurants, and lunch counters of entire communities.

Senator THURMOND. Now, you say, in your statement, on page 1—

nor is this discrimination sporadic or incidental, but where it exists, it is systematized and complete.

Do you mean to say there is no discrimination in all of these places listed on page 2?

Mr. MARSHALL. No, Senator.

Senator THURMOND. Kansas City, for instance, Buffalo, N.Y., there is no discrimination in any of those places.

Mr. MARSHALL. No, there is, Senator.

Senator THURMOND. There is some discrimination.

Mr. MARSHALL. Yes, but not necessarily this kind. There is racial discrimination in those places. I don't say there is no discrimination.

Senator THURMOND. Then what you say on page 1, where it exists, it is systematized and complete, so what you are saying now is inconsistent with your statement, isn't it?

Mr. MARSHALL. No, Senator. I am sorry if my statement is confusing. But the places listed on page 2 are not places necessarily which practice this kind of discrimination. They are places in which we have had large-scale racial demonstrations in the past 45 or 60 days.

Senator THURMOND. You don't mean to say all of those places you list here were merely out of sympathy? Some of them were certainly demonstrations to get what they felt were equal rights, were they not?

Mr. MARSHALL. That is correct, Senator.

Senator THURMOND. Then how do you make the statement, that where it exists, it is systematized and complete?

Mr. MARSHALL. Senator, I am sorry the statement is confusing.

Senator THURMOND. If the statement is in error, just say so.

Mr. MARSHALL. I am trying to explain.

Senator THURMOND. Anybody can make a mistake.

Mr. MARSHALL. Senator, the places that are listed on page 2 are places where large-scale racial demonstrations have occurred. Those demonstrations, I would categorize in three categories: Some of them have been directed mainly against the practice of discrimination in places of public accommodation, some of them have been in sympathy with those demonstrations and some of them have been directed toward other kinds of racial discrimination, particularly in employment or in union membership.

Senator THURMOND. Don't you think that you should be a little more careful in the use of the words "all" and "totally" when you use them in this connection?

Mr. MARSHALL. Senator, I am attempting to explain what the statement means. I am sorry if I didn't clear it up.

Senator THURMOND. Well, it seems your statement though is somewhat similar to the bill. I will read from page 4 of the bill, paragraph (h):

> The discriminatory practices described above are in all cases encouraged, fostered, or tolerated in some degree by the governmental authorities of the States in which they occur, which license or protect the businesses involved by means of laws and ordinances and the activities of their executive and judicial officers.

Mr. MARSHALL. Senator——

Senator THURMOND. Do you think that is a fair statement, to put in a law? To say in all cases—not in all cases in Buffalo, N.Y., is it? Not in all cases in Kansas City, Kans.?

Mr. MARSHALL. Senator, these practices do not exist as far as I know in Buffalo, N.Y., and I don't believe in Kansas City, Kans.

Senator THURMOND. Well, they have had demonstrations there, haven't they, claiming they wanted equal rights?

Mr. MARSHALL. Senator, the demonstrations in those cities were not directed at these practices in those cities.

Senator THURMOND. Are you telling me in none of these places you listed here were the demonstrations for anything but out of sympathy?

Mr. MARSHALL. No, Senator, in a number of the places they were because of these practices in those very places.

Senator THURMOND. And that is the reason they had the demonstrations?

Mr. MARSHALL. Yes, Senator.

Senator THURMOND. All right. Then how can you put in this law and how could you include in your statement "in all cases"? That is untrue, isn't it? Isn't that incorrect?

Mr. MARSHALL. Senator, I don't think I understand the question. In all cases, what?

Senator THURMOND (reading):

> The discriminatory practices described above are in all cases encouraged, fostered, or tolerated—

And so forth.

Mr. MARSHALL. Senator, with reference to the cities, which you asked about, Buffalo, N.Y., and Kansas City, Kans., as far as I know, these practices do not exist. Therefore, paragraph (h) is not applicable to them.

Senator THURMOND. Well I thought you just said a few moments ago that there was discrimination even in those places, some discrimination.

Mr. MARSHALL. Not this kind of discrimination, Senator.

Senator THURMOND. What kind do they have in Buffalo then and those places?

Mr. MARSHALL. Employment, and discrimination by labor unions.

Senator THURMOND. Well, that is discrimination, isn't it?

Mr. MARSHALL. Yes it is, Senator.

Senator THURMOND. What is greater discrimination than if a man wants a job and can't get it?

Mr. MARSHALL. Excuse me, Senator.

Senator THURMOND. Is there any greater discrimination than that?

Mr. MARSHALL. No, that is a very serious problem.

Senator THURMOND. Under these right-to-work laws in the States, where the unions cannot have closed shops, and the people have a right to apply for a job, the law should be amended and they would have to join a union and if they didn't join the union they couldn't get a job, could they?

Mr. MARSHALL. Senator, I am not much of an expert on right-to-work laws.

Senator THURMOND. Aren't you interested in people's civil rights and labor unions?

Mr. MARSHALL. Senator, I am sorry, but I am not an expert in that field.

Senator THURMOND. What field are you an expert in within civil rights? You are the Chief of the Civil Rights Division in the Department of Justice.

Mr. MARSHALL. That is right, Senator.

Senator THURMOND. Tell me now, what fields you are an expert in in civil rights that don't cover the rights of laboring people.

Mr. MARSHALL. Not under the right——

Senator THURMOND. It only covers the rights of Negroes. Is that your specialty only?

Mr. MARSHALL. No, Senator, that is not correct.

Senator THURMOND. Would you tell us then, what is your field and specialty?

Mr. MARSHALL. Can I tell you the principal responsibilities that we have under existing statute?

Senator THURMOND. Would you cite us any case you have handled other than those for Negroes pertaining to civil rights?

Mr. MARSHALL. Senator, we have prosecuted a number of *Civil Rights Cases* involving police brutality where the victims were not Negroes at all. Those statutes have nothing to do with the race of the victim of brutality, and they are not administered with that in mind at all. There are a large number of complaints that are investigated, processed every year by the Civil Rights Division, and have been for many years under those statutes, sections 241 and 242.

Senator THURMOND. All right. Tell us about any others.

Mr. MARSHALL. Senator, the other statutes for which the Civil Rights Division has primary responsibility I would put in three categories: one is the voting statutes which Congress enacted in 1957 and 1960. Those are designed to give the Attorney General the responsibility for eliminating discrimination in registration of voters that is based upon race. Now——

Senator THURMOND. That was mainly calculated to help the Negroes, was it?

Mr. MARSHALL. It was calculated to help any citizen who is deprived of the right to vote because of his race. Now our investigations under those sections show, Senator, that the major abuse in this area is the deprivation of the right to vote to Negroes in some States, on a county-by-county base. Now in addition to those statutes, which are

civil statutes, the Civil Rights Division enforces all of the statutes that deal with election frauds in Federal elections and corrupt practices. Those statutes have nothing to do at all with race. And many of the investigations and actions that are taken under them have nothing whatsoever to do with race.

Senator THURMOND. Have you investigated in New York City with regard to the Puerto Ricans voting?

Mr. MARSHALL. We haven't had any formal investigation, no sir; but I am aware of the situation.

Senator THURMOND. You haven't had any complaints?

Mr. MARSHALL. No, Senator. The problem in New York is not a problem of discrimination by registration officials who are, as far as I know, happy to register any one that wants to vote. The problem is the framework of statutes in New York, and I think they should be considered, but that is primarily the responsibility of the State of New York. Now I think the Congress could act in that area, too, but they haven't, Congress hasn't acted to the degree that would give us any responsibilities.

Senator THURMOND. What do you think Congress ought to do?

Mr. MARSHALL. I say I think Congress could act in that area also. Last year there was a bill that was proposed by the Department of Justice which would have made a sixth grade education in a school in Puerto Rico, in the language used in the schools of Puerto Rico, a base for registering to vote. That would have dealt with the problem of Puerto Ricans. But Congress did not enact that statute.

Senator THURMOND. You don't feel that the statute Congress passed to help Negroes vote was sufficiently broad to cover Puerto Ricans?

Mr. MARSHALL. No, Senator. I do not think that under the statutes enacted in 1957 and 1960, there is any action that can be taken by the Department of Justice with respect to that situation.

Senator THURMOND. Now, on page 3 of your statement you said that the Department of Justice has attempted by means of persuasion and mediation to solve these problems. Haven't you, at the same time, actually been encouraging the sit-ins and thereby, in many instances, encouraging a violation of the local trespassing laws?

Mr. MARSHALL. No, Senator.

Senator THURMOND. And you do not feel the actions that have been taken, and the words that have been used in such statements, to stop violence is to prepare civil rights laws. You don't feel all of that is calculated to bring about more sit-ins and violations of law with regard to local trespassing laws?

Mr. MARSHALL. No, Senator.

Senator THURMOND. Now on page 3 of your statement, you make note of the fact that voluntary integration will actually hurt the business of the place which decided to desegregate. If voluntary desegregation would hurt these businesses, then of course, involuntary desegregation would also hurt their business. Since some places would not be covered by this law, wouldn't it be more of a burden on interstate commerce than the present situation?

Mr. MARSHALL. Senator, there would not be any significant establishments that would not be covered by this law, so, I don't think that premise of your question is correct.

Senator THURMOND. In other words, you think this law will cover most establishments.

Mr. MARSHALL. Yes, Senator, and I think that involuntary desegregation, as you put it, will not hurt their businesses, as long as it is done across the board.

Senator THURMOND. You don't feel there will be some businesses that will be covered and other businesses that will not, which will result in discrimination itself, would it not? In other words, you feel the law is just going to about cover all businesses, and, therefore, there will be no discrimination?

Mr. MARSHALL. That is correct, Senator. I think it will cover all significant establishments of the kind that are defined in the bill.

Senator THURMOND. Even though they are small businesses? You think it would cover them?

Mr. MARSHALL. Yes, Senator.

Senator MONRONEY. Would the Senator from South Carolina care to suspend at this time?

Senator THURMOND. I can stop at this point, Mr. Chairman.

Senator HART. I wonder if the Senator from South Carolina would permit me to ask a question on one of the points you have concluded, or ask the witness to comment on one point only. I know you want to terminate at 12:30 p.m.

Senator THURMOND. I will be pleased to yield to the distinguished Senator from Michigan if it meets with the chairman's approval.

Senator MONRONEY. Certainly.

Senator HART. Mr. Marshall, the Senator from South Carolina was talking to you about the newspaper stories about employment directives that were issued by the Social Security and VA offices and he, several times, said that there isn't any doubt that the Negro knows he is welcome by the Federal Government. I would like to ask you a question related to this. Wouldn't you agree that the Negro would judge this Nation's welcome of him to a large extent by what this committee and this Congress does with this bill and the administration's recommendations in other areas?

Mr. MARSHALL. Very much so, Senator. I think that is one of the reasons why this bill, this part of the President's recommendations is so immensely important to the country.

Senator HART. You have been sitting on top of this volcano for months and are more intimately connected with its developments than any man in the Federal Government. And, parenthetically, may I say you served well. The concern of the Negro, of course, goes to jobs, housing, and schools, but isn't the bill we are considering aimed at the thing which is the point of highest irritation and frustration and offense?

Mr. MARSHALL. Yes, Senator, I think that is true in the places where this kind of discrimination exists. I think it is also true as to the Negro population of this country as a whole, because many of them have relatives and friends in places where this kind of discrimination exists, and when they see it, and they know if they were there, it would be directed at them, it affects the entire population. I think also, Senator, another aspect of it is that this is the part that will have an immediae effect and is of immense importance. The vocational recommendations of the President are important. But this bill that deals with the public accommodations would have an immediate effect and, as you say, Senator, I think it would bear very heavily upon how 18

or 19 million Americans feel they are looked upon by their Government.

Senator HART. I would like to think about 160 million other Americans will feel better in the knowledge that if we pass this bill, when the Federal Government orders a Negro young man to an Army camp, that he can get a cup of coffee on the way.

Mr. MARSHALL. That is right, Senator.

Senator HART. Thank you very much.

Senator MONRONEY. The committee will stand in recess until tomorrow morning at 10 a.m., at which time we will meet in room 5110.

(Whereupon, at 12:35 p.m., the committee adjourned to reconvene on Tuesday, July 9, at 10 a.m.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

TUESDAY, JULY 9, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 10 a.m. in room 5110, New Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order.

Several other Senators will be here this morning but we will proceed with Mr. Marshall. When the committee recessed yesterday, I believe the Senator from South Carolina was in the process of asking some questions which he didn't finish. So I yield to him to continue with questioning.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Excuse me. Then the Senator from Michigan, I believe, has some more questions to ask so we will yield to him after that, if that is agreeable with the committee.

FURTHER STATEMENT OF BURKE MARSHALL, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Senator THURMOND. Mr. Marshall, do you agree that the police power of the States and local governments is exclusive with them and the National Government has no general police power and that all regulation by the National Government must stem from some other ground of authority contained in the Constitution?

Mr. MARSHALL. Yes, Senator.

Senator THURMOND. Mr. Marshall, the Constitution has granted to Congress the power to make all laws, which are necessary and appropriate to regulate commerce with foreign nations and among the several States and with the Indian tribes. That is the section I quoted to you yesterday.

What is your definition of the word "commerce," as it is used in this provision of the Constitution?

Mr. MARSHALL. Senator, I think that it encompasses all matters that affect the national economy, that involve more than one State.

Senator THURMOND. Do you think it goes beyond the period when goods leave one State and arrive at another?

Mr. MARSHALL. Yes, Senator, I believe the Supreme Court has so held.

Senator THURMOND. Although the Constitution doesn't say so?

Mr. MARSHALL. Senator, the Constitution——

Senator THURMOND. That is correct, isn't it, the Constitution does not say so?

Mr. MARSHALL. The words of the Constitution are as you read them, Senator.

Senator THURMOND. How is that?

Mr. MARSHALL. The words of the Constitution are as you read them.

Senator THURMOND. As I read them yesterday?

Mr. MARSHALL. Yes, sir.

Senator THURMOND. Mr. Marshall, although the power of Congress is supreme as to the delegation of power to regulate commerce among the several States, I am sure that you would agree that some area of authority was retained by the States as to solely intrastate commerce. Will you tell us the bounds by which you believe this reservation to the States is governed?

Mr. MARSHALL. Senator, I think it is a complex question and it varies depending on the kind of business that is involved, and I think it depends in part on what Congress has done. I don't think that there is a clear-cut division. I think that the States have a reservoir of power that goes beyond simply and purely intrastate commerce, and that they can regulate matters that affect interstate commerce, just like the Federal Government can, in its turn, regulate matters that affect intrastate commerce, when that is necessary to effective regulation of interstate commerce, which is appropriate.

Senator THURMOND. Now, Mr. Marshall, if the theory upon which this legislation is predicated is valid, could not the National Government regulate and coerce every activity, whether by State or individual, within the bounds of any and every State?

Mr. MARSHALL. No, Senator.

Senator THURMOND. Would you tell us just what establishments or businesses would be exempt if this legislation is passed?

Mr. MARSHALL. Well, Senator, I think that it depends upon the existence of a substantive problem that substantially affects interstate commerce. Now, in this legislation there is such a problem. The problem is the widespread practice of discrimination in places of public accommodation.

If Congress attempted to regulate the conduct of this business in some way that did not involve such a problem, did not involve a problem that affected the national economy, that affected interstate commerce, and the allocation of resources within the country, I think that would be beyond the power of Congress.

Senator THURMOND. If you choose any particular State and assume there is no discrimination there, then would establishments like hotels and restaurants and barbershops and beauty shops and so forth, fall within the category of this legislation?

Mr. MARSHALL. They would fall within the category, Senator, but it wouldn't directly affect any of them if they weren't practicing the kind of evil that the legislation is intended to prohibit.

Senator THURMOND. In other words, the point is then as to what is interstate commerce or intrastate commerce, depends on whether discrimination exists.

Mr. MARSHALL. Senator, whether Congress has the power to regulate it depends on whether there is a substantive problem that affects interstate commerce. In the case of this legislation, that substantive problem is the existence of discrimination.

Senator THURMOND. Well, is the delineating factor here whether it is interstate commerce or intrastate commerce, or is it whether or not there is discrimination?

Mr. MARSHALL. I think it is whether or not there is a practice, which in this case is discrimination, which affects interstate commerce and therefore gives Congress the power to deal with it.

Senator THURMOND. Can you have discrimination that does not affect interstate commerce?

Mr. MARSHALL. Yes; I think you can.

Senator THURMOND. Then this bill would alleviate or remedy the discrimination that affects interstate commerce, but allow the discrimination to remain that does not affect interstate commerce?

Mr. MARSHALL. That does not affect interstate commerce.

Senator THURMOND. So you would still have discrimination if this bill passed?

Mr. MARSHALL. Senator, in some degree you will have discrimination; yes.

Senator THURMOND. So you will have then the result that in a certain city or town those establishments that are said to affect interstate commerce will be remedied of discrimination, but in others, no matter how large or how much business they do, if they are purely intrastate, they will not be affected by this law and the discrimination in those establishments will continue?

Mr. MARSHALL. Yes, Senator. I do not believe there would be any large establishments of that sort.

Senator THURMOND. Well, I said if they are purely intrastate, discrimination would continue, wouldn't it?

Mr. MARSHALL. Senator, there may be such, some such establishments; yes, sir.

Senator THURMOND. So the legislation that you are offering here then is only a partial cure for discrimination?

Mr. MARSHALL. That is correct, Senator, but—may I add to that, Senator?

Senator THURMOND. Surely.

Mr. MARSHALL. I think it goes to the heart of the matter. As to the national problem that we face, there may be remnants left after this legislation is passed and becomes effective, but they will be minor and won't create the national problem that now exists, which I think Congress has the clear power and I think responsibility, to deal with, Senator.

Senator THURMOND. In other words, you think the present Supreme Court would bring practically all business establishments within the interstate commerce designation, in one way, shape, or form?

Mr. MARSHALL. Senator, I think that it is not a question of the present Supreme Court. The Supreme Court in the past has rendered many decisions which clearly show that Congress has a very broad power to regulate when a national problem exists, that affects interstate commerce. And that power is not rigidly delineated by the character of the people who regulate it.

The case of *Wickard* v. *Filburn*, the regulation affected wheat grown by a farmer for consumption on his own farm, and the Supreme Court held it valid. That wasn't the present Supreme Court, that was some 20 years ago.

Senator THURMOND. Do you think the Supreme Court of today would follow the same line of thinking as they did previously?

Mr. MARSHALL. Yes; I do, Senator.

Senator THURMOND. Then, why would you not think the Supreme Court of today would follow the same line it followed in 1883, on a very identical statute as you are now attempting to pass?

Mr. MARSHALL. Senator, I think conditions in the country have changed substantially since 1883, and those changes are reflected in the constitutional powers of Congress. That the powers of Congress——

Senator THURMOND. Is that a matter—excuse me, go ahead.

Mr. MARSHALL. That the powers of Congress are set forth in the Constitution to deal with the problems that exist at a given time, and are not limited to the time in which the Constitution was written.

Senator THURMOND. The Constitution hasn't changed, has it?

Mr. MARSHALL. No, Senator.

Senator THURMOND. It is the same as it was in 1883?

Mr. MARSHALL. Yes, Senator.

Senator THURMOND. And the interstate commerce provision is the same. If the Court follows stare decisis, the legal principle of following the previous decisions unless some new facts come to light, or there is some reason to change, it would declare this bill unconstitutional, wouldn't it?

Mr. MARSHALL. No, Senator.

Senator THURMOND. You don't think so?

Mr. MARSHALL. No, Senator. This act is based upon different constitutional principles than the act of 1875. So that is one point. Another point is that I think there are additional new factors which have come to pass since 1883.

And a third point, Senator, with respect to that decision itself, is that I think the law as to what constitutes State action within the meaning of the 14th amendment, has developed and evolved itself.

Senator THURMOND. Well, the Supreme Court in 1883 held that the statute could not stand because it was in violation of the Constitution, even though it was based on the 13th or 14th amendments.

Mr. MARSHALL. That is correct, sir.

Senator THURMOND. Now, if the Supreme Court had held it was constitutional, couldn't it have so held anyway, whether the question of interstate commerce was raised or not?

Mr. MARSHALL. Senator, I think that it would have been very difficult for the Court to have based a decision as to constitutionality of a statute upon the ground that was not chosen by Congress and was not relied upon by the United States at the time.

I think that it would have been most unusual. I don't think it occurred to anyone.

Senator THURMOND. Suppose you were testing this statute today on the 14th amendment, as was done in 1883. Do you think the Supreme Court today would hold it unconstitutional?

Mr. MARSHALL. The 1875 statute? This statute, Senator?

Senator THURMOND. Similar to the one proposed here, yes.

Mr. MARSHALL. My own opinion, Senator, is that the Supreme Court would uphold this statute, even if it were not based on the commerce Clause. But, I think, Senator, that there is room for disagreement clause. But, I think, Senator, that there is room for disagreement

on that, and there are a great many lawyers that would have a different opinion.

Senator THURMOND. So, whether it is based on the 14th amendment or the interstate commerce clause, you think the Court today, since the country changed, would hold it constitutional?

Mr. MARSHALL. Yes.

Senator THURMOND. Because the country and not the Constitution has changed?

Mr. MARSHALL. Yes, Senator.

Senator THURMOND. And the members of the Supreme Court of course have changed as time has gone by and that frequently changes decisions, too, doesn't it?

Mr. MARSHALL. It can, Senator.

Senator THURMOND. It does, doesn't it?

Mr. MARSHALL. Well, Senator, I think probably there are occasions in which you could find a change in the Court——

Senator THURMOND. Do you know exactly how many States and local communities have statutes forbidding service in establishments covered by this measure to classes of people solely because of their race, color, religion or national origin?

Mr. MARSHALL. No, Senator, I don't have an accurate count on that. There are quite a few.

Senator THURMOND. There aren't very many, are there?

Mr. MARSHALL. Senator, I would say there are quite a few. And in the past, there have been a good many. Some cities such as Albany, Ga., have in recent months repealed their statutes, and city ordinances. But, I would say that over the years, there have been a good many such statutes and local ordinances in a number of States.

Senator THURMOND. You think public opinion is bending that way, and that this indicates that more will take that position as time goes by?

Mr. MARSHALL. Which position, Senator?

Senator THURMOND. The position of Albany, Ga., that you mentioned.

Mr. MARSHALL. I do, Senator.

Senator THURMOND. You do?

Mr. MARSHALL. Yes.

Senator THURMOND. Then, if you think public opinion is changing, and this is going to be done on a voluntary basis, then why do you want Congress to pass a law like this?

Mr. MARSHALL. Senator, I don't think it is changing rapidly enough, I don't think it is changing in all areas and all places. The problem exists in all areas and all places, and it is, I think, very difficult for the businessmen in some States and some localities to take voluntary action without legal compulsion. So, that is one reason.

The other reason, Senator, is that I think when we have a problem of this magnitude, in this country, that it is the responsibility of the executive branch to seek and it is the responsibility of Congress to grant a legal method of resolving this problem, and that is what this statute is intended to do.

Senator THURMOND. You don't think it is changing fast enough, although there have been, as you stated, quite a number of laws passed, and in Kentucky, I believe, the Governor issued an executive order a

few days ago, in Albany, Ga., and various other places to open business establishments to all groups. Do you feel it is not changing fast enough?

Mr. MARSHALL. That is correct, Senator. I think it should be remembered, Senator, that in some of the places where this problem exists, Negroes are not even permitted to register to vote, and if they cannot freely exercise their franchise, and bring the weight of their opinion on the elected officials of their State and localities, I think that it is very difficult to get this kind of a change by the State, by the locality.

Senator THURMOND. If action comes voluntarily, then it comes on the quality of the people; it comes from their hearts; and if public opinion favors it, it is more apt to be a success, rather than if it is attempted to be forced by law, isn't it?

Mr. MARSHALL. I agree it is most desirable that it be done voluntarily.

Senator THURMOND. How fast do you want it to change? Do you want to get it all changed by the next election?

Mr. MARSHALL. Senator, I don't think this has anything to do with elections. I think it is a very serious national problem, and it should be dealt with as speedily as it can be dealt with, considering the need for full deliberation by the Congress.

Senator THURMOND. Why hasn't it been done before now?

Mr. MARSHALL. Senator, I think that we would not have as much trouble as a Nation now if it had been done before, I agree with that.

Senator THURMOND. If it is that important, and if we need to rush it so, why wasn't it done last year or year before last or before that?

Mr. MARSHALL. Senator, as I say, I agree with that point. I think it is too bad it wasn't dealt with many years ago.

Senator THURMOND. Do you agree with what Abraham Lincoln said: "With public opinion you can do anything, and without public opinion you can do nothing"?

Mr. MARSHALL. Senator, I agree with that statement. I think that a change in the law can change public opinion, because I think the people of this country, throughout the country, are law abiding. If Congress acts, they will obey the law that Congress passes.

Senator THURMOND. You think a change in the law will bring about a change in public opinion?

Mr. MARSHALL. Yes, Senator.

Senator THURMOND. We didn't do it with the prohibition law, did we?

Mr. MARSHALL. No, Senator; that was a failure. But it was one of the few in this country.

Senator THURMOND. Don't you think this could be a similar failure, if the people are not in favor of it?

Mr. MARSHALL. No, Senator; I do not believe this would be a failure.

Senator THURMOND. Why do you think this will succeed if prohibition failed?

Mr. MARSHALL. Because, Senator, I think it meets a need which is not just a need in one section of the country. I think it meets a need that is a need in all sections of the country, and I think it will be of benefit to the people in all sections of the country and in all

States, including the States where this problem of discrimination in public accommodations exists.

I think this law will be of benefit to those States in getting that problem behind those States, so their economy can be freed of the burden that that kind of discrimination imposes upon them.

Senator THURMOND. I presume you would agree that Congress actually has the power to regulate interstate commerce, whether the subject of the regulation burdens interstate commerce or not.

Mr. MARSHALL. Senator, I don't think that Congress has the power to regulate commerce unless there is some problem in commerce that Congress should deal with.

Maybe I don't understand the question.

Senator THURMOND. Well the statement I made was, I presume you agree that Congress actually has the power to regulate interstate commerce, whether the subject of the regulation burdens interstate commerce or not.

Mr. MARSHALL. Yes, Senator; I would agree with that.

Senator THURMOND. Aren't the first 10 amendments to the Constitution specific restraints upon Congress' power to regulate interstate commerce, as well as other powers granted in the body of the Constitution?

Mr. MARSHALL. Senator, the first 10 amendments are restraints on power of the Federal Government, and maybe all of them in some way affect how the Federal Government should regulate commerce. I think probably that is true.

Senator THURMOND. Are not these establishments which would be regulated by this act, private establishments, notwithstanding the fact that they are subject to State or local regulation under the powers retained by the governmental bodies?

Mr. MARSHALL. Yes, Senator.

Senator THURMOND. If they are private establishments, do not you feel that a statute of this kind would violate the 5th and 14th amendments, which provide that no person shall be deprived of life, liberty, or property without due process of law?

Mr. MARSHALL. No, Senator.

Senator THURMOND. If you tell a man how he can use his private property, isn't that exercising such control over the use of it as is practically equivalent to taking the property?

Mr. MARSHALL. But Senator those amendments do not prohibit Congress from telling people how to use their property. The use of property is not uncontrolled by Congress now. It is controlled in many ways by Congress now. It is a question whether the control that is exerted bears some reasonable relationship to a problem that Congress has the power to deal with.

Now, if the problem that Congress has the power to deal with has a great effect, as this problem does, on interstate commerce, and the economy of a number of States, then the Congress exercising that power doesn't violate the 5th or the 14th amendments.

Senator THURMOND. Wouldn't it make very little difference whether the Government had the power or the individual had the power, if the Government is going to so regulate and control use of the property that the individual cannot use it as he pleases?

Mr. MARSHALL. Senator, no; I don't agree with that statement.

Senator THURMOND. In other words, you think that the Government should regulate the control and use of it and the man still has freedom?

Mr. MARSHALL. Yes, Senator; I do. I think the Government now controls and regulates to a great degree the use of property by businesses, large businesses and small businesses. It regulates the relationship between them and their employees. It regulates the amount of wages that have to be paid. It regulates the labeling of goods they sell. It regulates the shape, as the Attorney General has pointed out, the shape of a pat of oleo margarine sold in restaurants.

So all of these are regulations of private property. But I think they are perfectly consistent with the freedom that goes with the possessing and using of private property, as against Government ownership.

Senator THURMOND. I will admit it has gone awfully far toward a welfare state, just along the lines you just stated. But you don't believe the Government should have done all those things, do you?

Mr. MARSHALL. Yes, Senator; I believe it.

Senator THURMOND. You do? You believe in regulation and regimentation by the Government, even of private property?

Mr. MARSHALL. Senator, I believe the Government has a responsibility to deal with national problems, and that in some cases that involves regulation of the businesses that have a problem.

Senator THURMOND. Would not this measure place the owner of an establishment, subject to this provision, into the category of a public servant?

Mr. MARSHALL. No, Senator.

Senator THURMOND. Isn't it really an attempt here to claim that because a man sells to the public, he is running a public business and therefore the Government should regulate it, although it is his own private business?

Mr. MARSHALL. No, Senator.

Senator THURMOND. Well, I have seen such expressions used in various statements about public service.

Mr. MARSHALL. Senator, these places——

Senator THURMOND. There is quite a distinction, Mr. Marshall, between public utilities like a power company or gas company and private property which a man owns and where he can close the doors at 4 o'clock or keep them closed all day, where he can choose his customers and sell to whom he pleases, because it is his own private property.

Now, is it the desire here to deprive them of the use of that property and try to place him in the same category as a public utility that has to serve everybody?

Mr. MARSHALL. Senator, all this legislation does is prevent racial discrimination by public places that are open to serve the public generally. That is all it does. It doesn't turn them into public utilities.

Senator THURMOND. And this bill was drawn on the theory that it could be sustained on the interstate commerce clause, because the Supreme Court had struck down a similar bill on the 14th amendment? I believe some one stated that, maybe the Attorney General, or some one.

Mr. MARSHALL. Senator, I don't agree with that as an accurate statement of our position, no, sir.

Senator THURMOND. Mr. Chairman, I yield to somebody else now. Maybe someone else has some questions.

The CHAIRMAN. The Senator from Michigan.

Senator HART. Mr. Chairman, at the conclusion yesterday, I was attempting to get more clearly in my own mind the possible implications if the committee does, in fact, adopt this 14th amendment approach. We have been told by some people that we would be creating a dangerous precedent, if we ground this on the commerce clause. I am not so sure that everybody has thought through the implications if we use the 14th amendment.

My hurried question yesterday sought to obtain from Mr. Marshall some opinion as to where we might wind up if we take the 14th amendment. Under the 14th amendment, this act would require the finding by the Court that the conduct in the complaint was State action. Are we in agreement on that?

Mr. MARSHALL. That is correct, Senator.

Senator HART. Now, if the business, whether it is a restaurant or hotel or theater, is held to be a State instrumentality for the purpose of this act, does it become a State instrumentality with very serious implications in other areas? Is there any possibility that the argument would be made that there would be immunity from tort action?

Mr. MARSHALL. Senator, to answer that question I will have to expand a little on the question, if I may.

Senator HART. I think we would appreciate that.

Mr. MARSHALL. The bills that have been introduced, that are based solely on the 14th amendment base the power of Congress on the fact that the business establishments are licensed or in some way authorized by the State, simply on that fact.

Now, as you say, Senator, if that fact, simply the possession of a State license, makes them an instrumentality of the State for purposes of the 14th amendment, that has implications that go way beyond racial discrimination. The 14th amendment controls State action in many ways. It controls, possibly, employment by the State. There would be a question whether a State could discriminate in employment.

It controls the degree to which a State can regulate speech or picketing, so that has implications that possibly bear on the way in which these business establishments could regulate picketing or speech within their own walls. Some cases have suggested that it regulates, as far as the Sate is concerned, the cause of discharge or the requirement of a hearing when an employee of the State is discharged.

It also, I suppose, would have some implications as to other kinds of establishments that are licensed by the States. For example, private educational institutions or charitable institutions. And the implications of applying the 14th amendment criteria of due process of law and equal protection of the law to these private institutions as if they were all instrumenalities of the State really has implications that possibly go very far.

Now—as I noted when I said that that was true of a bill that was based solely upon the fact that a business establishment is licensed by the State—if that makes it an instrumentality of the State by itself for 14th amendment purposes, I think that has implications for possible Federal control of their activities that go very far.

S. 1732, insofar as it relies on the 14th amendment, doesn't rely solely on State licensing at all. It relies on the fact that there has been State encouragement and fostering and toleration of this particular practice. So, its implications are somewhat less.

Nevertheless, I think that the implications, Senator, of enactment under the 14th amendment, insofar as possible further controls by the Federal Government over the conduct of businesses, that those implications are much broader, much broader than any implications from reliance on the commerce clause, which, as I said and the Attorney General explained at some length, is, in my view, not an expansion of congressional power at all. I think as far as the commerce clause is concerned, this bill travels down a path that is well worn by a great deal of previous legislation.

Senator ENGLE. Would you yield for a question?

Senator HART. Yes.

Senator ENGLE. Senator Cooper was before this committee the other day about his bill which is based on the 14th amendment. Is it your view that that bill could be constitutionally enacted?

Mr. MARSHALL. Well, Senator, I think that it carries a very heavy burden, when it is based solely upon the fact that business establishments are licensed by the State. I think that is a very heavy burden.

There are a number of recent decisions by the Supreme Court in this area and one Justice of the Supreme Court has put some reliance on the fact that a business establishment is licensed in one way or another by the State. But that is only one Justice. The majority opinions stay clear of that.

Now, I think there are other justifications, Senator, for the passage of this kind of legislation under the 14th amendment that go beyond the fact simply that the business establishment is licensed.

Senator ENGLE. I am glad Senator Cooper just walked into the room because I just asked you about his bill. Now, we all take an oath to support the Constitution, and the Constitution is what is written in it, plus what the Supreme Court says it is.

Now, the Supreme Court, in 1883, said that a bill on all fours with what is intended to be done here, was unconstitutional. How do we stand up and vote for it and not violate our oaths?

Mr. MARSHALL. I think you would have to come to the conclusion, as a personal matter, that the Supreme Court would not decide that case the same way now.

Senator PASTORE. Will the Senator yield on that point?

Senator ENGLE. My friend, Hart, has the floor.

Senator PASTORE. Will the Senator yield?

Senator HART. Yes.

Senator PASTORE. We have drifted into the habit here of speaking of decisions of the Supreme Court as being sacrosanct, as being irreversible and irrevocable. There have been instances where the Supreme Court overruled itself on all fours, haven't there?

Mr. MARSHALL. Yes, there have been, Senator.

Senator PASTORE. Take a specific case. The case of *Plessy* v. *Ferguson*, in 1896. The Supreme Court held that separate but equal facilities were constitutional. As late as 1954, the Supreme Court said that separate but equal facilities were unconstitutional and absolutely in contravention of the Constitution.

Now, we have an instance where the Supreme Court overruled itself. And I understand that you are taking the position that while we are leaning heavily upon the commerce clause, we are still saying that there is based upon the custom that has developed since 1883, a strong possibility that the Supreme Court will overrule that case. Is that exactly what you are saying?

Mr. MARSHALL. Yes, Senator.

Senator ENGLE. Let me keep the record straight on this point. I would prefer to base this legislation on article 14, if we could get away with it. I will admit the bill introduced is the Administration bill, of which I am a coauthor, which ties in the commerce clause and thereby gives us some wiggling room, you might say. But Senator Cooper is here now and what I asked is this. If you take his bill, and put it on the floor, and vote it out squarely on the 14th amendment, where are you going to end up—flat on your face?

Mr. MARSHALL. Senator, it is my opinion that the Supreme Court would uphold that bill. But I think that, as I say, many lawyers would disagree with that, and I might well be wrong about it. On the other hand the power of Congress to deal with this problem as a commerce problem, which is what it is, is perfectly clear cut. So that——

Senator ENGLE. You mean under the interstate——

Mr. MARSHALL. Under the commerce clause.

Senator ENGLE. But you have to admit that the commerce clause has limitations, which would not be as effectual as if you could move squarely under the 14th amendment; is that right?

Mr. MARSHALL. Senator, I don't think that is really correct. I mean in terms of the problem we are dealing with.

The bills under the 14th amendment, I think, are not clear in terms of the problems, of their scope of coverage, as the bill based upon the commerce clause. I think that there are ambiguities in that.

Now, I do not know, for example, Senator, that all of the establishments that should be covered, that in fact create this problem, are licensed by the State. Some of them unquestionably are. And I think the practice would vary from State to State. So I don't think the coverage is made clearer by the 14th amendment than it is by the commerce clause.

I think you have some problems of coverage under both. I think that maybe the 14th amendment would not reach under the licensing theory some of the important establishments that should be reached, such as department stores, Senator. It would certainly reach places that sold liquor, but I am not sure that it would reach all places that sold food.

Senator ENGLE. You mean under the 14th amendment?

Mr. MARSHALL. Yes, Senator.

Senator ENGLE. As I read the 14th amendment, it is an inhibition upon the States taking discriminatory action of any kind. As I understand the decision in 1883, that is what it said.

Mr. MARSHALL. That is correct, Senator.

Senator ENGLE. Now, if that is true, it did not give to the Congress the power to affirmatively go forward in this field under the 14th amendment. And if that conclusion is correct, it necessarily strikes down Senator Cooper's bill, does it not?

Mr. MARSHALL. Senator, if that decision were correct, I would say that Senator Cooper's bill would not stand; that is correct, yes.

Senator ENGLE. So we have wrapped up a different package, and we have tied in the 14th amendment, plus the interstate commerce clause. And the commerce clause has certain limitation, as we will all admit; is that right?

Mr. MARSHALL. Yes, Senator.

Senator ENGLE. So what we have done is, we have split the difference and tried to figure out a way that maybe will stand up constitutionally?

Mr. MARSHALL. That is correct, Senator.

Senator ENGLE. And if that is correct, what we are going to do is do a little less than what needs to be done. We are compromising in order to do what is possible under what we predict is the constitutional situation? Is that right?

Mr. MARSHALL. Yes, Senator.

In my opinion—just so we are clear on this—in may opinion, S. 1732 would deal with the problem. The degree to which there is discrimination by establishments that are open to the public that are not covered by this bill, the degree to which that is true is really insignificant. I think that the bill goes far enough to deal with this problem as far as this country is concerned. And that the remaining discriminations in these establishments that would be permitted would be insignificant.

Senator ENGLE. In yielding the floor, I want to say I would prefer to proceed under the 14th amendment, if I thought we could constitutionally do so. But, failing that, I think the Administration bill is the good approach because if we fail under the 14th amendment we are still protected within limits by the commerce clause.

Mr. MARSHALL. Yes, precisely, Senator.

May I make another—expand a little again on the problem under the 14th amendment?

Senator ENGLE. By all means, but the time belongs to my friend from Michigan.

Senator HART. That was the basic point I thought we should develop and I am glad we are.

Senator ENGLE. Go right ahead.

Mr. MARSHALL. Senator, the reliance in the administration bill on the 14th amendment is based upon the fact that the States themselves are the cause, to a large degree, of this kind of discrimination. I think that is a valid basis on which Congress can act under the 14th amendment; that is, if the States have created this problem, through ordinances requiring segregation, through State laws requiring segregation, that then Congress has the power to eliminate the effects of that State action.

That is the theory of the administration bill. That is not the theory, Senator, of Senator Cooper's bill.

Senator ENGLE. You are right on the point. The 14th amendment would empower the Congress, and in my opinion by way of a private law suit, to strike down discriminatory ordinances such as those mentioned by the Attorney General.

But, if you turn the case around and try to make it the basis of going forward in an affirmative fashion, as is proposed in Senator Cooper's bill, it seems to me that you are on very fragile ground from the standpoint of the Constitution.

That is what I wanted to make clear. By wrapping the bill in the commerce clause, at least you get most of the problem, don't you?

Mr. MARSHALL. Yes, Senator. I think you run the danger, if you relied solely on the 14th amendment, that the Court might uphold the bill as to those places that have ordinances, and say it was invalid as to those places that didn't have ordinances, which would mean you prohibit discrimination in some places and not other places, which would be a very unsatisfactory result.

The CHAIRMAN. Well, I think we ought to keep in perspective the fact that there are 30 States that have laws now in these United States and 2 more by Executive decree, making 32, and they are in most cases much stronger than the bill we have.

One of those laws has been taken to the Supreme Court and upheld. They have all been upheld by their own supreme courts whenever a case arose and many of them have been in operation.

California and Washington have about the same law and it is much stronger than this law. We are trying in effect to correct a need that exists in the States that don't have laws, for their own reasons, good or bad. And I think if the need exists, we ought to proceed in the best possible legal way to take care of that need and not proceed in a way that might be questionable and upset consistent State laws that now exist and have existed for many years.

This is nothing new for my State. The State laws are much tougher than this law. And I think it is true in most of the 30 States. They are all on the basis that when you open your business to the public the State has an inherent right to impose some regulations, and every State does. And that is all there is to it.

Mr. MARSHALL. That is right, Senator.

The CHAIRMAN. This doesn't have the drastic penalties that most of the State laws have.

Mr. MARSHALL. No, Senator. Most of the State laws, I think, have criminal penalties.

The CHAIRMAN. Yes.

The Senator from Michigan.

Senator PROUTY. Will the Senator yield?

Senator HART. Yes.

Senator PROUTY. Mr. Marshall, getting down to fundamentals, is discrimination the basic evil we think it is, because of its effect on commerce or because of its effect on man and his dignity?

Mr. MARSHALL. Senator, I think that discrimination is a basic evil because of its effect on people. But it also has an effect on commerce. And Congress has a clear power and responsibility to deal with that effect.

Senator PROUTY. Thank you.

Senator PASTORE. Will the Senator yield for another question to clear up this point on the 14th amendment?

I am a little disturbed about the carefulness we are exercising on both sides here with relation to the inviolability of an opinion of the Supreme Court of 1883. I submit that until it is changed by another opinion of the Supreme Court, or by constitutional amendment, that it is the binding law of the land and we must preserve it.

But is there any constitutional prohibition about Congress taking a second bite at the cherry?

Mr. MARSHALL. No, there isn't, Senator.

Senator PASTORE. In other words, if the Senator from Rhode Island thought the case of 1883, while it is the law of the land, misinterprets

the Constitution of the United States, insofar as the 14th amendment is concerned, I certainly would not be violating any law or violating the oath of office if I passed or voted for another law identical to the one that was overruled in 1883, in the hope that the new Supreme Court would hold it constitutional. Do you agree with that?

Mr. MARSHALL. I agree with that, Senator. But I think it should be recognized that you would be facing the possibility that the Supreme Court would follow the 1883 decision, would hold the law that you voted for unconstitutional, and that, therefore, the action of Congress would have been ineffective, and I don't myself see the reason to follow that course, when there is a power in Congress that is clear-cut, where I don't think there is any serious question but that the Supreme Court would uphold it.

Senator PASTORE. I am coming back to Mr. Prouty's question. I believe in this bill, because I believe in the dignity of man, not because it impedes our commerce. I don't think any man has the right to say to another man, You can't eat in my restaurant because you have a dark skin; no matter how clean you are, you can't eat at my restaurant. That deprives a man of his full stature as an American citizen. That shocks me. That hurts me. And that is the reason why I want to vote for this law.

Now, it might well be that I can effect the same remedy through the commerce clause. But I like to feel that what we are talking about is a moral issue, an issue that involves the morality of this great country of ours. And that morality, it seems to me, comes under the 14th amendment, where we speak about immunities and where we speak about equal protection of the law. I would like to feel that the Supreme Court of the United States is given another chance to review it, not under the commerce clause, but under the 14th amendment.

There is nothing wrong with the Congress of the United States passing the law again as it did in 1775 and give the new Justices a chance to decide whether it should be maintained and affirmed, or whether it should be repealed as they did in the case of the equal and separate facilities. They did that in 1954; they said the Court in 1896 was wrong in their opinion, and, therefore, they overruled it.

Why can't we hope this Supreme Court might do the same thing again and still remain within the Constitution of the United States? Do you see anything wrong in that?

Mr. MARSHALL. Senator, I think it would be a mistake to rely solely on the 14th amendment. This bill, S. 1732, relies on the 14th amendment, and also relies on the commerce clause. I think it is plainly constitutional. I think if it relied solely on the 14th amendment, it might not be held constitutional. I think it would be a disservice to pass a bill that was later thrown out by the Supreme Court.

Senator PASTORE. I am not being critical of you. I am merely stating my own position. I am saying we are being a little too careful, cagey, and cautious, in debating this question of the 14th amendment. I realize you should bring all of the tools at your disposal and that is what you are doing. You are saying you are not only relying on the 14th amendment, you are relying on the commerce clause as well and you have every right to do that as a good lawyer. All I am saying here is that we have a perfect right to proceed under the 14th amendment, and try it again.

Mr. MARSHALL. Yes, Senator.

Senator ENGLE. Would the Senator yield for a question?

Senator PASTORE. I will yield for two questions.

The CHAIRMAN. The Senator from Michigan has the floor.

Senator HART. I yield, I guess.

Senator ENGLE. If you put this squarely under the 14th amendment, you are not worrying about Mr. Murphy's boardinghouse, because under the 14th amendment, you would desegregate everything. You are talking about desegregating the Waldorf Astoria, and the Statler Hilton, and I claim there are going to be more Negroes discriminated against at the hamburger stands of this country than there are going to be discriminated against in the Waldorf Astoria or the Statler Hilton.

So, if I had my way about it, and it is either right or wrong, I would take it right from the bottom up. There wouldn't be any exceptions. But when you proceed under the commerce clause, you necessarily create those exceptions, don't you?

Mr. MARSHALL. Senator, only to a very insignificant degree. As I say, I think this bill would do the job. If this bill were passed, I think it would do the job. I think it would cover most hamburger stands. And I am not sure, Senator, if I may, that it is correct to say that the 14th amendment would cover everything. Because there are two problems about that. I don't want to repeat myself, but one problem is that if you rely solely upon the fact that they are licensed, you may omit a large number of establishments because in a particular State they are not licensed. So that is one problem.

The other problem is that if you rely also, as we do in S. 1732, on the fact that this discrimination was created by State action in the past to a large degree, you may cover the discrimination in some place but not cover it in other places. You may cover it in Albany, Ga., where they had ordinances up to a few weeks ago, but not in Cambridge, Md., where they have had ordinances for a long time.

So, I think there are problems of coverage, Senator, under the 14th amendment that are in some ways more difficult than the problems of coverage under the commerce clause. And I think this bill would do the job.

Senator PASTORE. I realize that, but I brought up the question, because I think my distinguished friend from California said if we voted for the Cooper bill, we would be violating our oath of office.

Senator ENGLE. I asked that question.

Senator PASTORE. I don't see that at all.

Senator ENGLE. I raised that question.

Senator PASTORE. Are you saying that if we acted contrary to the decision of 1883 in any way, until such time as it was overruled in some form or other, wouldn't we be violating our oath of office? But we have a perfect right to enact legislation and have a second test case made, if we felt it was in the public interest that that should be done. That is the question I raise here.

Senator ENGLE. May I say to my friend that is a good answer, too.

Senator MONRONEY. May I ask a question?

The CHAIRMAN. Let the chairman ask a question first. Mr. Marshall, if you have a job to do, and the need exists, isn't it the oath of every Senator or every public official to use whatever means is possible to do that job?

Mr. MARSHALL. Senator, I think that is the wise course of action.

The CHAIRMAN. Now, I yield. What difference does it make whether we go under the 14th amendment or commerce clause or both, as we are doing in this case, as long as we conscientiously feel this job should be done? They are both legal.

Mr. MARSHALL. They are both legal.

Senator PASTORE. In spite of any previous decision of the Supreme Court.

The CHAIRMAN. Of course. And it is beside the point which way you are going to go.

Mr. MARSHALL. I agree with that, Senator.

The CHAIRMAN. And anybody who sits around and argues for weeks and days whether we are going to do it this way or that way is wasting his time. If we believe this should be done, we ought to use the legal means that exist. And that is all there is to it. The rest of it is just words, despite the decision of the Supreme Court. Congress has passed bills overruling the Supreme Court on many occasions when they thought it was necessary to do so. I did it once by unanimous consent. This is true. We overruled a Supreme Court decision by unanimous consent within the maritime field.

Senator PASTORE. We did that in offshore——

Senator MONRONEY. Mr. Chairman, can I ask a question to clarify this?

The CHAIRMAN. Yes. Do you yield to the Senator from Oklahoma?

Senator HART. Yes.

Senator MONRONEY. What happens to the law? The decision rendered on it still stays on the statute books, but the Court holding says it is unconstitutional; is that correct?

Mr. MARSHALL. That is correct, Senator.

Senator MONRONEY. So another case coming up from an original court could reach the Supreme Court on writ of certiorari and could be decided again by the Court in any way the present Court felt the Constitution directed; is that correct?

Mr. MARSHALL. Senator, I think not completely. If I may expand on that, I think that is not completely correct.

Senator MONRONEY. In other words, the law cannot be resurrected, even though Congress has not repealed it, because the Court years ago held it was unconstitutional.

Mr. MARSHALL. Senator, may I explain that?

Senator MONRONEY. Yes.

Mr. MARSHALL. Senator, the law of 1875 was a criminal statute. It has not been repealed by Congress. But it is not in the Criminal Code. Anyone who is trying to obey the laws of the United States and looks through the Criminal Code could not find this as law that had to be obeyed. As I say, Senator, it is a criminal statute. I think it might be improper for the Attorney General to attempt to prosecute some criminal under a statute that had been declared unconstitutional by the Supreme Court of the United States, whether he agreed with the Supreme Court of the United States at all or not. I think that for that reason, as applied to the 1875 statute, or any criminal statute, once the Supreme Court has said it is unconstitutional, it is for all practical purposes unavailable, completely unavailable, for testing purposes or any other purposes.

Senator MONRONEY. I just wanted to know what the situation was. Thank you.

The CHAIRMAN. Now, the Senator from Michigan.

Senator HART. Mr. Marshall, the Supreme Court on its own initiative—I must admit I haven't read the case, but I read the newspaper reports—has held local ordinances and State laws requiring discriminatory treatment in the area of public accommodations to be unconstitutional, and it has held that such discriminatory practices give rise to either an adequate defense in a criminal action brought against the alleged trespasser, or on his initiative a right to obtain service by Court order; is that right?

Mr. MARSHALL. Not the latter, Senator. They have not held the latter. They have held, Senator, if I may add one word, they have held that while such ordinances exist, the police of the city in which they exist cannot arrest someone for trespass or under some other ordinance for going into a business establishment which is prohibited by law from serving him.

Senator HART. Is there not pending a case which will give an answer to the question of whether, absent any such ordinances, an individual restaurateur or hotel proprietor, may elect to exclude on the base of race?

Mr. MARSHALL. Senator, there are cases pending which may raise that question. I think that we will undoubtedly file a brief with the Supreme Court in those cases. It may be that even the cases that are still pending do not fully raise that question, that there are other grounds on which the cases may be decided. If the Supreme Court can decide those cases on other grounds, I think it unquestionably will.

Senator HART. If the decision is based on the grounds that occupy our concern this morning, this would establish a right of action under the 14th amendment on behalf of any individual with respect to public accommodations; wouldn't it?

Mr. MARSHALL. Senator, it is more complicated than that. The cases involve arrests and State action in those terms. They do not involve a suit by someone seeking access to a place. It is a conceivable that the Supreme Court could decide the State could not arrest someone for going in, but at the same time the person that wants to get in could not bring a suit to get in. So that is one of the difficult problems of those cases.

Senator HART. I see. You would be in an area comparable with this restrictive covenant situation.

Mr. MARSHALL. That is right, Senator. The restrictive covenant is invalid, but that doesn't give someone the right to sue to buy a house.

Senator HART. It is clear, is it not, that linking both methods, the commerce clause and the 14th amendment as the base for a bill, would not jeopardize the bill, even though one of the methods later was held to be unconstitutional.

Mr. MARSHALL. I think that is clear, Senator.

Senator HART. There is no doubt, is there, that the Congress already has used the commerce clause to enact racial antidiscrimination legislation and these acts have been held constitutional.

Mr. MARSHALL. There is no question about that, Senator.

Senator HART. We have precedent in this area; don't we?

Mr. MARSHALL. That is right, Senator. You have precedent in that area with the case of the bus terminals, airplanes, and railroads.

Senator HART. My last comment is one which may permit you to correct my understanding. I think one of the worse things we could do would be to wind up with a bill that established a right of action to one denied accommodations, then have the Supreme Court in these evolving series of cases we have talked about, hold that there was a right of action beyond the area which we, by legislation, may grant. It would not, I suppose, embarrass the citizen, but it would embarrass Congress because would it not be true that if the Court, in these evolving cases, holds that under the 14th amendment, a citizen has a right of action, that the reach of the administration bill would be less inclusive than that Court-established right. Isn't that true?

Mr. MARSHALL. Yes, Senator, if the Court held that, I think that would be true.

Senator HART. Thank you very much.

The CHAIRMAN. The Senator from New York is here and he asked to testify some time ago, and we have had to delay him. I am sure the committee will have no objection if we hear from him now; we could further question Mr. Marshall later. Is that agreeable with the committee?

Senator COTTON. Mr. Chairman, you mean we will be able, presumably, to question Mr. Marshall more this morning?

The CHAIRMAN. Yes; I think the Senator from New York doesn't have too long a statement.

Senator COTTON. By permitting the Senators to yield back and forth, a couple of us, or I at least am in a situation where I won't get a chance to ask the questions I have in mind.

The CHAIRMAN. Well, the Senator from Washington will recognize the Senator from New Hampshire.

Senator COTTON. I don't want to hold up the Senator from New York, but I have two or three questions I might ask, and the other day when I yielded just once to the Senator from Vermont, I thought the Chair very wisely ruled that to let a Senator yield to other Senators, meant he could monopolize the floor.

I just wanted to get a chance before noon, because I suspect we won't hold a session after 12 o'clock.

The CHAIRMAN. No; I guess we will not.

Senator PROUTY. Mr. Chairman, if we won't complete the questioning of Mr. Marshall today, will he be available tomorrow?

The CHAIRMAN. Yes; Mr. Marshall is available.

Mr. MARSHALL. I am available.

Senator COTTON. I don't want to be responsible for holding up anyone.

The CHAIRMAN. Out of courtesy to the Senator from New York, I wanted to give him a chance to testify, because he has a bill in this committee, with other cosponsors, that deals with this subject. The Senator from New York and myself have participated in some of these similar matters in the field of transportation, and I think he has waited a couple of days to testify. I want to give him the courtesy of making his statement now, and then we will proceed back to Mr. Marshall, and I am sure that all of us will have a chance to ask any questions we wish.

I understand the Senator from New York doesn't have too long a statement.

STATEMENT OF HON. JACOB K. JAVITS, SENATOR FROM THE STATE OF NEW YORK

Senator JAVITS. Mr. Chairman, I express my gratitude to the Chair and the members of the committee, and I shall not intrude upon the committee's time. I shall finish my statement in 10 minutes, and I will watch the time myself.

The CHAIRMAN. I would suggest that you won't intrude, you can make it short, because your views are fairly well known in this area by other Senators.

Senator JAVITS. Mr. Chairman, my purpose in testifying today is to testify essentially as a lawyer, because I think you are faced with a legal problem. I have had some experience as a lawyer, on constitutional questions and in arguments before the courts.

As the Chair says, my views are well known on this subject, and I have debated it many times and will debate it again.

Mr. Chairman, I am the author of S. 1217, for myself, Senators Beall, Case, Fong, Keating, Kuchel, and Scott, introduced March 28, 1963, which in essence is exactly the same bill to bar discrimination in places of public accommodation, and proceeds along the same lines, to wit, the Commerce Clause of the Constitution as the bill introduced on behalf of the administration.

I am cosponsor of that bill, as well, but this bill preceded it, based upon a rather extensive study which we made of this situation. Mr. Chairman, the bill before this committee reaches an aspect of the civil rights crisis now sweeping the Nation which almost no other civil rights proposal can reach in the same way: I speak of the moral issue of personal dignity. To understand fully what this legislation is about, one need only for a moment put himself in the position of a Negro who, walking into a restaurant or a hotel or a store, must first look around apprehensively to see whether or not he or she is welcome. I have seen this human tragedy a thousand times myself.

I would like to read to you a short passage from a very fine article, entitled "Discrimination in Hotels: A Cause for Crisis?" which, you will be surprised to hear, was carried in a trade journal, the Hotel Monthly, just a year ago:

> One balmy January midnight on St. Petersburg's motel-lined Treasure Island a tired and hungry family of four pulled their new Chrysler into the driveway of a modern 100-room motel-hotel. The father got out, stretched and straightened his tie. Through the large glass doors he could see a middle-aged woman behind the registration desk engrossed in a book.
>
> Ralph Sims went in and greeted her with his best smile. The woman looked up startled and without a word disappeared through a door behind her. Moments later her drowsy husband appeared through the doorway with a frozen stare fixed on the traveler.
>
> "Yes?" he inquired at last.
>
> "How much are your double rooms?" said Sims. "I notice there's a vacancy."
>
> The manager sucked in his breath and looked Sims in the eye. "Fifty thousand dollars," he said.
>
> Even Sims, who owned a $500,000-a-year appliance business was caught off guard, "I don't get it," he said, forcing a laugh.
>
> "That's what the price is," repeated the manager. "That's how much it would cost me in business to serve you. I've got 75 guests here tonight and I've got to think of them."
>
> "Look, mister," said Mr. Sims finally. "I'll pay you twice the price. I've got two kids out there. They haven't had a good meal all day, we're all exhausted and we can't find any place to sleep."

"Sorry," said the manager, shrugging his shoulders, "I feel sorry for you, but I just can't do it." And with that he abruptly disappeared through the same door.

That night the Sims family, who were Negroes, tried to doze curled up inside their parked car, counting the minutes until sunrise when they could begin hunting a colored restaurant for breakfast.

I began with this very human anecdote because I believe it helps to portray the deep importance which this proposal has to the Negro community and to the Nation itself, which is at last becoming mobilized to begin to meet head on the justifiable demands of its Negro citizens for equal opportunity and equal treatment now.

Other aspects of civil rights—in voting, education, administration of justice, housing, even employment—vital as they are in themselves—do not involve the day-by-day confrontation in restaurants, lunch counters, hotels, motels, stores, and shops and other similar public accommodations which make this one of the most explosive aspects of racial relations.

It is because of this very human, moral element that, in my judgment, the Negro community has directed most of its campaign of demonstrations against discrimination in public accommodations. I believe it was no accident that the beginning of this movement, in the spring of 1961, the sit-ins in Greensboro, S.C., was directed against segregated lunch counters.

Now, I consider this bill a pivotal part of the President's program, Mr. Chairman, because I think it represents the basis for what has brought forth such a surge of protest and brought us to this crisis in race relations. I point out, I think, the Congress and the President missed the boat in 1957 and in 1960 in failing to enact part III to give the Attorney General authority to bring injunctive suits in representative *Civil Rights Cases*, including school desegregation.

It missed the boat again in failing from 1957 to date to crack down on the use of Federal funds to subsidize State programs in which segregation or discrimination were practiced.

It is rather amazing to me this now becomes by no means the stormy petrel in this field that it was then. Yet, if we had done it then, we might very well have given tongue to the grievances of the millions who are now protesting so very strongly.

I think our failure to act in 1957 and 1960 had a tendency to lose the confidence of the Negro community and the will of the Federal Government to redress its reasonable grievances and therefore caused it to feel the need to express its impatience by direct action and demonstration. So, I say again we have another opportunity in this public accommodations bill, Mr. Chairman, and we will not, in my opinion, be true to the national interests, unless we pass it.

We cannot limit ourselves to pouring buckets of water over the raging fires of racial unrest. Americans are entitled to have an outlet for what they feel is elementary justice in this field.

The CHAIRMAN. I think the Senator from New York ought to put in the record at this point that there were several Members of Congress that tried very hard and voted to keep part III in the bill, in 1957. But there were not enough of us at that time to do the job.

Senator JAVITS. I am delighted with the Chair's addition. The Chair was one of those who fought very manfully for that.

The CHAIRMAN. There were several members of this committee among its supporters, too.

Senator JAVITS. I think it is sad we didn't succeed for it has caused us no end of grief, but I mention it only because it is such an object lesson for what we face now. Here again on front stage center is this so-called public accommodation section; it is so easy to lay it aside and go on to other things, and say it is too tough, we won't do it.

I think it would be as great a mistake and could have the same repercussions in terms of not dealing with the causes of grave public unrest, as we made in 1957 and 1960 in the judgment of those who fought for part III.

Now, Mr. Chairman, the one other thing I would like to point out is that I am not for a bill on public accommodation which has the conciliation technique as its only method of enforcement. I have been attorney general of my State, and have actually enforced civil rights laws, and I believe, Mr. Chairman, though the conciliation and mediation technique must always be employed, the residual right of enforcement is absolutely essential in this field. It is the only way in which you can deal with a diehard minority and that is what you face here. And certainly you face it in communities where the social order is a social order of segregation.

The conciliation technique is a valuable one, but unless it is backed up by a sanction in law, you don't have anything in the way of a statute which is going to do you any good in the field we are discussing.

So, I am against a toothless public accommodation law. And I think if we are going to act, we should act meaningfully and in a law which has the necessary sanctions. I believe the bill which is before the committee has reasonable sanctions of the kind we are accustomed to, and they are not unreasonable in the sense that there are no criminal sanctions; there is a full canopy of civil remedies and that is reasonable in my opinion.

Now, I would like to conclude, Mr. Chairman, with the legal arguments. It is my judgment that to resolve the differences between those who take one approach and those who take another on the constitutional question, we ought to adopt both.

I noted this was recommended here by my colleague from New York, Senator Keating. I notice also it was recommended by the Leadership Conference on Civil Rights. I believe this is the right course. If we are going to act meaningfully, we ought to exhaust Congress' power, by invoknig both the commerce clause and the 14th amendment.

Now, I have had the Library of Congress make a study, so hurriedly it is in longhand, as to whether a single provision of law may depend upon two constitutional authorities, and they feel it can, and I would like, if I may, Mr. Chairman, to have permission to introduce this memorandum in the record.

I feel the committee can base this particular statute both on the commerce clause and on the 14th amendment, and the Library has made this study which I think bears out that fact, and I would like to offer it.

The CHAIRMAN. I think it would be a valuable contribution.

(The memorandum referred to follows:)

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D.C., July 9, 1963.

To: Hon. Jacob Javits.
From: American Law Division.
Subject: Dual constitutional basis for legislative provisions.

Reference is made to your request for information on the following question: Are there any precedents for the enactment of a provision of law by Congress the authority to do so stemming from more than one constitutional clause because of the possibility that the exercise of authority on one base might be deemed invalid by the courts?

In answering these questions a distinction should be drawn between a bill in which it is sought to rest a single provision on more than one constitutional base, and a bill in which several provisions are included all relating to the same general subject matter but each resting upon a separate and distinct constitutional clause.

An example of both types is the Civil Rights Act of 1960 (74 Stat. 86) which contained provisions resting upon Congress power over the Federal judiciary (obstruction of court orders), over Federal elections (preservation of Federal elections records), over raising Armed Forces for national defense (education of children of members of the Armed Forces), and over the right to vote without discrimination because of race (Federal referees). This latter clause was also declared to be based upon Congress power to regulate Federal elections (art. I, sec. 4), and to protect against denial of equal protection of the laws by State action (14th amendment) (see *U.S.* v. *Manning* (D.C. La.), 215 F. Supp. 272 (1963)).

This memorandum will discuss only the first possibility; i.e., the basing of a single provision on two separate constitutional clauses.

The proposal at the present time of basing the so-called public accommodations feature of the proposed civil rights bill on both the 14th amendment and the Commerce Clause (art. I, sec. 8, cl. 3) seems to be a de novo undertaking. No precedent of a similar nature involving these two clauses has been found in the past.

Congress has, however, sought to obtain legislative objectives in the past through the use of several of its constitutional powers simultaneously. Perhaps, in some instances, this was done to broaden the scope of the statute, but in others it was apparently done to bolster its exercise of power. Both reasons might well have been utilized in some cases.

It might also be noted that beginning in the thirties, particularly, Congress has tended to attach so-called separability clauses to many of its enactments (see "Separability and separability clauses in the Supreme Court," Robert L. Stern, 51 Harvard Law Review 76 (1937)). While these clauses generally relate to the separation of different provisions in a law, there would seem to be no reason why such a clause could not be drafted to relate to the possible separation of constitutional powers supporting a single provision (see "Dissection of Statutes," Noel T. Dowling, 18 Am. Bar Asso. Jour., 298 (1932)). It might be a redundancy insofar as judicial interpretation would be concerned, but it also might have some value as an expression of congressional intent.

As respects instances where Congress has based its authority on more than one clause of the Constitution, the following are presented as examples:

(1) Tariff Act of 1922—*Trustees of University of Illinois* v. *U.S.* (20 C.C.P.A. (Customs) 134, cert. granted 287 U.S. 596, aff'd. 289 U.S. 48 (1932)). This case involved a claim by the State university that certain laboratory material imported for its benefit was not subject to import duties because the university as a State institution possessed an exemption from Federal taxation while engaged in the performance of public governmental functions. The claim was denied by the Court of Customs and Patent Appeals and this denial was affirmed by the Supreme Court.

In sustaining the legislation, the Court of Customs and Patent Appeals stated, page 138:

"The power to lay imports or duties and the power to regulate commerce may and often do find expression in the same act of Congress. The statutory provision may be the combined judgment of the legislative body and may embrace objects extending beyond that of revenue."

And, on pages 139–140:

"We come, therefore, to this conclusion, based on reason and on the constitutional authorities cited, that it was within the constitutional power of the Congress to fix a rate of import duties to be paid when the articles imported here entered the commerce of the country. This it might do for purposes of raising revenue; it might do it as the result of a national policy of protection to the industries of the country; it might do it as a regulation of foreign commerce, for all these powers were within its exclusive power."

(2) Civil Rights Act of 1960 (74 Stat. 86)—*U.S.* v. *Manning* ((D.C. La.) 215 F. Supp. 272, (1963)). In upholding the voting referees provision of the 1960 Civil Rights Act, the district court stated, page 289: "We summarize. The object of the act is to guarantee to qualified voters the right to register and vote. That end is within the scope of article I, section 4 and the 14th and 15th amendments; the corrective registration plan embodied in section 1971(e) (of title 42, United States Code) is an appropriate means to accomplish the end."

(3) Tennessee Valley Authority Act (48 Stat. 58, (1933)). Enacted for the purposes of national defense and improvement of commerce, agriculture, and navigation (16 U.S.C. 831) (see *Tennessee Electric Power Co.* v. *T.V.A.*, (D.C. Tenn.) 21 F. Supp. 947, 306 U.S. 118 (1939); *Ashwander* v. *T.V.A.* (297 U.S. 288), rehearing denied 297 U.S. 728 (1936)).

(4) Atomic Energy Act, as amended (68 Stat. 921—Enacted on war and commerce powers (42 Stat. 2011, (1946)).

There are several instances where a dual basis for authority was asserted by Congress or where courts have spelled it out. There are others of the latter kind, such as the power of Congress to authorize the issuance of legal tender and make it a suitable medium for the payment of debts (see 12 Stat. 345, 532, 709 (1862), 20 Stat. 87 (1878) Legal tender case (*Julliard* v. *Greenman*, 110 U.S. 421 (1884); 48 Stat. 112 (1933), *Norman* v. *B. & O. R.R. Co.*, 294 U.S. 240 (1934)); this power has been held to rest on the authority to coin money, borrow on the credit of the United States, raise funds by taxation, and regulate commerce (supra).

In other instances courts have sustained a congressional enactment through limiting its area of application to conform with the constitutional powers of the legislative body. For instance, in *U.S.* v. *Dewitt* (76 U.S. 41 (1869)), the Supreme Court declared that while a provision of an act of March 2, 1867 (14 Stat. 484) prohibiting the mixture of naphtha and illuminating oil was a police regulation related exclusively to the internal trade of the States and thus beyond Congress power over interstate commerce, nevertheless the act could be enforced in the territories and the District of Columbia where the authority of Congress was plenary.

And, the courts have likewise (although there are opposite opinions on this point) sustained legislation as within the power of Congress to enact even though aspects of it might be questionable. In *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court, in upholding the National Labor Relations Act, rejected an argument that since the preamble to the statute and its legislative history afforded some indication that the act was intended to operate (i.e., affect labor-mangement relations) in fields not subject to the commerce power, it should be declared invalid in toto. Chief Justice Hughes stated (p. 30): "But we are not at liberty to deny effect to specific provisions which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. *Federal Trade Com'n.* v. *American Tobacco Co.*, 264 U.S. 298, 307; *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 390; *Missouri Pacific R.R. Co.* v. *Boone*, 270 U.S. 466, 472; *Blodgett* v. *Holden*, 275 U.S. 142, 148; *Richmond Screw Anchor Co.* v. *U.S.*, 275 U.S. 331, 346.

"We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority."

In any event, there seems to be no reason why Congress cannot base its power to enact a particular provision into law upon several constitutional clauses particularly in an area where the law has not been adjudicated with

finality. As was stated in *Trustees of the University of Illinois v. U.S.*, *supra*, "The statutory provision may be the combined judgment of the legislative body * * *" and this will have some relevance in an interpretation of a statute by the courts (*see N.L.R.B. v. Jones & Laughlin Steel Corp.*, *supra*).

ROBERT L. TIENKEN, *Legislative Attorney.*

Senator JAVITS. Now, the basis for action under the commerce clause is firmly embedded in the dozens of congressional enactments under that clause. It includes the National Labor Relations Act, the Fair Labor Standards Act, the Agricultural Adjustment Act, and the Food and Drug Act. The Attorney General, in testimony before this committee last week, referred to the Oleomargarine Act, which sought to regulate under the commerce clause the shape and color of oleomargarine, which has a detailed form of regulation under the commerce clause. Just as in those enactments, the bill before the committee is validly within the Congress interstate commerce power because the practices which it seeks to regulate are a burden upon interstate commerce. Denial of services and accommodations on the basis of race or color interferes with the freedom of interstate travel by Negroes.

I don't think there is any question about its burden, because I think we can almost testify on our personal experience that it reduces the volume of interstate travel and that is certainly the most elementary form of burden.

I believe the incident to which I referred at the beginning of my testimony is eloquent evidence of just how such discrimination does interfere with such travel; I am sure the committee will hear more such testimony firsthand during these hearings.

The 14th amendment also could support legislation along these lines, although, as I have suggested, it would probably be best to spell out the reliance on that amendment by expanding the definition of establishments covered by the bill in order to make it clear that it proscribes discrimination on grounds of race or color by any business in which such discrimination is enforced by State action.

The cases have been discussed in great detail by the committee. There is one additional argument which I think is very important.

The essence of the law under the 14th amendment is that the law implementing the 14th amendment creates no new rights. All it does is give a method of enforcement for rights which do exist.

On the other hand the law under the commerce clause can create new rights because the commerce clause gives a plenary power to Congress to legislate in a field.

Therefore, it seems to me that if you really want to cover the field, and I am sure that if we pass a bill, we want it to be effective, the most uniform, the most all-inclusive coverage would come under the commerce clause, where Congress has the power to impose a specific type of regulation out of which a right then arises, whereas under the 14th amendment you are only dealing with rights which already exist and giving them an opportunity to be enforced by appropriate action.

To me, that is a very important point. I feel that the 14th amendment basis for the statute—and I say that based upon the point which I have just made—has the greater chance of being uneven in its application, for it depends too heavily on legal or factual situations. Incidentally, these legal or factual situations are generally

found only in the South; to wit, if you stretch the Supreme Court case to their outermost limits, a social pattern of segregation. And let us remember that the Court has sent back to the lower courts that very case. It hasn't even gone that far. Otherwise, you have regulation under the commerce clause that is applicable everywhere across the board, and it is based upon the established right of the Congress to create a right, which is not written in the Constitution but which is created by virtue of the plenary power over interstate commerce, which has been granted to the Congress by the Constitution.

Whereas if you leave it only on the 14th amendment ground, you are trying to enforce rights which the 14th amendment itself has created and they are bound to be, according to the decision of the courts, when stretched to their outermost limit, more uneven in their application than would be the invocation of congressional authority under the commerce clause.

Senator COTTON. Mr. Chairman, I didn't mean to curtail your testimony, Senator, by what I said at the start. And secondly, would you permit a question at this point?

Senator JAVITS. Certainly.

Senator COTTON. Your statement very much interests me about the 14th amendment's application.

You say it would depend—it would be uneven in its enforcement, I assume even if we passed an act and the Supreme Court now upheld it, because it relies too heavily on legal or factual situations. It is not exactly clear to me.

Do you mean it would still only affect establishments licensed by the State? Would you clarify that a little or give an example?

Senator JAVITS. I would be glad to.

It would affect any situation in which there was "State action." Now, licensing alone, according to decisions so far, has not been held to be State action. In fact, this case of Johnson Motels, what has been held to be State action is a State statute or a municipal ordinance which brings about or directs segregation, or the statement of municipal officials that with their police authority they will even force segregation. The third example is the *Wilmington* case, in which a coffee shop, on State property was called a State entity, based upon a lease with a State. We haven't even equivocable declaration that the license itself represents State action. As a matter of fact, the only case decided, I think in the Fourth Circuit Court of Appeals, holds that State action is not manifested by a license, which is kind of a peripheral act.

Personally, I believe the Supreme Court would overrule that. That is just the judgment of one lawyer. I believe the Supreme Court would hold, under today's conditions, that licensing does represent State action. But that is extending it beyond the decided case. I say it would be uneven in its application for this reason.

I am very cognizant of the fact that you are bound to have litigations, no matter whether you use the 14th amendment or the commerce clause or both, because of the mere definition of the word "substantial." I think the very excellent nature of the questioning on the part of the committee has certainly shown that you cannot devise a scheme which would save you from litigations. That is the

essence of our country. But what you want to do is set a standard which is as uniform as possible. I think my credentials are good on this to speak not only for the South but for the North and the West and every part of the country. My point is in view of the nature of these two provisions of the Constitution, the 14th amendment, which Congress first wrote itself and the commerce clause, which gives a license to the Congress to create rights. I think it is much wiser to employ both because there is greater danger of uneven necessity and perhaps even sectional application in the 14th amendment approach standing alone than there is if you include the commerce clause as well. That is the essence of the legal argument I make to the committee.

Again, I don't claim you avoid litigations, but I feel you make a more uniform standard in an established area where the law is very clear, in terms of how the Congress can proceed and where it is entitled, under the constitutional mandate, to regulate business or to confer rights in a general field, to wit, the field of interstate commerce. That is the essence of my legal argument.

If I may conclude, Mr. Chairman, the argument has also been made in these hearings and elsewhere that some countervailing rights of privacy or freedom of association are infringed by these proposals. To me a complete answer is that almost every regulatory enactment of the States as well as of the Congress involves some loss of privacy or freedom of association, yet our Nation could hardly exist without them. Labor legislation, food and drug legislation, and farm legislation all involve some countervailing loss of freedom on the part of some in order to serve the national interest. A minister in Atlanta, Ga., Rev. Roy Pettway, recently put this very well in a sermon. He said:

> When a man operates a store, restaurant, hotel, or other business, he may do so as a corporation chartered by the State, and in any event, he can do so only by license from the Government. He cannot do so privately without a Government license, and thus the right to operate his business is a privilege granted to him by the Government. And his business may be worth so many thousands of dollars; but those are U.S. dollars, and without the U.S. Government, his property would be worth no more than Confederate currency.
>
> If your private building is dangerous, the Government can make you tear it down. If a private druggist has tainted drugs, the Government can seize and confiscate them, even though they are his private property. If a physician or lawyer does not follow the regulations of the Government, his license will be revoked. If you don't obey traffic rules, your driver's license will be taken away from you. And if a man does not operate his business in accordance with the law, his business license can be taken away, and his place of business "padlocked."

That goes for saloons, inns, and so on. So I don't think the freedom argument will stand up against the argument——

The CHAIRMAN. You didn't read the next line.

Senator JAVITS. What this legislation would do is only to deprive operators of public places of the freedom to discriminate against patrons because of the color of their skin.

The CHAIRMAN. That is as simply and succinctly stated as I have heard it.

Senator JAVITS. You are very kind. The freedom of operators of public places has long been restricted in many ways which no one has seen fit to challenge as a deprivation of private property rights. In common law innkeepers were required to make their establish-

ments open to all travelers. Today in most States those who invite the public onto their property to do business are obligated to provide greater precautions for the physical safety of their customers than owners of wholly private property. Some 32 States already prohibit operators of public places from exercising freedom to discriminate on grounds of color. And a number of Southern States indicate no countervailing protection of private property rights because they prohibit operators of public places from exercising freedom not to discriminate on grounds of color, by having segregation status.

Now, as to this so-called argument for Mrs. Murphy's boarding house, I do not believe an explicit cutoff—in either dollar volume or number of employees—should be written into this bill to exempt outright smaller businesses from the effect of the act. In the first place, that is not done in any one of the 32 State statutes to which I referred. I think that is a powerful argument against it. To do so in the Congress would negate the moral and human base for this legislation. I do not believe Congress should itself discriminate against the larger businesses in favor of the smaller ones, in order to permit the latter the capability of racial discrimination.

A Negro should not be forced to decide whether the particular hotel or motel he is approaching is one large enough to treat him like any other fellow American. Unfortunately, this is going to be the result as a practical matter no matter how the legislation is phrased, since limitations of manpower and funds would ordinarily prevent the Department of Justice from pursuing any but the prominent cases. And the commerce clause approach itself requires a substantial involvement in interstate commerce so that again the smallest establishments would practically not be covered. But I do not feel that the Congress should go beyond these built-in exemptions to exempt specifically any class of proprietors of public places.

If a small rooming house in which the proprietor lives—which is the case most often described in this connection—is regulated as a public place by the city and State through licensing, special fire laws, and public health standards, I see no reason why it should not also be subject to the same moral code as its larger competitors. Just as in the choice between the commerce clause and the 14th amendment, my recommendation here is that Congress should exhaust all of its power to do away with the blight of racial segregation and discrimination.

In conclusion, it is my firm belief, as a lawyer and as a legislator, that the pending legislation is wholly constitutional and vitally needed.

Mr. Chairman, may I have permission to do one other thing? We have some excellent opinions from law school professors of very great respect, sustaining the constitutionality of this particular statute. One is Paul Freund of Harvard.

The CHAIRMAN. He is going to be a witness here. He has consented to come down and testify. I understand he is one of the outstanding authorities in this field.

Senator JAVITS. Yes, and Prof. Arthur Sutherland of Harvard, a very distinguished authority has written me a long and very fine letter again bearing out the constitutionality question.

The CHAIRMAN. For the purpose of those interested, as long as we are on the subject, six or seven deans of the law schools of some of our great educational institutions, including Notre Dame, California, Arkansas, Virginia, Yale, and Harvard are going to testify before us. I don't know why the University of Washington is not in there. We can get the legal opinion of these people who have studied this question. I am very interested in your giving us the benefit of this study which we can go into deeper, arguing that you can proceed under both constitutional bases and then let the Court determine on which they choose to rely. I want to ask you one further question. From your experience as Attorney General do you know of a single State law in the 32 States having public accommodations rules that gives these exemptions you talk about?

Senator JAVITS. No, not a one.

The CHAIRMAN. I don't know of any particular practical problems we have had in these States in the enforcement of these laws against discrimination based on race, color, or creed. There have been some cases, that is true. But a lot of them have been friendly suits to determine this. In no case that I know of have they put in any exemptions.

Senator JAVITS. No. 1, the Chair is right, there are no exemptions, and No. 2, of all of the antidiscrimination statutes in the State of New York, and I think we have as complete a network as any State in the United States, the one with which we have the least problem is the public accomodations law. It just is accepted and that is the end of it.

The CHAIRMAN. I know that is true in my State and I am sure it is true in the three Western States with which I am familiar, Washington, Oregon, and California. And also is it not true that in all of the 30 States, there are stronger penalties than are even suggested by this piece of legislation?

Senator JAVITS. Almost without exception, there are criminal penalties for enforcement. As I run down the sheet, California has no criminal penalty, Maryland——

The CHAIRMAN. Most of them. I will get that for the committee's files.

Senator JAVITS. A few don't, but the overwhelming majority have criminal penalties.

The CHAIRMAN. We will put into the record all of the legal opinions we receive.

Senator JAVITS. Thank you. I have one from Professor Cooper, of the University of Michigan Law School also, and in fairness to these men, who have done a lot of work, I would appreciate very much, including their opinions, in my testimony.

(The matter referred to follows:)

NEW YORK UNIVERSITY SCHOOL OF LAW,
New York, N.Y., July 8, 1963.

Senator JACOB K. JAVITS,
U.S. Senate,
Committee on Labor and Public Welfare,
Washington, D.C.

DEAR SENATOR JAVITS: In your letter of June 28, 1963, you inquire about constitutional aspects of the five principal Senate proposals to prohibit discrimination in public accommodations. We are pleased to respond to your

request, first noting the essential features of the five bills, and then commenting briefly on certain aspects of the constitutional questions raised by these several approaches.

Legislative proposals to prohibit discrimination in public accommodations

1. Title II of S. 1731, the administration bill, relies principally upon the commerce power, and secondarily upon section 5 of the 14th amendment, to assure "the full and equal enjoyment of the goods, services, privileges, advantages and accommodations" in places of lodging, public places of amusement, and retail commercial establishments wherever there is "substantial" effect on interstate commerce. Civil action for preventive relief is authorized by any aggrieved person or, upon satisfaction of certain preconditions, by the Attorney General.

2. S. 1732 is identical with title II of S. 1731 except that it omits any reference to the Community Relations Service (separately provided for in title IV of S. 1731) and adds a paragraph requiring the Attorney General, before bringing an action, to use the services of any Federal agency that may be available to secure voluntary compliance, if he believes such a procedure is likely to be effective.

3. S. 1622 relies exclusively upon the commerce power to authorize the Attorney General to institute civil suits for preventive relief "whenever a person engaged in any business affecting commerce refuses or denies to any other person, or withholds from another, equal treatment in the facilities, services, or accommodations afforded by one in such business on the ground of race, religion, color, or national origin of such person. * * *"

4. S. 1217, like S. 1622, relies solely on the commerce power; but, unlike S. 1622, it forbids discrimination only as to "any hotel, motel, or other public place engaged in furnishing lodging, the business of which affects interstate commerce. * * *" Violation is made a misdemeanor subject to a fine not to exceed $1,000; and civil suit is authorized by an aggrieved party or by the Attorney General (in behalf of the aggrieved party) "for damages or preventive or declaratory relief."

5. S. 1591 relies exclusively on the 14th amendment authorization in section 5 to enact appropriate legislation to prohibit discrimination on account of race or color. The bill would authorize suit by an aggrieved person at law or in equity, or a suit for preventive relief by the Attorney General, where discrimination is practiced by a "business or business activity affecting the public which is conducted under a State license." The coverage would include any business or business activity required to be licensed by the State, "which holds itself out as offering for sale or use to the public, food, goods, accommodations, facilities, or transportation, including services connected with the sale or use of such food, goods, accommodations, facilities, or transportation."

Comment on constitutional validity of above proposals

We wish to say first, and without equivocation, that we believe that each of the above proposals, if enacted, should be regarded as a valid exercise of congressional power. However, because reliance on the commerce power and on the 14th amendment raise somewhat different considerations, these two sources of authority are here considered separately.

1. *Commerce.*—We do not believe there can be any doubt that Congress may forbid racial discrimination and provide appropriate sanctions against such discrimination wherever it occurs in connection with businesses or other activities that affect interstate commerce. The power of Congress to forbid or regulate activities affecting interstate commerce is so well settled that only a reminder is necessary of the familiar cases. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States* v. *Darby*, 312 U.S. 100 (1941); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *United States* v. *Sullivan*, 332 U.S. 689 (1948). Under these cases it is clear that the touchstone of congressional power is found in the concept of "affecting commerce," the phrase used in S. 1217 and S. 1622. The more limited reach of title II of S. 1731 and of S. 1732, making the provisions applicable only where there is "substantial" impact on interstate commerce, is thus a limitation of policy rather than one of constitutional necessity. As Mr. Justice Jackson once noted, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

Indeed, as Senator Cooper has pointed out, the approach of S. 1732 and S. 1731 would permit many business establishments and places of public accommodation to continue, or even to initiate, discriminatory practices. And, of course, proposals to impose a minimum dollar volume of $150,000 or $500,000, as some have suggested, would have the same effect in still more explicit fashion.

2. *Fourteenth amendment.*—At first impression it might seem that an approach to congressional power under section 5 of the 14th amendment is of doubtful validity in view of the 1883 decision in the *Civil Rights Cases*, 109 U.S. 3, where the Court said at page 17:

"In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; * * *"

Accordingly, many have assumed that Congress is without power to protect against discrimination except where the State or its officers and employees are the direct instrumentalities of discrimination. But this cannot be categorically so. Even the above-quoted portion of the opinion does not exclude Federal prohibition of discrimination which is supported by "State law" or "State customs." Segregation of public accommodations has long been required by "State laws" in large parts of the country and, even where those statutes have fallen, segregation is still widely enforced by "State customs."

When Mr. Justice Bradley, speaking for the Court in the *Civil Rights Cases*, described the nature of the power of Congress under section 5 to enact "appropriate legislation," he noted that Congress is not empowered "to legislate upon subjects which are within the domain of State legislation. * * *" *Id.* at 11. But it must be remembered that at that time it was assumed that the States could by State law require segregation. See, *e.g.*, *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). Now that a requirement of segregation is no longer within "the domain of State legislation," a fundamental premise of the Court's argument has been removed. Similarly, with the significant rise in the extent of State regulation of business and other activities by licensing or otherwise, it has become clear, as indicated in S. 1591, that businesses and activities which are subject to State licensing requirements are no longer exclusively "private" activities in the sense of the language of the *Civil Rights Cases*. Accordingly, they should no longer be immune from Federal regulation to protect against racial discrimination.

Moreover, the Supreme Court has indicated in various contexts that discrimination in an allegedly private context is not to be tolerated under the equal protection clause of the 14th amendment where the "private" action is an integral part of a State election system, as in *Terry* v. *Adams*, 345 U.S. 461 (1953), or the act of a lessee in a building owned and operated by an agency of the State, as in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). See also *Garner* v. *Louisiana*, 368 U.S. 157 (1961); *Peterson* v. *City of Greenville*, 83 Sup. Ct. 1119 (1963); *Lombard* v. *Louisiana*, 83 Sup. Ct. 1122 (1963). The concurring opinions of Mr. Justice Douglas in *Garner*, 368 U.S. 157, 176, and in *Lombard*, 83 Sup. Ct., 1122, 1125, include interesting analyses of the commonlaw obligation of innkeepers and carriers to serve all travelers and of the increasing role of the States in the licensing of businesses and other activties in the nature of public accommodations.

Argument is made against the 14th amendment power of Congress on the ground that such regulation would be an interference with rights of privacy or freedom of association and with private property rights. But these contentions do not seem well founded. Those who now advance such arguments did not make similar arguments against former laws requiring segregation in restaurants, hotels, and other places of public accommodation where clearly the State interference with private rights of association and property was more substantial. The argument should be rejected as an after-the-fact rationalization. In fact, the proposals to remove discrimination from certain phases of public-connected activity serve rather to promote than to discourage freedom of association.

In this connection, it is also noteworthy that 32 or more States forbid discrimination in public accommodations. Thus, the question is not whether there is power to regulate "private" property so dedicated to the public use, for the States have long done so without challenge to their power to do so. The only question, then, is whether the Federal Government may impose uni-

form standards in this regard. For the reasons above stated, we believe an affirmative answer should now be given.

Sincerely,

EDMOND CAHN,
ROBERT B. MCKAY,
Professors of Law, New York University.

ARTHUR GARFIELD HAYS,
CIVIL LIBERTIES PROGRAM,
NEW YORK UNIVERSITY SCHOOL OF LAW,
New York, July 9, 1963.

HON. JACOB K. JAVITS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR JAVITS: Please forgive me for the delay in responding to your letter of June 28, 1963, relating to five alternative bills now pending in committee that would prohibit discrimination in public accommodations. I shall key my response to the numbered questions contained in your letter.

(1) I believe that S. 1217, S. 1622, S. 1731 (and the latter's counterpart in S. 1732) are all well within the power of Congress under the Commerce Clause to the Constittuion. I also believe that S. 1591, which would derive its authority through the 14th amendment, is within the power of Congress because a State requirement of a license as a condition for conducting business constitutes sufficient "State action" to serve as a basis for Federal regulation.

(2) I do not believe there is any legally or morally cognizable right of privacy or freedom of association that would be infringed by any of the pending measures. The laws in many Southern States which require owners to discriminate against Negroes are but one manifestation of the South to have it both ways—to enforce separateness through State laws, but to resist on the ground of a spurious "right to privacy" Federal laws to eliminate segregation and discrimination. The "private" interest of owners of public service enterprises to insult and denigrate large sections of the population pales in weight before their moral obligation, which Congress should enact into law, to do business with all well-behaved members of the public.

(3) Innkeepers at early common law were required to serve all guests in a fit condition who had the ability to pay, and this conmmon law rule was generally adopted in the United States. The bills to prohibit discrimination are consistent with this common law obligation, not only of persons who are "innkeepers" in the technical sense, but of persons who own and manage all enterprises of public accommodation.

(4) The thrust of this question is not entirely clear to me, but I shall make two comments. First, there would appear to be a legal obligation on the part of owners and managers who admit individuals to a "public place" for one purpose (say purchase of goods) to permit such person to use the facilities of the place for another purpose (say lunch counter eating). Secondly, there is a well-established duty of occupiers of land under general tort law to protect invitees from the foreseeably dangerous conduct of third persons. The precise limits of this duty are uncertain, but it might well impose a legal duty on occupiers to protect well-behaved customers from the insults, and especially from the physical barm, that sit-in demonstrators and other Negroes and whites have incurred in certain southern establishments.

(5) The widespread State antidiscrimination statutes are evidence of the conviction of State legislators that legal sanctions are needed to enforce the moral obligation of owners of public service enterprises to serve the public in a nondiscriminatory way. These statutes also speak eloquently about the insubstantiality of the claim that a countervailing "right of privacy" or "freedom of association" is infringed by measures prohibiting discrimination in public accommodations.

I hope that the above comments are helpful. I should be pleased to testify before the Judiciary or Commerce Committee if you believe my testimony would be useful to the passage of any of these bills. Otherwise, you have my permission to include the above remarks in your own testimony.

With kind regards,

Sincerely,

NORMAN DORSEN, *Associate Professor of Law.*

CAMBRIDGE, MASS., *July 1, 1963.*

Hon. JACOB K. JAVITS,
U.S. Senate, Washington, D.C.:

Your bill No. 1217 and title 2 of the omnibus bill in its operative provisions are fully supported by the Commerce Clause including the precendents on Federal labor legislation. The objection based on freedom of association is no more weighty than it was in the case of the New York civil rights law applicable to union membership decided unanimously in 1945. It would be unnecessary and unwise to rely on 14th amendment because of uncertainties regarding scope of its application to private business. Commerce Clause is adequate and provides appropriate legislative flexibility in application.

Respectfully,

PAUL FREUND.

THE UNIVERSITY OF MICHIGAN,
LAW SCHOOL,
Ann Arbor, July 6, 1963.

Hon. JACOB K. JAVITS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR JAVITS: Because of the Fourth of July holiday I have been delayed in responding to your letter of June 27 in which you request my views with respect to a series of questions pertaining to the various proposals now before the Senate designed to prohibit discrimination in public accommodations. Since you wished an early reply and since my own time at present is limited because of vacation plans, I shall set forth my views in a very brief way.

1. S. 1591 is based on the power of Congress to enforce the 14th amendment, whereas the other bills in dealing with the public accommodation question are based on the commerce power.

As long as the Supreme Court adheres to the views expressed in the civil rights cases; namely, that the power of Congress to enforce the 14th amendment is limited to the power to prescribe remedies and sanctions directed against governmental action which results in denial of equal protection, any proposal to deal with the public accommodations problem on the basis of the 14th amendment power raises serious constitutional difficulties. I do not see how S. 1591 could be sustained without an overruling of the civil rights cases.

I realize that S. 1591 is based on the theory that any person who engages in business (of the kind mentioned in the bill) under a license required under the laws of a State is so identifiable with the State in conducting a business clothed with a public interest that he should be treated as an agency or instrumentality of the State and hence subject to 14th amendment restrictions. The elder Justice Harlan made this argument already in his dissent in the civil rights cases. Mr. Justice Douglas has been making the same argument in recent cases before the Supreme Court involving sit-ins. But to date the Supreme Court has not given approval to the idea that every State licensee is to be regarded as a State agent for the purpose of the 14th amendment. I have difficulty with the idea myself. Distinctions need to be made. I see no problem in subjecting to constitutional limitations a licensee whose license confers special or monopolistic or quasi-monopolistic privilege as in the case of a public utility which receives a franchise or a certificate of public convenience and necessity. Where the license device is used as a means of restricting competition, a plausible case may be made out for identifying the licensee's actions with the State. But I have difficulty with the mine-run type of license, whether issued by State or local authorities, which is used as a device for police regulation and furnishes an effective means of administering a regulatory statute or ordinance. If an ordinance regulates theaters by making it a misdemeanor to show obscene films, the theater owner would not for this reason alone be considered a State instrumentality. I fail to see how a different result should be reached on this question simply because the city resorts to a licensing scheme as a more effective means of enforcing its police ordinance.

But while I have serious doubts about the constitutionality of a public accommodations bill resting on a theory of the power of Congress to enforce the 14th amendment, I think a fairly good case may be made out for the other proposals that rest on the Commerce Clause. I say this in view of the broad

reach of the commerce power as interpreted by the Supreme Court in recent years. Certainly there should be no difficulty whatever in reaching hotels, motels, restaurants, and places of business that offer accommodations and services to a substantial degree to interstate travelers. Denial of service and accommodations in such cases on the ground of race, color, etc., does interfer with the freedom of interstate travel and imposes a burden upon this travel. Applying the bill to public places of amusement which present motion pictures, etc., which move in interstate commerce and to retail shops which sell goods that have moved in interstate commerce is a further stretch of the commerce power, but in view of the decisions under the Federal labor legislation and the Sherman Act and the breadth of the power of Congress to define the conditions of carrying on interstate business where there is some substantial relationship between local activities and interstate trade or transportation. I am inclined to think that these provisions would be held constitutional. Experience has demonstrated that discriminatory practices in local business establishments, theaters, etc., do have interstate implications and repercussions.

2. I think that there is a right of privacy and a freedom of association that are protected under the due process clause of the fifth amendment, but I do not believe that recognition of these rights would seriously affect the validity of the proposed public accommodations legislation. The right of privacy is not very relevant since the proposed legislation would deal only with business establishments which in a general way hold themselves out to serve the public. Freedom of association becomes relevant either if the proposed legislation would restrict the practices of private clubs or on the theory that a proprietor in following discriminatory practices is thereby protecting the freedom of association of his customers. But these proposals do not reach the private club. And so far as the proprietor's right to protect the freedom of association of his customers is concerned, it seems to me that in the context of business establishments that in a general sense are open to the public, the elements of freedom of choice with respect to customers and freedom of association have already been reduced to a minimum, and in any event these freedoms and rights are always subject to some restriction pursuant to legislation designed to promote important public interests. Any right of privacy and freedom of association must be weighed against the evils of discrimination as determined by the legislative body, and then the question is whether the legislature in making the choice it has, has acted in an unreasonable way in abridging or restricting private rights. I would be very much surprised if the Supreme Court were to hold that the proposed legislation violates any rights or freedoms protected under the due process clause. Indeed, the whole tendency in recent years in the Court's decisions has been to minimize the significance of the due process clause as a restriction on the legislative power to limit business practices.

Of course Congress might well decide that apart from constitutional limitations it would want to protect freedom of choice and freedom of association in certain limited areas in addition to the private club situation. For instance, it seems to me there is much merit in exempting from the proposed coverage any rooming or boarding house or private home that rents rooms to transients where the proprietor lives on the premises. Here a statutory limitation on freedom of choice of tenants does intrude more markedly on right of privacy and freedom of association.

3. So far as hotels and motels are concerned, the proposed bills do have an intimate relation to the common law obligations of innkeepers. In the first place, the fact that at common law the innkeeper had a duty to serve all the public is in itself a strong historical argument in support of the conclusion that the imposition of a statutory duty not to discriminate does not violate any constitutionally protected freedom of the hotel or motel owner to choose his customers. Secondly, the recognition of the common law obligation does have a bearing on the State action question raised with respect to the 14th amendment. Although as stated in my response to question 1 above I have serious doubts about the power of Congress in reliance on the 14th amendment to impose a duty not to discriminate on all licensed business establishments, the hotel and motel raise a special problem in view of the historic rule of the common law respecting innkeepers. If a State by common law or statute still recognizes the innkeeper's status as a special one arising from the nature of his calling and undertaking and imposes a duty to serve all, then the discriminatory application of this State-imposed duty to serve so as to leave the inn-

keeper free to discriminate on the basis of race or color is a discrimination pursuant to law and should be subject to challenge under the 14th amendment. I do not see how a State, consistent with the 14th amendment, can give members of one race a right to demand service from a hotel but deny this right to members of another race. I reach this result not on the ground that the innkeeper is a State instrumentality, since he enjoys no special monopolistic franchise or license, but on the ground that a State-imposed rule which discriminates on the basis of race or color is a violation of the equal protection clause. Of course if a State no longer follows the common law rule respecting innkeepers and has no statutory substitute, the argument is no longer relevant.

4. The relation between these legislative proposals and the obligations of owners of business establishments toward invitees and licensees depends on the laws of the several States. As I understand it (and I should add that I have not explored this problem in any thorough way), the obligation imposed by tort law depends on the scope of the holding out to the public on the part of the proprietor. Whereas in the innkeeper case the obligation to serve all is determined by law by reference to the nature of the business, the obligation to serve on the part of other business establishments (excluding carriers) is determined by the proprietor's own practice, and in turn the significance of this obligation is governed by local law. If a given business establishment undertakes to serve all the public without discrimination, this determines his legal obligation. On the other hand, if he undertakes to serve a limited class, whether the class is determined by race or on any other basis, this limits the scope of his obligation. At least up to this point I find nothing in the Supreme Court's holdings to indicate that the State itself is engaging in discrimination forbidden by the Constitution if in determining the duties owed by business establishments to invitees and licensees it is governed by the nature of the voluntary holding out on the part of the proprietor. Under the proposed bills forbidding discrimination by business establishments, any restrictions on the general holding out to the public as voluntarily imposed by the proprietor and as recognized under State law, would be irrelevant at least so far as any racial restriction is concerned.

5. The fact that some 32 States persently have antidiscrimination public accommodation statutes is certainly significant in pointing up the consideration that a majority of State legislatures have recognized that a problem exists here and that it is an appropriate exercise of the police power to deal with the problem in this way. The argument that the proposed Federal legislation would unjustifiably infringe upon freedom of choice, personal liberty, and right of privacy loses much of its force when consideration is given to the limitations already recognized under these State laws. The fact that a large number of States already have such laws suggests also that as a practical matter enforcement of antidiscrimination laws could still be left in large part to States under their own statutes, thereby reducing the necessity of invoking Federal law and its enforcement provisions.

6. I am not clear as to the thrust of this question except as it points up the consideration that because of the restraining effect of laws in certain Southern States, the proprietors of business establishments do not enjoy a real freedom to carry on their business as they see fit and without engaging in discriminatory practices. The right of privacy, the freedom of association and the freedom of choice work both ways in this matter. A business proprietor should have the freedom to serve without discrimination and customers if they wish should have the freedom to patronize establishments that do not discriminate. This is part of their freedom of association. So while the proposed legislation may restrict the freedoms of some, it will serve to enlarge the freedom of others, and this is another consideration to be taken into account in determining whether such proposed legislation is unreasonable or arbitrary in its effect on private rights. The task of resolving conflicts between competing sets of rights is appropriately a matter for legislative determination.

7. I wish to add one word by way of special comment. As indicated above, I think that the commerce power furnishes a constitutional basis for dealing with the problem of discrimination in public accommodations. But it seems to me that the legislation should be as specific as possible in dealing with this matter so far as the commerce aspect is concerned. Rather than leave the matter entirely in terms of a vague standard such as "substantially affects commerce," I would prefer that at least with respect to business establishments, a standard be established in terms of the annual volume of business. This has the merit of stating an objective standard—thereby reducing the area of inter-

pretation, excluding the small establishments that do not present the major problems, and restricting the enforcement task.

I trust that my thoughts on these matters will be of some assistance to you. Because of vacation plans I am not in a position to go to Washington to testify with respect to these bills, and in any event this letter pretty well sets out my thinking on these question. Feel free to use this letter as you see fit.

With best wishes, I remain

Sincerely yours,

PAUL G. KAUPER.

YALE UNIVERSITY LAW SCHOOL,
New Haven, Conn., July 10, 1963.

Hon. JACOB K. JAVITS,
U.S. Senate, Washington, D.C.

DEAR SENATOR JAVITS: By letter of June 27 you sent me copies of the five principal alternative Senate proposals relating to discrimination in public accommodations. Very briefly, my views on these proposals are as follows:

I have no doubt that either the Commerce Clause or the 14th amendment is an adequate constitutional basis for legislation of the type contemplated. As between the Commerce Clause and the 14th amendment, I do think that the grant of power to Congress to enforce the amendment yields a more satisfying sense of historical relevance. (I mean, in essence, what Mr. Justice Douglas meant in his concurring opinion in *Edwards* v. *California*, 314 U.S. 160, 177, when he expressed a preference for deciding that case on the basis of the 14th amendment rather than the Commerce Clause.) I have, however, no doubt that the commerce power is as adequate to reach these aspects of racial discrimination as it has been to reach, for example, those aspects of antiunion discrimination covered by the National Labor Relations Act.

But for the decision in the *Civil Rights Cases* in 1883, I would suppose that it would be hard to construct a very plausible argument that Congress lacked power under the 14th amendment to prohibit racial discrimination carried on by businesses operating pursuant to State authorization. I have no doubt that the Supreme Court would not find its 1883 decision an obstacle to the validation of a new attempt by Congress to utilize the 14th amendment to police this area of State-authorized public discrimination. For one thing, the Supreme Court could today find that the Southern States have not given those discriminated against by places of public accommodation a right of action under State law—contrary to the assumption with respect to the generality of State law which seems to have underlain much of the majority's reasoning in the *Civil Rights Cases*.

Although I am quite confident that the decision in the *Civil Rights Cases* presents no real barrier to utilization of the 14th amendment to halt discrimination in places of public accommodation today, it does seem to me that—since the decision in the *Civil Rights Cases* stands unoverruled—reliance on the 14th amendment alone may well seem to clothe the adamant southern congressional opposition with an apparent constitutional validity to which I think it is not genuinely entitled.

In this sense it would strike me as being tactically prudent, for the purpose of expediting enactment of a bill by Congress, to put one's constitutional reliance both on the 14th amendment and on the Commerce Clause. This, I take it, is the theory underlying section 2(i) of S. 1732 and section 201(i) of S. 1731.

I am sure it is obvious from what I have already said that the notion that prohibiting discrimination in places of public accommodation impinges on anybody's right of privacy seems to me wholly unpersuasive. The undoubtedly valid 32 State public accommodation statutes, to which you refer in your letter of June 27, fully establish the point. Rather than belabor the point further, I would like simply to quote two paragraphs written by my colleague, Charles L. Black, Jr., 3 years ago:

"* * * Freedom from the massive wrong of segregation entails a corresponding loss of freedom on the part of whites who must now associate with Negroes on public occasions, as we all must on such occasions associate with many persons we had rather not associate with. It is possible to state the competing claims in symmetry, and to ask whether there are constitutional reasons for preferring the Negroes' desire for merged participation in public life to the white man's desire to live a public life without Negroes in proximity.

"The question must be answered; but I would approach it in a way which seems to me more normal—the way in which we more usually approach comparable symmetries that might be stated as to all other asserted rights. The 14th amendment forbids inequality, forbids the disadvantaging of the Negro race by law. It was surely anticipated that the following of this directive would entail some disagreeableness for some white southerners. The disagreeableness might take many forms; the white man, for example, might dislike having a Negro neighbor in the exercise of the latter's equal right to own a home, or dislike serving on a jury with a Negro, or dislike having Negroes on the streets with him after 10 o'clock. When the directive of equality cannot be followed without displeasing the white, then something that can be called a 'freedom' of the white must be impaired. If the 14th amendment commands equality, and if segregation violates equality, then the status of the reciprocal 'freedom' is automatically settled.

"I find reinforcement here, at least as a matter of spirit, in the 14th amendment command that Negroes shall be 'citizens' of their States. It is hard for me to imagine in what operative sense a man could be a 'citizen' without his fellow citizens once in a while having to associate with him. If, for example, his 'citizenship' results in his election to the school board, the white members may (as recently in Houston) put him off to one side of the room, but there is still some impairment of their freedom 'not to associate.' That freedom, in fact, exists only at home; in public, we have to associate with anybody who has a right to be there." [1]

Sincerely yours,

LOUIS H. POLLAK.

P.S.—As my schedule for July now shapes up, I do not think it would be possible for me to get to Washington to testify with respect to the pending legislation. But you are, of course, more than welcome to utilize this letter, if you wish to do so, as a very hasty and fragmentary presentation of my views.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., July 1, 1963.

Hon. JACOB K. JAVITS,
U.S. Senator,
Washington, D.C.

DEAR SENATOR JAVITS: Your letter of June 27, concerning S. 1591, S. 1622, S. 1217, S. 1731, and S. 1732, reached me Saturday, June 29. Yesterday, Sunday, the 30th, I sent to you a long day letter, which should be in your hands this morning. I write this letter by way of confirmation.

Your first question concerns the constitutional base of this legislation. It is particularly important insofar as the measures undertake to restrain retail merchants, proprietors of restaurants, of places of amusement, and of similar places of public resort from racial discrimination among those who wish to patronize these establishments. You ask about the extent to which such acts of Congress might be constitutionally based on the Commerce Clause, or the 14th amendment. In the first place, as I am sure you will agree, it is unwise to make any piece of legislation depend expressly on a single clause of the Constitution. While the Supreme Court, in my estimation, should uphold legislation if it can find any heading of constitutional power under which the act of Congress may be sustained, still, as the opinion in the *Civil Rights Cases* of 1883 indicates, there have been occasions in the past when that Court unfortunately limited its considerations to the constitutional basis recited in the legislation. Would it not be well, in any such legislation as these measures contemplate, to include in the preamble a dragnet clause, stating that the legislation relies on all relevant provisions of the Constitution whether recited or not in the bill?

The Commerce Clause surely is a great source of constitutional power which has been utilized with increasing scope in other legislative fields, but has been much neglected in Federal legislation concerning civil rights. Labor legislation, the Fair Employment Labor Standards Practices Act, Agricultural Adjustments Acts, food and drug legislation, and many other Federal enactments have been sustained under the Commerce Clause, and offer excellent

[1] 69 Yale Law Journal 421, 428–429 (1960).

precedent for sustaining measures concerning patronage of retail establishments, restaurants, places of amusement, hotels, inns, and the like. The preamble of title 2 of S. 1731 demonstrates the parallel between this legislation and the National Labor Relations Act. In 1937 the Supreme Court, deciding *NLRB* v. *The Jones and Laughlin Steel Corp.*, 301 U.S. 1, relied on a recital in the statute concerning burdens and obstructions to commerce by "strikes and other forms of industrial unrest" which arose because of aspects of employment relations which the legislation undertook to correct. (See p. 23 of the opinion.) The proposed legislation regulating patronage of various retail and similar establishments seems to me to resemble in its scope the Federal legislation regulating labor relations. It also seems clear that the validity of the legislation need not depend on the movement in any given case of persons or goods from State to State. It is sufficient to bring the legislation within the commerce power that local action has an "effect" on interstate commerce. Here one may refer to the Supreme Court's opinion in *Wickard* v. *Filburn*, 317 U.S. 11 (1942) upholding Federal regulation of wheat consumed on the farm where it grew. The Congress did not hesitate to pass the Oleomargarine Act of 1950, 21 U.S.C. 347 which, so far as I know, has never been challenged in the Federal courts. The congressional declaration of policy in this legislation is worth quoting.

"The Congress finds and declares that the sale, or the serving in public eating places, of colored oleomargarine or colored margarine without clear identification as such or which is otherwise adulterated or misbranded within the meaning of this chapter depresses the market in interstate commerce for butter and for oleomargarine or margarine clearly identified and neither adulterated nor misbranded, and constitutes a burden on interstate commerce in such articles. Such burden exists, irrespective or whether such oleomargarine or margarine originates from an interstate source or from the State in which it is sold" (Mar. 16, 1950, c. 61, 3(a), 64 Stat. 20).

See 21 U.S. Code 347A. The substantive part of the legislation, among other things, prohibits the serving of colored oleomargarine unless the serving be labeled, or be cut in a triangular shape; it applies even when the margarine is produced and consumed in the same State. There is in this and similar legislation ample precedent for the use of the commerce power to forbid racial discrimination in retail establishments, restaurants, and places of amusement.

The 14th amendment, as a basis for legislation, applies to matters quite different from those covered by the Commerce Clause, and so may for your purposes be more restricted as a source of Federal legislation. That amendment, like the 15th, prohibits discriminatory activity by public action of the State or of public officers acting with State authority. These amendments furnish a firm foundation for dealing with public schools, with voting, and any other activity of State or local public officers whether judicial, executive, or legislative. The Supreme Court has never held that a State license for a private person to engage in private activity converts that activity to "State activity" under the 14th amendment, though this has been suggested in the opinions of various justices. It seems to me, therefore, that S. 1591 should contain a statement that it is predicated not alone on the 14th amendment, but on any other provision in the Constitution which could sustain the measure.

Your second question asks about countervailing rights of privacy or freedom of association which these measures might be thought to infringe. I know of no legislation of any importance which does not prevent somebody from doing something that he wants to do and which he generally thinks is right and proper. This is true, for example, of article 4 of the New York civil rights law, entitled "Equal Rights in Places of Public Accommodation and Amusement." The question in any case, I suppose, is whether legislation makes so flagrant an invasion of privacy or free association that the statute infringes the Due Process Clause of the 5th amendment.

Your fifth question mentions antidiscrimination public accommodations statutes now in effect in 32 States. Such widespread legislation indicates a widespread feeling that in order to do justice to certain groups in society, persons who go into business must undertake to serve all alike. Unless the New York civil rights law violates the 14th amendment, I do not think similar Federal legislation would violate the 5th.

Where State legislation of the sort mentioned in your sixth question undertakes to restrain proprietors from serving Negroes, there seems to me to be a clear violation of the 14th amendment. This doctrine emerges from the "*Sit-in Cases*" decided by the Supreme Court on May 20, 1963.

Your third question asks about the relation between "public accommodations" measures and the common law obligations of inkeepers. Surely legislation requiring a hotelkeeper, a restaurateur, or man in similar business to accept all persons regardless of race who request the services he offers to the public, is in direct line with the common-law obligations of innkeepers. This fact has a bearing on the reasonableness of the legislation, which in turn tends to indicate that it would not conflict with the Due Process Clause of the fifth amendment.

Your fourth question asks about the relation between these measures and existing tort law. This suggests the matter of trespass, the theory that a man who is conducting a grocery store or an inn and who has the right to pick and choose among the members of the public whom he will serve can dismiss a customer whom he dislikes on any ground, and if the customer refuses to leave, the customer becomes a trespasser whose wrongdoing may be restrained by civil or criminal penalties. If this purports to be the law in any State, it is certainly dubious under the decision in *Shelley* v. *Kramer* decided in 1948 and reported 334 U.S. 1.

As I write this letter, my mind goes back to the difficult years of the 1930's when other legislation, not constitutionally dissimilar, met much of the same opposition that these bills have evoked. The reasons which prompted the legislation of that era are in many ways comparable to the reasons underlying the measures now before the Congress. Just as the Supreme Court came in time to find a firm base for the New Deal legislation in the Commerce Clause, it would, I am confident, similarly uphold Federal statutes proscribing racial discrimination in "public accommodations."

You are of course entirely free to make use of this letter or my telegram of yesterday in anyway you wish.

Sincerely yours,

ARTHUR E. SUTHERLAND.

Senator JAVITS. Thank you, Mr. Chairman.

The CHAIRMAN. Do any members of the committee have any questions? I note the presence of the distinguished Senator from Massachusetts here with us, and Kentucky also, both of whom have a deep interest in this matter. We are glad to have you both here, as well as the Senator from New York. Do any members of the committee have any questions of the Senator from New York? If not, we thank you very much.

Now, Mr. Marshall will come back and the Senator from New Hampshire has some questions that he would like to ask.

The CHAIRMAN. The Senator from New Hampshire.

Senator COTTON. Mr. Marshall, you heard the testimony of Senator Javits.

Mr. MARSHALL. Yes.

Senator COTTON. And his testimony pinpointed one question that I wanted to ask you in connection with the vehicle to be used in effectuating the purpose of this bill. Now the previous decisions of the Supreme Court relative to the 14th amendment were based largely on the fact that they held the 14th amendment affected States and not individuals. Is that correct?

Mr. MARSHALL. That is correct, Senator.

Senator COTTON. Now if this Congress should see fit to pass legislation on the assumption that the 14th amendment does reach individuals, and the legislation provided that the individuals in certain establishments could not discriminate by reason of color, also provided Federal enforcement, and if the present Supreme Court upheld the law, then these objections about unenforcement and ineffectiveness under the 14th amendment would be dispensed with, wouldn't they?

Mr. MARSHALL. Yes, Senator, if all that happened. Could I expand on that a little?

Senator COTTON. Yes; our time is limited but go ahead.

Mr. MARSHALL. Senator, as I understood Senator Javits' statement, which I had not heard before, but which I thought was a very fine statement, he did not speak of the 14th amendment reaching individual actions and I don't think that is the suggestion, Senator. What he spoke of was the 14th amendment reaching State actions, which was in one way or another implemented through private business.

The cases that he referred to were that kind of case, that the State leased its property to a private individual, the way in which the private individual used that State property was held to be State action. So, I don't think there is any suggestion, Senator, that the 14th amendment, as such, reaches individual actions. It is only if the individual action can in some way be attributed to the State, and as Senator Javits said, one danger of relying on that approach alone would be the action of an individual in the State of New York that might not be attributable to the State of New York, whereas the action of a similarly situated individual in Birmingham, Ala., where they had a city ordinance requiring segregation would be attributed to the State.

Senator COTTON. Well if Congress passes a law which provides that there can be no discrimination anywhere in the United States against any person because of the color of his skin, and it says nothing about interstate commerce, but is based on the 14th amendment, then it is going to affect anyone who is furnishing accommodations to the public if it is upheld by the Supreme Court. Is that correct?

Mr. MARSHALL. That is correct, Senator.

Senator COTTON. So that those distinctions are dependent upon the Supreme Court adhering to the 1883 decision?

Mr. MARSHALL. No, Senator. I don't think that is correct. I think——

Senator COTTON. At least adhering to a chain of previous decisions.

Mr. MARSHALL. Yes, Senator, including some very recent ones.

Senator COTTON. Well now, on this question of the Interstate Commerce Clause, this bill which is before the committee, opens with these significant words—and perhaps you wrote them:

> The American people have become increasingly mobile during the last generation and millions of American citizens travel each year from State to State by rail, air, bus, automobile, and other means.

Then it goes on to take up the matter of those who are rejected because of race or religious grounds. That indicates that this bill is based on Congress regulating interstate commerce for the convenience and protection of those who travel. Right?

Mr. MARSHALL. Among other things, Senator, yes.

Senator COTTON. That "among other things" covers a multitude of sins. But this particular sentence indicates that; does it not?

Mr. MARSHALL. Yes, Senator.

Senator COTTON. Would you say that it would be constitutional, under the interstate commerce clause, if Congress passed an act that any restaurant or other food establishment, furnishing food to people traveling in interstate travel, must remain open until after 8 o'clock at night?

Mr. MARSHALL. No, Senator, not necessarily at all. I think that Congress has a very very far-reaching power to regulate interstate commerce. But I think that power is limited in some ways. It is

limited by the requirement, the substantive requirement, that the legislation be related to some end which makes some sense in racial terms.

Now it may be that Congress could, or that there are reasons for that kind of a statute, but I don't think there necessarily are. I don't think Congress can use the commerce clause in an arbitrary or capricious fashion.

But this bill, Senator, deals with a problem which is very real, which is very immediate for the country, which does in fact affect a great many travelers in a way that is not in keeping with the conscience of the country, and which also has an adverse effect on the economy of the country, and the economy of many States.

So, I don't think that there is any question about Congress' power to deal with this. But I don't think that dealing with this means that Congress can also deal with some hypothetical form of regulation that is, as I say, arbitrary, like possibly requiring everyone to stay open until 8 o'clock at night.

Senator COTTON. To see to it that no travelers have to go hungry. Is that capricious?

Mr. MARSHALL. Well, Senator, it may be such legislation would not be capricious. I don't say it would. But I do think that there is no implication in Congress in passing this bill that it can pass any kind of bill it wants to——

Senator COTTON. This bill has a moral, a moral problem, that sticks out all over it. Now, I am trying to find out about the use of the interstate commerce clause. Would it be constitutional if Congress passed an act that every establishment furnishing food to the public shall furnish fish on Friday and kosher food at all times?

Mr. MARSHALL. Senator, I think there would be grave question as to the constitutionality of that law.

Senator COTTON. Why?

Mr. MARSHALL. I think that—at least I don't have any facts before me that would indicate that the refusal of a number of establishments to furnish fish on Friday and kosher food at all times, has created a burden on the economy of this country. Now, if there were such facts, then Congress could deal with them. I think offhand it would be difficult to develop such facts.

Senator COTTON. Well, I am not asking these questions with any reflection on anybody's religion or anything else. I am trying to search into this matter of using the interstate commerce clause. Now, do you seriously assert that the difficulty of people of certain races being served in certain places is really a burden on the commerce of this country?

Mr. MARSHALL. Oh, yes, Senator, I do. I do.

Senator COTTON. In spite of the fact that all of the chains tell you, now, they do not discriminate?

Mr. MARSHALL. Senator, there are entire communities and, in fact, virtually entire States where there are no decent hotels that will accept a Negro. Now, that obviously, Senator, I think, gravely affects the economy of those States and those communities.

Senator COTTON. I am not suggesting they shouldn't accept the Negro. But I am trying to find out the vehicle for this Congress to act. Would an act passed by this Congress be constitutional which provides that every restaurant, or place furnishing food, shall have

its food inspected by a Federal inspector, once a week or once a month, and have a certificate posted in view of travelers?

Senator THURMOND. Mr. Chairman, the hour of 12 having arrived and the Senate now being in session, I make a point of order that we have to discontinue.

The CHAIRMAN. The point of order is well taken. The committee will recess until 10 o'clock tomorrow.

Senator COTTON. Mr. Chairman, I don't want to have this gentleman brought back here simply because I haven't had an opportunity to question him, because I am not going to have anyone say I am holding up these hearings.

Senator THURMOND. Mr. Chairman, I have some more questions for him, too, though.

The CHAIRMAN. Mr. Marshall will be available for further questioning.

(Whereupon, at 12:05 p.m. the committee hearing in the above matter was adjourned to reconvene the following morning at 10 o'clock.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

WEDNESDAY, JULY 10, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 10 a.m. in the caucus room, Old Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order.

There are several Senators, Mr. Secretary, who will be here in a minute. Probably the members of the committee will want to ask you some questions after your statement, so I think if you will proceed now with your statement, we will ask questions afterward.

We are very pleased you could find time to come up here and discuss this matter with us, Mr. Secretary.

STATEMENT OF HON. DEAN RUSK, SECRETARY OF STATE, DEPARTMENT OF STATE, WASHINGTON, D.C.

Mr. RUSK. Thank you very much, Mr. Chairman and members of the committee.

I appreciate this opportunity to appear before your committee to offer to you my advice about the foreign policy implications of Senate Bill S. 1732. Let me say, at the very beginning, that I consider these foreign policy aspects to be secondary in importance. I should like to emphasize that it is not my view that we should resolve these problems here at home merely in order too look good abroad. The primany reason why we must attack the problems of discrimination is rooted in our basic commitments as a nation and a people. We must try to eliminate discrimination due to race, color, religion, not to make others think better of us but because it is incompatible with the great ideals to which our democratic society is dedicated. If the realities at home are all they should be, we shan't have to worry about our image abroad.

As matters stand, however, racial discrimination here at home has important effects on our foreign relations. This is not because such discrimination is unique to the United States. Discrimination on account of race, color, religion, national, or tribal origin, may be found in other countries. But the United States is widely regarded as the home of democracy and the leader of the struggle for freedom, for human rights, for human dignity. We are expected to be the model—no higher compliment could be paid to us. So our failure to live up to our proclaimed ideals are noted—and magnified and distorted.

One of the epochal developments of our time has been the conversion of the old colonial empires into a host of new independent nations—

some 50 since the Second World War. The vast majority of these newly independent peoples are nonwhite, and they are determined to eradicate every vestige of the notion that the white race is superior or entitled to special privileges because of race. Were we as a nation "in their shoes," we would do the same.

This tremendous transformation in the world has come about under the impulse of the fundamental beliefs set forth in the second and third sentences of our Declaration of Independence. These universal ideas which we have done so much to nurture have spread over the earth. The spiritual sons of the American Revolution are of every race. For let us remind ourselves that the great declaration said "all men are created equal and are endowed by their Creator with certain unalienable rights," it did not say, "all men except those who are not white."

Freedom, in the broadest and truest sense, is the central issue in the world struggle in which we are engaged. We stand for government by the consent of the governed, for government by law, for equal opportunity, for the rights and worth of the individual human being. These are aspirations shared, I believe, by the great majority of mankind. They were formally inscribed in the United Nations Charter at the end of World War II, a charter ratified by a vote of 89 to 2 in the Senate. They—these ideals—give us allies declared and undeclared, on all of the continents—including many people behind the Iron and Bamboo Curtains.

I believe that the forces of freedom are making progress. I am confident that if we preserve in the efforts we are now making, we shall eventually achieve the sort of world we seek—a world in which all men will be safe in freedom and peace.

But in waging this world struggle we are seriously handicapped by racial or religious discrimination in the United States. Our failure to live up to the pledges of our Declaration of Independence and our Constitution embarrasses our friends and heartens our enemies.

In their efforts to enhance their influence among the nonwhite peoples and to alienate them from us, the Communists clearly regard racial discrimination in the United States as one of their most valuable assets.

Soviet commentary on racial tension in the United States has stressed four themes:

(1) Racism is inevitable in the American capitalist system.

(2) Inaction by the U.S. Government is tantamount to support of what they call the racists.

(3) Recent events have exposed the hypocrisy of U.S. claims to ideological leadership of the so-called free world.

(4) The U.S. policy toward Negroes is clearly indicative of its attitude toward peoples of color throughout the world.

Racial discrimination and its exploitation by the Communists would have damaged our international position more than they have in fact done but for four circumstances. The first is that nonwhite students have encountered race prejudice in Soviet bloc countries. The second is the loyalty of nonwhite Americans to the United States and its institutions. Despite the disabilities they have suffered they have, with rare exceptions, preserved their faith in our democracy. They have fought to defend it and they stand guard on the ramparts of

freedom today—in Berlin, in West Germany, in southeast Asia, on all the continents and seas, and in the skies.

The third reason why racial discrimination and its exploitation by our adversaries have not caused us greater damage is that we have made progress in removing discriminatory laws and practices, have advanced toward full equality.

And the fourth reason is that the power of the Federal Government--especially its executive and judicial branches—has been exerted to secure the rights of racial minorities. The recent meeting of African heads of state, at Addis Ababa, condemned racial discrimination "especially in the United States," then approved the role of U.S. Federal authorities in attempting to combat it.

If progress should stop, if Congress should not approve legislation designed to remove remaining discriminatory practices, questions would inevitably arise in many parts of the world as to the real convictions of the American people. In that event, hostile propaganda might be expected to hurt us more than it has hurt us until now.

I now turn to a special concern of the Department of State: The treatment of nonwhite diplomats and visitors to the United States. We cannot expect the friendship and respect of nonwhite nations if we humiliate their representatives by denying them, say, service in a highway restaurant or city cafe.

Under international law and through the practice of nations, a host country owes certain duties to the diplomatic representatives which are accredited to it, in order to facilitate the discharge by those representatives of their functions. For example, the Vienna Convention on Diplomatic Relations, which is widely recognized as codifying much of the international law on the subject of diplomatic relations, provides that a diplomat shall be treated by the receiving state with due respect, and that that state shall take all appropriate steps to prevent any attack on his person, freedom or dignity. These obligations are not properly discharged, in my view, unless diplomatic representatives have access, without discrimination or hindrance, to the public accommodations required by travelers in going about their business.

The U.S. Government similarly expects that American diplomats abroad will be received in a manner appropriate to their capacity as representatives of the United States. We expect that they will be treated with courtesy and that they will be afforded the facilities necessary for the performance of their functions. Comity among the nations of the world requires that all countries act to receive foreign diplomatic representatives with courtesy and treat them with helpful consideration. We in the United States want to make sure that our conduct as a host country does not merely live up to commonly accepted requirements, but indeed sets a standard for all the world.

Putting aside law, custom and usage regarding the reception of foreign diplomats in this country, the United States has a tradition of warm and friendly reception for those who come to visit these shores from abroad. This tradition is one of the important values in the American heritage. It has been known throughout the world. We want to continue to uphold it and give it living reality in all of our actions and dealings.

One hundred and eleven nations send their diplomatic representatives to Washington and to New York City—in New York to an orga-

nization created to represent humanity. And every year thousands of other foreign nationals come to this country on official business or as visitors—professors, mayors, provincial governors, technicians, and students, as well as chiefs of state and heads of government and cabinet ministers. They come with avid interest in learning more about us. We value this good will. Indeed, we enjoy much good will. And we would enjoy much more if we did not permit good will to be impaired by such senseless acts as refusing to serve a cup of coffee to a customer because his skin is dark.

Yet within the last 2 years, scores of incidents of racial discrimination involving foreign diplomats accredited to this country have come to the attention of the Department of State. These incidents have occurred in all sections of the United States. Let me cite a few examples.

DENIAL OF ADMITTANCE TO HOTELS

In one case, the Ambassador of one of the larger African countries was taking a trip involving a reservation at a large hotel. When the manager of the hotel realized that the Ambassador was not white, he decided to cancel the reservation. It took several top level officials the better part of a day to persuade the management of that hotel to accept the Ambassador in order to avoid an international incident.

REFUSAL OF SERVICE IN RESTAURANTS

There have been many complaints on this score. One of the most publicized involved the representative of a West African country about to obtain its independence. He was refused service while en route from Washington to Pittsburgh. As a result of a casual remark made by him some time later, this incident was reported in our newspapers and throughout Africa. The Department worked hard to make amends for this unfortunate episode. The restaurant opened its doors to all customers regardless of color. Local authorities asked the representative to pay a return visit. But, even in this case, the damage was probably not completely undone. And in many cases, there have been no amends.

One African Ambassador was en route here from New York. His first experience, even before he had a chance to present his credentials to the President, was that of being ejected from a roadside restaurant.

A Caribbean country which recently became independent assigned consular responsibilities in the immediate area to its First Secretary in Washington. In traveling through his area of responsibility he was recently ejected from a restaurant which he had previously been informed was integrated.

An African ambassador who had experienced several times refusals of service in restaurants finally complained to the Department of State when his wife and 8-year-old child were denied a glass of water. The ambassador wrote to me that he had been an officer in the French Army during World War II and had led his men in battle. He said that even under battle conditions he had treated the children of the enemy with enough kindness and consideration to spare them a drink of water from his canteen.

DENIAL OF ADMITTANCE TO PUBLIC BEACHES

An Asian cabinet member and some of his diplomatic colleagues stationed in Washington were refused admittance to a beach nearby. An African ambassador was not only refused admittance to a privately owned beach open to the public in this area, but was threatened and insulted. He now represents his country in a European country. The act of hostility he experienced here remains for him a vivid recollection.

These unpleasant experiences indicate the conditions under which foreign diplomats of color work in the Capitol of the United States. I have heard it suggested that some of these representatives may be looking for trouble, that they are trying to test facilities in order to embarrass the United States for political purposes. But it has been our experience in the Department of State that these diplomats are, in fact, trying to avoid incidents.

The nonwhite diplomat often prefers to keep within the confines of the District of Columbia, knowing that restaurants, swimming pools, beaches, theaters, and other establishments in a large part of the United States are potential places of trouble. If he wants to make a trip he frequently seeks the assistance of the Department of State in order to avoid embarrassment.

Most governments expect their diplomats to travel in the host country. Most foreign countries, and particularly those in Africa, are well aware of the problems of racial discrimination in the United States. When diplomats from these countries return home they may have learned to understand the difficulties with which our Government has to cope in giving full effect to the civil rights to which all Americans are entitled.

Humiliating incidents are not confined to foreign diplomats stationed in this country. They sometimes involve other visitors from abroad such as recipients of leader grants, AID specialists who may be teachers and graduate students, and even high-level state visitors.

The head of the civil aeronautics board of a West African country, brought here under the sponsorship of the U.S. Government, was denied service in a restaurant. He terminated his trip right then and there. The mayor of the capital city of a British possession in Africa, which was just about to obtain independence, was humiliated in a restaurant. The assistant secretary of state of another West African country was refused service at a hotel and a restaurant.

We are also aware of incidents involving foreign students who come to the United States, some under Government sponsorship and others on their own. These students come here to learn not only skills which will be useful to them when they return home, but about our way of life. Some of them return home disappointed and even embittered.

Sometimes these incidents involve not Africans or Asians, but Europeans. Not too long ago a German student was jailed for having eaten a meal in the colored side of a bus terminal lunch counter. The student had chosen to sit there because the white side was completely filled.

I have cited typical incidents. Now, I should like to quote just a few of the comments made by nonwhite diplomats in Washington to members of the staff of the Department of State.

An African ambassador:

I am a friend of the United States and I want relations between our two countries to be as good as possible. I am particularly aware of the efforts this administration is making to improve the status of civil rights and, therefore, I shall instruct my staff to be careful not to embarrass our government by being involved in any unpleasant situations. Yet I have to find some sort of accommodations for my staff, and I am really at a loss as to how to avoid getting into trouble.

Another African ambassador said:

In spite of the good work this country is doing, personal relations spoil a good deal of the work done in other fields. People feel very hurt when they are treated in this way.

These comments are illustrative. Others are contained in a supplemental paper which I shall be glad to leave with the committee, if the committee desires.

The CHAIRMAN. We will be glad to have that.

(The document follows:)

OTHER COMMENTS MADE BY NONWHITE DIPLOMATS TO REPRESENTATIVES OF THE OFFICE OF PROTOCOL

A counselor of an African embassy: "The result is that a black diplomat is rather cut off, he withdraws to himself and sees only his own people. This creates constant resentment throughout our staff. Some of us are rather bitter. There is so much about America which is good. What America has done for the underdeveloped countries is wonderful. But here, in this matter, we are dealing on a personal level. When people come to our country, we try to make them feel more at home than they are in their country. Our general feeling here is that 'I am forever a stranger.' There is something about American policy which cannot be explained. It cuts through all your policy—it is the contradiction between what you say and what you do. You accuse the new countries of a double standard, but there are certain things in this country which seem false. On the one hand, ideals are pitched very high; while on the other, behavior is pitched very low. With never-ending talk of equality there is flagrant racial discrimination—we don't trust this country. If you give me what I know you think is second rate, I resent it, and I do not respect you."

An African ambassador: "I definitely feel that life in Washington is like living on an island, and that if I ever travel, it should be only en route to New York. But even in Washington, things have not been easy."

A staff member of an African embassy: "Even the best friend of this country cannot be happy. One feels bad. One begins to feel all this talk of good relations, the free world * * * is farcial when in daily life this is the situation. It imposes an undue burden which ordinarily one wouldn't have. We feel humiliated."

A staff member of an African embassy: "Ever since I ran into discrimination, I am conscious that we must avert any type of incident. We go about our work with a great load on our minds. We are conscious of it all the time. One is not in the country to provoke incidents. One does not wish to embarrass the host government."

An Asian ambassador: "I realize that discrimination exists and that it cannot be completely abolished overnight. However, I cannot understand or tolerate this discrimination. Although I am not directly affected by it, it hurts me deeply because it affects some of my best friends. When my friends are insulted, I am insulted as well. The people who wrote the Constitution and the Bill of Rights meant well and I sincerely hope that one day soon the Constitution will be justified. The Government of the United States has shown its willingness to uphold America's boast of equality of all men. But it must act more strongly or this equality will be ridiculed in foreign countries by those who would use it as propaganda. We know that we are limited in our choice of accommodations and this creates in us an inferiority complex. We are here to do a job, but because of this inferiority we cannot do it well. It also leads to dangerous statements made by the diplomats on their return to their countries."

An African ambassador: "I have been told that I ought to wear my robes when I go out, but no, that's ridiculous. At home I dress the way Americans do,

and I am not going to dress specially. After all, it's the man who counts, the person inside the suit. I will not wear special clothes in order to be respected as a person. I will be respected regardless of what I wear. When I feel like wearing robes, I will, but if you ask me to do it so everyone will know I am an African, no, I won't."

Another African ambassador: "If I have to announce that I am an ambassador before I enter any establishment or apartment building in order not to be subjected to insults and humiliation, I will request that my government recall me."

Mr. RUSK. With respect to the presence of diplomats and other foreign visitors in the United States, the provisions barring discrimination in places of public accommodation would go a long way toward removing some of the most acute problems we have experienced in this area. These provisions would end some of the most obvious and embarrassing forms of discrimination. They would enable foreign visitors in our country to travel with much less fear of hindrance and insult. They would create a more normal and friendlier environment for our relations with other countries.

I have dwelt on the experiences and reactions of diplomats and other visitors to this country because they are of special concern to the Department of State. But I would state as emphatically as I can that I do not ask for them rights and decencies which are in practice denied to colored American citizens. One should not need a diplomatic passport in order to enjoy ordinary civil and human rights. Nor would these diplomats and other visitors be favorably impressed by efforts on our part to treat them differently from nonwhite Americans. They realize full well that they are being discriminated against, not as diplomats or as foreigners, but on account of their race.

The counselor of an African Embassy said:

We do not want any special privileges. We should decline them if they were offered. That is not the answer. We want what American diplomats in our country would get.

The head of government of a large West African country complained when he found that the hotel in which he had been lodged was segregated. He said he would not have stayed there if he had known it was not open to Negro Americans.

So, let me stress again, the interest of the Department of State in this bill reaches far beyond obtaining decent treatment for nonwhite diplomats and visitors. We are directly and comprehensively concerned with obtaining decent treatment of all human beings, including American citizens.

This is a problem which merits the concern and effort of all Americans without regard to any particular region of the country, race, or political party. The present racial crisis divides and weakens, and challenges the Nation both at home and in the world struggle in which we are engaged. I deeply hope that the issues involved can be approached on the basis of genuine bipartisanship, just as are the broad objectives of this country's foreign policy.

Finally, I note that specific legislative language is being considered by the committee with the Justice Department; the Department of State is not concerned with detailed questions of legislation and enforcement. We in State are concerned with the underlying purpose of the proposed measure and the adverse effects of the present situation. What we would hope is that the Congress would join the ex-

ecutive and the judiciary in declaring it to be our national policy to accord every citizen—and every person—the respect due to him as an individual.

I want to reiterate most emphatically that in the fateful struggle in which we are engaged to make the world safe for freedom, the United States cannot fulfill its historic role unless it fulfills its commitments to its own people.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Secretary.

Many members of the committee, I know, want to ask you some questions. I hope all of us will be as brief as possible this morning, because the Secretary does have other commitments, and I know he wants to fully answer all of the questions. Hopefully, we can get through with you this morning.

So, without limiting anybody as to time, I hope you will be as brief as possible. The Senator from Rhode Island.

Senator PASTORE. I have no questions to ask the distinguished Secretary of State, but I do want to congratulate him for a very forthright statement on this very important problem and, for the life of me, I can't see how any man in his right mind can dispute anything you have said here this morning.

Mr. RUSK. Thank you, sir.

The CHAIRMAN. The Senator from New Hampshire.

Senator COTTON. Mr. Chairman, I haven't any more than some very brief questions of the Secretary, and I would like to join the able Senator from Rhode Island in complimenting the Secretary on his statement. I think the statement is so excellent that I can say it is a rather inspiring statement and I say that with deep sincerity. I, too, can't understand why anyone should not be thoroughly in accord with the objectives of this program. Mr. Secretary, there is one thing with which I have been impressed in the few times that I have been abroad and mingled with people in other countries and I wonder if I am correct in my impression: I have been perfectly amazed at the knowledge the average people, both in European countries and in the East, have of what is going on in this country and what questions are before us and what is happening. Has that been your impression, Mr. Secretary?

Mr. RUSK. Yes, Senator. The situation is that we, in this country, live under the klieg lights of widest publicity, and the attention of much of the world is focused upon the United States.

It is partly because of our power; it is partly because of our general position in the world—the position of leadership in such organizations as the United Nations—but I think it is also because we have committed ourselves historically to some ideas which I consider to be still the most explosive political ideas in history—these notions of freedom. And these simple notions are creating great changes in other parts of the world. And when they talk about their versions of government by the consent of the governed, when they talk of more decent life for their citizens, they tend to look to the United States to see what we are doing and how we are trying to go about it.

I think we are expected to meet a standard, almost of perfection, and this is a great burden on us in some respects, because when we do make

mistakes, those are multiplied and the news of those mistakes is spread around the world with the speed of light, to the discomfort of our friends and to the pleasure of our enemies. We are watched everywhere.

I had occasion some time ago to discover—this was some years ago now—to discover, through a friend who was visiting in the area, that the villagers in the Khyber Pass area, for example, were discussing in small villages a housing race riot which occurred in this country 24 hours before; and a few days later, they were similarly discussing the election of a Negro girl as the beauty queen for homecoming day for a State university. Those incidents were being discussed within hours in remote villages of the Hindu Kush Mountains.

We are being watched. And this is something the explosive effects of radio and television throughout the world is magnifying almost every day.

Senator COTTON. The particular problem that faces this particular committee is only one facet, of course, of the whole civil rights program presented to the Congress by the President. It involves some rather vexing, or at least puzzling constitutional questions about how far we can go.

I, for one, can't conceive of our not going the full length in all public facilities—Federal, State, municipal, or anything else, including the schools. But the question is how far we can go in dealing with private property, and what is the best avenue with which to approach it under the Constitution.

I was also impressed with the fact that students abroad are extremely familiar with our own Constitution and our own basic documents of freedom and, referring to this particular perplexity, that they are not entirely impervious to those problems. Would you comment on that?

Mr. RUSK. Are you referring, now, sir, to the fact that there is discrimination in many other countries? Is that it?

Senator COTTON. No, I am referring to this: as far as I am concerned, I think that every restaurant and every hotel and every facility in the United States should be open to people regardless of the color of their skin. There is, however, before this committee a rather difficult question, I think, about how far you can stretch the interstate commerce clause of the Constitution, whether it should be approached under that or under the 14th amendment, and there is the problem of how far we can, in guaranteeing a very important right to our people, how far we can constitutionally limit other rights.

Now, I don't expect that the average person in another land would be cognizant of those difficulties which we discussed with the Department of Justice, but their statesmen and their diplomats and their students are rather familiar with the importance of that problem, wouldn't you say so?

Mr. RUSK. Yes, I do believe that the complexity of this issue is understood abroad. For example, I know that in some countries, where they have had to work at their own problems of discrimination, they themselves have discovered that there are certain limitations within which constitutions and laws can operate, and there are other areas in which social tradition and pattern and social aspirations will have to assist and help.

I, myself, am aware of the discussion between this committee and the Department of Justice on the constitutional problems and the practical problems of wise provision and enforcement.

I do think it is relevant to bear in mind, in connection with the constitutional issues, that this does affect the power of the United States to conduct our foreign relations adequately abroad. For example, the Department of State has a duty to assist and protect American citizens traveling abroad—and without regard to race, religion, or national origin of the particular American citizen.

Now, against a background of, shall I say, disability in our own country on some of these same issues, our voice abroad, in seeking to protect American citizens abroad, is somewhat muted and uncertain. And I think this affects the elements of reciprocity under the conduct of our foreign relations as well as the broader issues in what might be called the propaganda and political field. I think the foreign relations aspect of this at least has some bearing on the broad constitutional issue, although I would not say that was directly at issue here.

Senator COTTON. I thank you, Mr. Secretary.

I would like to leave this one word of testimony to supplement what you said. I was in Japan just after the first Russian sputnik made its impact known on the world, and everybody in this country, when I left here, was saying that this was going to cause this country to lose face abroad; that other nations would immediately assume that our rivals, our potential enemies, had outstripped us; our defense was gone; it would be a terrible blow to our prestige.

I spent some time in Japan and I spent some time in other points in the Far East right following that, and during all of the time I was there not one single person commented with any interest whatsoever on sputnik; but almost everyone I talked to asked me about Little Rock, which took place at the same time.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Secretary, I know you are familiar with the fact that this committee, and the chairman, who happens to be the author of the bill, passed legislation to embark this country upon a program which would encourage, we hope, a greater number of foreign visitors to this country. The State Department cooperated and simplified the procedures of entry in, among other things.

It has been quite successful. The last report I received was that this year alone it was up 26 percent over last year, and last year we were up about 18 percent over the previous year.

So we are trying, for many reasons, as you know, to get as many of our foreign neighbors to come to the United States as we can to visit us.

There is a financial reason involved, too, because the deficit balance accounts for one-half of our gold drain.

Two-thirds of the world is not white.

Do you agree that unless we can clear up some of these problems that are before us, we might seriously hamper this very worthy objective we have in trying to know other people better?

Mr. RUSK. I think there is no question, Senator, that these problems of travel in the United States do inhibit travel to some extent, and certainly in some parts of the country restrict them very severely.

I think there is another element that is relevant here, and that is that in an effort to avoid incidents—and I am now speaking of incidents in all parts of the country, not just one particular section—in an effort to avoid incidents, we on occasion have to go through elaborate preplanning for visitors coming to this country and make arrangements which I think embarrass us simply because they become so obviously necessary.

That the great United States of America would need to prepare the way so carefully for some of our visitors to avoid incidents that would be embarrassing to us that in itself is a great restriction on our reputation and freedom of action, I think.

The CHAIRMAN. I, and I know some of the people in the State Department, have had to act almost as travel agents to the extent of advising them where would be the best places to go at different times, in an effort to avoid incidents.

Mr. RUSK. And I should say, sir, we have been deeply grateful to mayors, Governors, and responsible officials in all sections of the country, who have done their best to be helpful in this regard.

We have had tremendous cooperation from public officials throughout the country.

The CHAIRMAN. Could the State Department get the figures on how many foreign students are now in the United States?

Mr. RUSK. Yes, sir. I will be glad to furnish those figures.

I would say roughly, subject to correction later, it would be not less than 60,000.

The CHAIRMAN. 60,000 foreign students?

Mr. RUSK. Yes, sir.

The CHAIRMAN. And would you break it down, because some of these are exchange students under the Fulbright program, and others come on their own.

Mr. RUSK. That is right. Most of them come on their own.

(The information requested follows:)

FIGURES ON INTERNATIONAL EXCHANGE TAKEN FROM OPEN DOORS 1963, AN ANNUAL SURVEY CONDUCTED BY THE INSTITUTE OF INTERNATIONAL EDUCATION

FOREIGN STUDENTS IN UNITED STATES 1962–63

Number of foreign students: 64,705 in 1,805 institutions (1961–62: 58,086).
Number of foreign countries and territories represented: 152.

Countries with most foreign students in the United States

	Number of students	Percent of total
1. Canada	7,004	10.8
2. India	6,152	9.5
3. Republic of China	5,526	8.5
4. Japan	2,934	4.6
5. Iran	2,824	4.4
6. Korea	2,233	3.5
7. Philippines	2,025	3.1
8. Hong Kong	1,695	2.6
9. Cuba	1,515	2.3
10. Greece	1,432	2.2
11. United Kingdom	1,432	2.2

Ten States with most foreign students in the United States

	Number of students	Percent of total
1. California	9,907	15 3
2. New York	7,853	12.1
3. Illinois	3,935	6.8
4. Michigan	3,904	6.3
5. Massachusetts	3,567	5.5
6. Pennsylvania	2,708	4.2
7. District of Columbia	2,566	3.1
8. Texas	2,145	3.3
9. Indiana	2,052	3.2
10. Ohio	1,814	2.8

U.S. universities with the highest foreign student enrollment

	Total enrollment	Number of foreign students	Percent of total enrollment
1. University of California	54,975	3,108	5.7
2. New York University	32,475	1,925	5.9
3. University of Illinois	32,088	1,369	4.3
4. University of Michigan	28,775	1,325	4.6
5. Columbia University	23,500	1,265	5.4
6. University of Minnesota	42,130	1,120	2.7
7. University of Wisconsin	32,535	1,068	3.3
8. Harvard University	11,677	1,020	8.7
9. University of Southern California	17,445	1,011	5.8
10. Howard University	5,628	942	16.7

Level of study of foreign students in the United States

	Number	Percent of total
Undergraduates	33,203	51.8
Graduates	28,850	44.6
Other (special students and no answer)	2,652	4.1

Leading fields of study for foreign students in the United States

	Number	Percent of total
1. Engineering	14,257	22.0
2. Humanities	11,998	18.5
3. Natural and pysical sciences	11,152	17.2
4. Social sciences	9,647	14.9
5. Business administration	5,597	8.7
6. Medical sciences	4,766	7.4
7. Education	3,307	5.1
8. Agriculture	2,205	3.4
9. Other (including field not known)	1,776	2.7

Sources of support

	Number	Percent of total
1. Self-supporting	26,564	41.1
2. U.S. institution	11,375	17.6
3. Private organizations	6,855	10.6
4. U.S. Government	5,088	7.9
5. Foreign government	3,212	5.0
6. U.S. institution and private organization	1,883	2.9
7. U.S. Government and U.S. institution	1,312	2.0
8. Foreign government and U.S. institution	609	.9
9. U.S. Government and private organization	438	.7
10. Foreign government and private organization	244	.4
11. Support not known	7,125	11.0

The CHAIRMAN. Do you not have many inquiries from foreign countries, or embassies here, when a person wants to come to the United States—supposing they are not white students, orientals or Asians—as to which universities would be most available?

Mr. RUSK. Senator, I have had some personal experience in this field and the private field of fellowships and exchange. And it is true that in trying to tailor for the foreign student the best experience he can have in this country, these problems which we are here to discuss today are highly relevant to where it is wise for him to study, and under what conditions.

I must say that the situation is steadily improving, but it is necessary for those who are advising such students to take this very much into account.

The CHAIRMAN. Getting down to a local matter, what is our situation in diplomatic housing in the District? Has that improved or are there still problems involved?

Mr. RUSK. There are some problems, but I think there has been some improvement in the last year or two.

Some of the leaders here in the District, and some of the real estate men, have tried to be helpful on this matter. And I think the situation is easing somewhat in this regard.

The CHAIRMAN. I am not speaking of the embassies themselves; I am speaking more of the staffs.

Mr. RUSK. Yes. This is a difficult question. We have a section in our Protocol Office in the Department of State that is designed to assist the staffs of local embassies in finding suitable living accommodations. This is a continuous process.

It is not simple, but we think we have been making some headway on it.

The CHAIRMAN. Now the State Department keeps a good account, I am sure, on the amount of coverage that these things we are talking about today get in different foreign countries. You stated that the Soviets make a lot of propaganda out of this, which I am sure we all understand.

Is the coverage stimulated by the Soviet press agencies greater than in the other countries that we consider either so-called neutrals or part of the free world?

Mr. RUSK. There are two kinds of coverage that are bothersome.

The CHAIRMAN. One is distorted propaganda.

Mr. RUSK. One is deliberately designed and manufactured and exploited and magnified for the purpose of a propaganda attack upon the United States; and these attacks are made by people who are seriously restricting the human rights of their own people, and also by countries who, we have discovered in recent years, are not extending courtesies to peoples of other races, for which they charge us with failure.

And this coverage is very wide, very intensive, and very sustained. I will be glad to submit to the committee a brief résumé of the type of coverage which we get from that quarter.

The other type is simply broad news reporting on the incidents themselves which occur here, straight news media representation of the events themselves with pictures. And these, of course, are also very damaging in many situations such as we have had in the last year or two.

So you get both kinds: those that are loaded and aimed and put out for a purpose, and those that result from simply news reporting.

The CHAIRMAN. One other question just for the record.

Do you experience any difficulties in the field of international transportation with our international airlines or ships, or foreign ships or airlines?

Mr. RUSK. I have not myself encountered any incidents of that sort.

May I ask my colleague if he knows of any? I don't myself, Mr. Chairman, know of any problems that arise from that source.

The CHAIRMAN. Because this committee is responsible for transportation policies, we wanted to be sure that there weren't these incidents there because of race, color, or creed.

Mr. RUSK. Such instances have not come to my attention, and I think that situation is in pretty good order.

The CHAIRMAN. When you break this down for us, I would be particularly interested in an analysis of how this is played up, if it is, or played down, or strictly reported, in the Western European countries.

Mr. RUSK. I will be glad to give you an analysis of that.

Of course, the news here is covered very heavily in the Western European countries. I think they understand the depth and difficulty of the problem here in this country. They understand that there are a great many Americans who are trying to do something about it; and that there has been a significant improvement on these problems in more recent years. And they approach it with a certain, shall I say, compassion and understanding of the nature of the problem. Nevertheless, it does injure our reputation, even in Western Europe.

(The information requested follows:)

MEMORANDUM

JULY 16, 1963.

Subject: Recent reactions abroad to racial tension in the United States.

Increasing racial tension in the United States during the past few weeks has given rise to expressions of concern, criticism, and, in some cases, deliberate anti-U.S. propaganda campaigns. This report summarizes the reactions and attempts to analyze the motives and attitudes toward the United States that underlie them. It treats each major geographical area separately.

1. AFRICA

(a) *Recent reactions*

The recent reactions in Africa, particularly to the difficulties in Birmingham, reflect keen interest and a strongly critical attitude, though not quite so intense as expected. The African heads of state meeting at Addis Ababa condemned racial discrimination "especially in the United States," but then approved the role of U.S. Federal authorities in attempting to combat prejudice.

In a number of instances, the African press has played on American sensitivities. For example, the Nigerian press compared conditions in Cuba favorably with the plight of the Negro in the South. Much of the coverage, however, has been drawn from international wire services and treated as straight news. Although editorial comment has been generally moderate, an insistent theme throughout Africa is that the United States must first remove its own blemishes before offering advice to the rest of the world.

Some regional variations have been apparent. In North Africa, for instance, the U.S. racial issue does not have the same impact as in black Africa. Also, reaction in French-speaking Africa has tended to be less violent than in English-speaking areas. In south Africa, U.S. racial tensions serve the Government as proof that racial "mixing" doesn't work.

(b) Attitudes and motives

It is difficult to judge how deeply attitudes expressed in the mass media have penetrated the population. Clearly, however, the educated elite and the majority of the urban populations are well aware of the discrimination against the Negro in the United States. Memories of discrimination in their own countries under colonial rule intensify their concern. At the same time there is general ignorance of gains made in the United States in recent years.

Racial conflict in the United States offers opportunities to jounalists to write sensational material and to politicans to dramatize their independence of Washington and to placate their more radical followers. A moderate reaction in some cases may represent a desire not to upset a current rapprochement with the United States. At the same time, extremist elements may exploit the issue to gain converts or strengthen their position.

2. LATIN AMERICA

(a) Recent reactions

Reaction at the time of the Birmingham crisis in May varied generally from sharp but rational criticism in Mexico to attempts to see the brighter side in various countries having a more strongly Europeanized culture. Haiti and Cuba were exceptions. Haiti, with its Negro population, identified itself completely with the U.S. Negro minority. Cuban propaganda emphasized the class struggle and claimed that Latin Americans do not rate much higher with the U.S. white population than do the Negroes. Brazilian Communists published graphic details on methods and instances of brutality directed against the Negroes.

(b) Attitudes and motives

Attitudes of Latin Americans toward racial conflict in the United States tend to reflect their cultural heritage and relations of the several countries with the United States. Only in parts of the Caribbean and Brazil, on the one hand, and a few of the more European countries on the other, is racial background a directly determining factor. European culture predominates, although a large part of the population is mixed, and other large elements are either Negro or Indian. Racial barriers as such are generally not great, and for the most part racial discrimination is looked upon with varying degrees of disapproval. Criticism of the United States for its racial policies tends to be greatest in those countries where conflict with the United States has been greatest, as in Cuba, and where Negro racism is acute, as in Haiti.

Latin American reactions to U.S. racial conflicts are marked by greater depth and subtlety and a more complex weighting of positive and negative factors than elsewhere in the world outside of the United States. Attitudes and factors tending toward a critical appraisal of U.S. racial conflicts include: personal identification of large numbers among the politically articulate groups, especially in Brazil and the Caribbean area, with the U.S. Negro minority; lack of identification with a stereotyped picture of an Anglo-Saxon protestant U.S. majority; a basic antipathy to any use of force in race relations and a tendency to condemn the dominant racial group for conditions leading to violence; little understanding of constitutional limitations on Federal powers; readiness to criticize the United States on moral grounds; resentment of implied condemnation of racial mixture; and, relatively wide press freedom and readership, with extensive use of U.S. wire and photo services covering incidents of racial violence.

Offsetting these factors, and tending to modify critical judgments of U.S. racial tension is a generally friendly attitude among leading Latin American groups toward the United States; habituation to morbidly graphic treatment of local crimes and violence in their popular press; belief that racial tension is largely localized in the South; recognition that the Federal Government is playing an active part to protect the minority.

In a rising middle class, many of whose members are racially mixed or non-European, a feeling of difference related to racial origins interacts with broad cultural disparities, a sense of economic and political inferiority, and tendencies toward anti-U.S. nationalism to produce a high degree of readiness to condemn U.S. racial practices. Among the lower classes similar tendencies are developing, but, except through labor unions and some leftwing parties, do not yet figure prominently in national opinion.

3. EUROPE AND CANADA

European press treatment of racial conflict in the United States has been uniformly heavy. Editorial comment, however, has been generally temperate, and, except in Portugal and Spain, there has been little tendency to mock the United States in its predicament. Although the European press has deplored the existing condition and recognized the seriousness of the problem, it has made a conscious effort to point out positive achievements in racial integration.

Even though press treatment is generally restrained in both Canada and Europe, there is among certain groups, especially intellectuals and leftists, a strong sense of indignation with regard to U.S. failure to provide equal rights for the Negro. In general, there is little knowledge of the historical background of the problem or appreciation of the complex Federal-State relationships involved. The Communists of Western Europe have given a heavy play to news of racial tension, but editorial comment in their papers has been sparse.

Europeans do not sympathize with those who maintain a segregationist policy, though only extremists are disposed to exploit the U.S. predicament. Europeans are undoubtedly concerned about the effect of this problem on the world view of the United States.

4. NEAR EAST AND SOUTH ASIA

(*a*) *Recent reactions*

Generally, in this area reactions to U.S. racial conflict have been moderate. In most of the Arab countries mass communications media are controlled closely by the Government and currently are either preoccupied with pressing internal or regional problems or reflect a satisfactory state of relations between the local government and the United States.

In Iran, U.S. racial tensions, particularly those in Birmingham, have received extensive coverage, including photos, but there has been little press comment. The Greek press has given only sporadic and brief treatment to the problem. Both the extreme left and the far right have been severely critical of the United States, but more influential opinion has noted with approval the Federal Government's posture.

In India, a much more sensitive country on racial matters, press coverage has ranged from moderate to heavy, and editorial comment has been mildly critical. Some of the press has carried sensational photographs, but the dominant tendency has been to deal with the matter in low key, as the press did with regard to the events in Mississippi last fall (but in contrast to the strident tone at the time of the Little Rock trouble.)

(*b*) *Attitudes and motives*

In the Near East and south Asia there is not, except in India and Pakistan, very keen interest in the U.S. racial problem. The Arabs, who have not experienced much racial discrimination and who are wrapped up in their own problems, are little interested in the subject. In Greece, Turkey, and Iran, the United States is not likely to suffer a serious adverse reaction. These nations would, of course, be disturbed by prolonged disorder and evidence of weakness, because, like some of the European and British Commonwealth countries, they are interested primarily in U.S. strength in the world picture.

The most complex attitudes and motivations in this area are found in south Asia. The Indians and, perhaps to a lesser degree, the Pakistanis still remember keenly the long period of European domination. Moreover, they are much aware of discrimination against Indians in Africa. The Indians and Pakistanis therefore have a general disposition to be critical of any failure of the U.S. Government to press rapidly for an end to discrimination against Negroes.

In general, throughout the area, there is little understanding of the U.S. attitude toward the law or of Federal-State relationships. Thus, respect for constitutional processes on the part of the Federal Executive in dealing with racial strife may be interpreted—especially among the Arabs and Turks—as evidence of weakness. On the other hand, there is a good deal of understanding of the benevolent role that the Federal Government is playing in the current racial strife. Unless U.S. relations with any of these countries should run into difficulties for other reasons, there apparently will be no strong inclination to exploit the issue.

5. FAR EAST

(a) *Recent reactions*

(1) *U.S. Allies.*—Korean, Thai, Filipino, and Japanese media have given moderately heavy news and editorial coverage to racial tension in the United States, with no attempt to play down the Federal Government's efforts or to derive satisfaction from recent events in the South. Most commentary strikes a tone of hope, in expectation that the United States will soon solve this internal problem. Japanese Communist publications have given the crisis a steady, though not exceptional play.

Australia and New Zealand's press gave heavy coverage to the turmoil in Alabama, with commentary generally favorable on the role of the Federal Government. Both countries would favor firm U.S. action to remove the racial question from general attention.

The South Vietnamese press, with one exception, has limited itself to occasional editorials deploring white supremacy and praising the President's effort to bring about racial amity. Taiwan media have apparently ignored the topic thus far.

(2) *Nonaligned nations.*—Burmese and Cambodian coverage has been relatively extensive and factual. While deploring violence, the press has expressed approval of the Federal Government's actions in the crisis.

(3) *Communist countries.*—Reaction has been much less extensive in Asian Communist countries than in the U.S.S.R. The bulk of comment has issued from Chinese sources; Peiping has devoted considerably more attention to U.S. racial problems during recent weeks than was the case during the Little Rock and Mississippi crises. Particularly in transmissions to Africa, Peiping has attempted to link U.S. Government policy with the attitude and methods of white supremacy. Mongolia, North Korea, and North Vietnam have picked up this theme in occasional commentary, but the racial issue in the United States will probably not become the target of a major propaganda effort by the Asian Communist parties so long as other, more pressing topics such as Laos, the Indian frontier, and South Vietnam are available.

(b) *Attitudes and motives*

Most Far Eastern groups, except for the Communists, have highly parochial interests. This becomes increasingly true as one goes down the socioeconomic scale from policy official to peasant. Domestic affairs in distant countries receive scant attention and play even less of a role in determining those attitudes which shape action. A general preoccupation with meeting personal and local problems requires that foreign developments have an especially dramatic focus, such as the death of a world renowned leader or a major natural disaster, before they permeate the consciousness of most audiences. Even then they may have a transitory impact so far as policy-relevant responses are concerned.

This does not prevent the reinforcement of existing images which may occur through such events as racial strife in the United States. Assumptions about American racial prejudice are deep rooted in Asian societies which have experienced similar problems under colonial rule or which have had unpleasant experiences with American officials, businessmen, and soldiers over past decades. The subtle manifestations of prejudice in these relationships are easily sensed by Asians even though they may not articulate their resentment except under unusual circumstances of frankness or provocation.

The Communists are excepted from these observations simply because their ideology and tactics orient them toward an interest in foreign developments and especially toward signs of "capitalist brutality" and "revolution" in the United States. With guidelines for attitude and action from Peiping and Moscow, these groups are better informed and more motivated toward political reactions than their non-Communist colleagues in most Asian societies, except, perhaps, in Japan. The importance of their response is conditioned not only by their actual strength in each country but also by the receptivity of target groups in that country to propaganda directed against the United States and keyed to racial themes.

6. SOVIET BLOC

(a) *Recent reactions*

In the past few weeks, Soviet reaction has been sharp. Soviet broadcasting on the current U.S. racial crisis has recently attained a level seven times that of the Mississippi crisis last autumn. For the period May 14–26, it was more

than 11 times the 2-week high during the Little Rock crisis of 1957. Interestingly, however, while the total has been so high, the amount of domestic broadcasting on the subject has been small. However, newspaper coverage makes up to some extent for this small volume of domestic broadcasting.

The following four themes have recurred frequently in Soviet radio commentary on the crisis:

(1) Racism is inevitable in the American capitalist system;

(2) Inaction of the U.S. Government is tantamount to support of the racists;

(3) Recent events have exposed the hypocrisy of U.S. claims to ideological leadership of the so-called free world;

(4) The U.S. policy toward Negroes is clearly indicative of its attitude toward peoples of color throughout the world.

Although the themes stressed by East European media have paralleled many of those of the Soviets, coverage has not been especially great.

(b) *Attitudes and motives*

Apart from a predictable desire to discredit the capitalist United States the greatly expanded Soviet coverage may mirror sensitivity to current publicity on the treatment received by Afro-Asian students in bloc countries and of Soviet racial and ethnic minorities, as well as a desire to undercut the Chinese Communists in their use of racial appeals against the Soviets.

(Additional information was submitted by the State Department and it is included in the official files of the Committee on Commerce for public inspection.)

The CHAIRMAN. I was quite interested, on page 3 of your statement, where you listed the four themes of racial tension; but I say nonwhite students have encountered race prejudice in Soviet bloc countries.

I don't particularly think you need to put in the record great detail as to incidents, but has that been generally true in Russia in particular?

Mr. RUSK. Such incidents have occurred in the Soviet Union. Indeed African students have been leaving bloc countries because of such incidents and such treatment. And some of us in the West have arranged for some alternative study opportunities for African students who come away disillusioned from that experience. This has not been an unusual situation.

The CHAIRMAN. But mainly in the Soviet Union proper, and not in the satellite countries?

Mr. RUSK. In one or two of the satellite countries there have been similar incidents. But the ones that have caused the most attention and the sharpest reaction among the African students have been in the Soviet Union itself.

The CHAIRMAN. All right.

Off the record.

(Discussion off the record.)

The CHAIRMAN. On the record.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Secretary, even though you are here today to testify as to this particular measure, S. 1732, I gather that yours is a statement of principle rather than one of specifics as to the bill.

Then I suppose that you support the entire package of civil rights programs, S. 1731, which has been introduced in Congress at the request of the President?

Mr. RUSK. That is correct, sir.

Senator THURMOND. Mr. Secretary, you mentioned in your statement that racial discrimination is not unique to the United States, but is found in many countries.

One provision of the President's package bill would permit the withholding of funds from any Federal financial assistance program in circumstances under which individuals participating or benefiting from the program discriminate on the ground of race, color, religion, or national origin.

I suppose, then, since you support this provision as to areas of your own country, you would support a similar provision in the foreign-aid legislation to withhold funds from countries which practice discrimination?

Mr. RUSK. Not necessarily, Senator, because here we are talking about a constitutional system in which we have control over our own affairs. When we are dealing with the rest of the world we are dealing with a world which we can influence, but cannot control. It is not our constitutional responsibility to do so.

In the rest of the world we are waging a struggle for freedom, from which we cannot withdraw by the type of abandonment which is suggested to me in your question. We must stay with that struggle, use our influence to the best of our ability to sustain and strengthen the cause of freedom; and that would mean we would work at it, use our influence, even though we can't necessarily control the result.

Our influence in these situations can be very strong. I think there are differences between situations where governmental laws and constitutional practices are responsible for the discrimination, and where you run into discriminatory situations simply because of the existence of religious or racial groups next to each other, with the social problems that have historically been associated with those situations.

Our influence has been in the direction or removing these discriminations abroad as well as at home.

I think our advice in this respect would be more powerful if we could move forward at home more rapidly.

But I do not think we should abandon the great struggle for freedom throughout the world by such a restrictive interpretation of our role abroad.

Senator THURMOND. So you would approve giving or lending foreign aid funds to other nations that practiced discrimination, although the particular bills which you endorse here would withhold funds from our own people for the same purpose?

Mr. RUSK. I think there is big difference between what we can do within the limits of our own constitutional responsibility here at home and what we cannot do, through lack of the authority and responsibility, abroad. And we must stay with this problem abroad and not turn over the world to the predatory aims and purposes of another entirely different system of government.

Senator THURMOND. Mr. Secretary, a recent edition of the U.S. News & World Report contained a comprehensive article concerning the different forms of discrimination which are prevalent in the different countries of the world.

I presume you have seen that.

Mr. RUSK. Yes, sir, I have seen that.

Senator THURMOND. Its theme is that some form of racial discrimination exists in almost every country of the world where there is more than one race.

Do you have any comments on this article?

Mr. RUSK. No. I have seen the article, and, in general, it seems to me this is a reasonable, accurate, and broad survey of the total problem.

But before underwriting or authenticating specific instances, I would want to make a careful study of the situation before I would want to submit official testimony to the committee on particular countries.

Senator THURMOND. Mr. Secretary, doesn't the study of anthropology and history show that where there is more than one race in a country that there has always existed some tension and differences between the races?

Mr. RUSK. I think there have been tensions where different groups that are different in any important respect live side by side. I think that has been a general experience of mankind.

Senator THURMOND. Mr. Secretary, in your statement you singled out for particular reference the newly independent states of Africa, and state that the people in these states are determined to eradicate every vestige of the notion that the white race is superior, or even entitled to any special privilege.

Are you aware of any discrimination against the white people who are remaining in these countries?

Mr. RUSK. In Africa?

Senator THURMOND. Yes.

Mr. RUSK. There are some forms of discrimination that exist in those countries, and I would be glad to submit a precise statement on that to the committee, if the committee desires it.

Senator THURMOND. Mr. Secretary, the article from U.S.——

Mr. RUSK. I might say those I am most directly aware of at the moment, without a careful examination on a country-by-country basis, have to do with the privilege of becoming citizens on one hand and, in certain cases, property ownership on the other.

Senator THURMOND. Mr. Secretary, the article from U.S. News & World Report, which I mentioned, details several instances of discrimination because of race in some of these countries.

Are these instances damaging the image abroad of these countries?

Mr. RUSK. I think, sir, that undoubtedly this is so. And I think that any country which finds itself in a position of discriminating on the basis of race or religion finds its reputation and standing in the general international community damaged thereby.

These shortcomings do not apply only to the United States, but to many countries. They are problems for all of those countries in their standing abroad.

Senator THURMOND. Has Communist Russia propagandized against such countries because of such discrimination?

Mr. RUSK. I am not aware of direct propaganda on this particular point. Their chief target is the United States.

Senator THURMOND. And it is not because of the racial discrimination; it is because they know that we are the only country between them and domination of the world. Is that not true?

Mr. RUSK. No. I think they seize upon any weak points that they can find, and attack those in an effort to reduce, minimize, U.S. influence, and to try to cast what we say about freedom into hollow tones.

I think they look upon us as the chief proponent, or opponent, in this great struggle for freedom, and anything they can do to diminish our influence suits their purpose.

Senator THURMOND. Does Russia practice discrimination?

Mr. RUSK. There have been numbers of instances of discrimination reported from the Soviet Union. I mentioned those earlier, or the chairman mentioned them in connection with some students.

Senator THURMOND. And do you agree Russia does practice discrimination of races?

Mr. RUSK. That is correct, sir.

Senator THURMOND. Mr. Secretary, wouldn't you agree that the Negro in America has made greater strides in all fields of endeavor—education, employment, culture—than in any other country in the world?

Mr. RUSK. Well, I think he has made very great strides, Senator. There is no question about it. But I think that so long as there is a missing piece, which has to do with his personal dignity as an individual, there is still unfinished business.

Senator THURMOND. Who has been responsible for that progress chiefly? The white man or the Negro?

Mr. RUSK. Both, working together for more than 50 years. For example, private philanthropic organizations and southern white and Negro leaders have been working on the education of the Negro, on improvement in his public health, his productive capacity, and his standard of living. This has been a great common effort by both whites and Negroes.

Senator THURMOND. Then if such great progress has been made, without these national laws, why not let that progress continue?

Mr. RUSK. Well, Senator, my own personal view on this is that we have reached a point now where that progress itself demands the next step; the essential element of personal dignity is the primary missing piece, and we ought to put that piece into place.

Senator THURMOND. Mr. Secretary, aren't these laws primarily vote getters for the next election?

Mr. RUSK. I think, sir, that members of both parties would recognize that, although this is a problem which has had in it much agony for many decades for all concerned, we are heading toward a deep internal crisis in our own country unless these issues are resolved satisfactorily.

And I don't believe, sir, that this can be approached fairly, looking toward a right result, on the basis of the vote-getting situation for one party or the other. I think this is a great national issue, if I may say so, sir.

Senator THURMOND. And both parties have been concerned with it.

Mr. RUSK. Yes, sir.

Senator THURMOND. And isn't there a struggle between the two parties for the Negro-bloc vote today?

Mr. RUSK. I would suppose there is a struggle between the two parties for everybody's vote.

Senator THURMOND. Isn't that competition to see which can offer the most and outdo each other, in order to try to get this Negro-bloc vote?

Mr. RUSK. I am not myself clear at the moment as to how this works out as far as the attitude of the leadership of the two parties in the Congress is concerned.

I would suppose there is a great deal of discussion across the aisle, and a determination to work in harmony on this matter if possible, because it has come to be such a great national issue.

Senator THURMOND. When did you first recommend to the administration that they submit to Congress proposals of this kind?

Mr. RUSK. My view on this matter, as far as the foreign relations are concerned, has been made known since I first became Secretary of State.

But as the committee knows, the primary responsibility for this legislation rests with another department.

Senator THURMOND. When did you, as Secretary of State, tell the President that you felt that Congress should pass these laws because the lack of such laws was hurting our foreign relations?

Mr. RUSK. Senator, it isn't customary for a Cabinet officer to discuss the dates or details of conversations with the President; but my view on this subject has been known since the beginning of the administration.

Senator THURMOND. Are you claiming executive privilege on that?

Mr. RUSK. No.

The CHAIRMAN. He said he made his views known since the beginning of the administration.

Senator THURMOND. I asked him when he first recommended to the President that the Congress should pass such laws as are recommended here in order to prevent our country being placed in a bad light before the world.

Mr. RUSK. My discussions have been involved primarily with the foreign policy aspects of these matters. I have had a number of incidents to discuss at the Cabinet level, from the beginning of my administration as Secretary of State.

But I would not wish to go into the question of discussions with the President on the particular legislation in front of us in any personal detailed sense.

Senator THURMOND. Now, Mr. Secretary, isn't it a fact that the great progress that has been made by the Negro in America should be pointed to with pride by the officials of our Government and by the Negro leaders in this country, instead of the constant and unceasing chorus of abuse heaped upon the white people in America, who have helped the Negroes make these strides?

Mr. RUSK. Well, I think, sir, that is a very important part of the total presentation of the American scene to the rest of the world. I did not emphasize that point in my statement today because we are talking about, it seems to me, some of the unfinished business in this field. But our information programs, our American Ambassadors, our Embassies, our consular officers, and our official visitors abroad do bring out the very point you are making repeatedly in every possible way; that great strides have been made, and we have been moving steadily on these great issues of relations between the races in this country.

And some of our most effective spokesmen in this regard abroad have been Negro citizens themselves, who have testified with great effect on just the point you have made.

Senator THURMOND. Mr. Secretary, in your statement you alluded to the fact that the Communists regard racial discrimination in the United States as one of their most valuable assets.

Don't the Communists, in fact, have a history of attempting to split racial groups in all free world countries by exploiting the difficulties between the races and encouraging demonstrations which border sometimes on outright revolt?

Mr. RUSK. I think, sir, that they will exploit any possibility of driving a wedge between people who believe in freedom. And these questions of race are one of the means by which they attempt to do that.

I might say, to me it is really extraordinary, and, I think, a matter of great satisfaction to all of us, that the Communists have made so little inroads among the Negro citizens of the United States, despite the presence there of an issue which would be subject to exploitation.

The loyalty and dedication of the Negro citizens of this country I think is a great testimonial to the strength of the notions of freedom on which this country is founded.

Senator THURMOND. And I agree they should be commended upon that.

Now, Mr. Secretary, do you see a pattern of this same type of operation being attempted in this country?

Mr. RUSK. Driving wedges on the basis of race? By the Communists?

Senator THURMOND. Attempting to split racial groups in the free world, and exploiting the difficulties between the races, and encouraging demonstrations?

Mr. RUSK. I have not had detailed reports on particular Communist operations. The Department of Justice would be better equipped to advise on that point.

But I would have no doubt if they saw such opportunities they would try to move in and take advantage of them.

Senator THURMOND. Mr. Chairman, I have some more questions, but I shall be glad to defer at this time to some of the other members, if you like.

The CHAIRMAN. The Senator from Kentucky.

Senator MORTON. Thank you, Mr. Chairman.

I have no questions, but I would like to commend the Secretary of State for a very articulate statement, and for his very articulate answers to questions that have been posed. I think he is probably the busiest man in the United States. And I defer.

The CHAIRMAN. The Senator from Indiana.

Senator HARTKE. I have no questions.

I would like to commend the Secretary on a fine statement. The first part of his statement is very important, in which he says the bill is not to make others think better of us, but rather because it is right. I commend you, sir.

The CHAIRMAN. The Senator from Texas.

Senator YARBOROUGH. Mr. Chairman, I have no questions.

I commend the Secretary of State on his forthright discussion of this problem, as it affects our foreign relations, without pulling any punches.

I also commend the State Department on the efforts it has made to make all of the diplomats to the United States and their staffs feel at home in this country.

Mr. RUSK. Thank you.

The CHAIRMAN. The Senator from Pennsylvania.

Senator SCOTT. I have no questions.

Mr. Secretary, I find myself quite in agreement with the statement which you made.

I would like to say that next week I have been asked to address a youth group in Germany, along with other Members of the Senate, and I am quite aware, from past experience, of the course that will be taken in the question period, which will begin with the issue of civil rights and will consume the greater part of the period, to discuss the impact of American policies, foreign and domestic, on Germany, and on Europe. And it is going to be a difficult and embarrassing experience, one more time, to have to explain why, when we take the pledge of allegiance to the flag and say "With liberty and justice for all," it is that sometimes it appears we do not mean all, or we may have limitations of race, creed, and so on.

So I wish I could go there with more help than I can carry, because, as one American citizen, I take with me this great burden of past injustice.

I will do the best I can for my country, but I wish my rucksack were not so loaded.

Mr. RUSK. Thank you, Senator, and I certainly wish you well on that journey.

But may I presume to suggest, sir, that if you take with you a sense of the deep concern which you and other people in this country have about this problem, you will find a response there; because I think they do understand the depth and the difficulty and the complexity of the problem, and they appreciate the effort so many Americans are now making to try to find some solution to it.

I think you will find more understanding than perhaps you would expect.

Senator SCOTT. Senator Church and Senator McCarthy are going with me, I am sure we will do the best we can. I have no further questions.

The CHAIRMAN. The Senator from Alaska.

Senator BARTLETT. Secretary Rusk, I have not been a faithful attendant at the committee meetings on this legislation. In fact, this is the first meeting I have come to. It would have been difficult for me to have been here because recently I was in Nome, Alaska, and after having been there I only wish this committee could sit there for 1 day, because that little community on the shore of the Bering Sea affords, in my opinion, the best example of what can be done in the area of bettering racial relations.

It is a little town of perhaps 2,000 people; the majority of them are Eskimos. Twenty years ago there was discrimination there in a degree and in a sense as great as might be found in any community in the United States. Today it is virtually nonexistent.

I will not say that there is social compatibility, or that all discriminations have been removed; but to a very large extent these

changes for the better have occurred. And today the whites and Eskimos in that remote community live together in a wonderful relationship. And this has been done partly through understanding on both sides and partly through territorial and State law.

I know of no better example anywhere of what can be done.

I have only one question to put to you, Mr. Secretary.

You have made a forceful statement and an eloquent one which, I doubt not, will be reported throughout the world today, as will the testimony heretofore given by other witnesses, and to be given by witnesses to follow.

In the concluding paragraph of your statement you said—and I quote:

> I want to reiterate most emphatically that in the fateful struggle in which we are engaged to make the world safe for freedom, the United States cannot fulfill its historic role unless it fulfills its commitments to its own people.

What do you think our situation will be in the field of your responsibility if this bill is not passed, or if no bill at all is passed, after this subject has been placed before the American people and before the American Congress?

Mr. RUSK. Well, Senator, I recognize that there are some difficult questions of detail with respect to a bill of this sort—in terms of what is wise to do and what the possibilities of enforcement might be. But nevertheless I think it is of the greatest importance for the Congress to make it very clear that the legislative branch, as well as the executive and judiciary, are behind the affirmation of a great national policy with respect to matters of discrimination and problems involving human dignity in the normal conduct of public life and public facilities.

I would suppose that if no action were taken, this would be interpreted as a diminution of our commitment to these great ideas.

And let me add, if I may, this point: We are a powerful nation, with enormous military strength. But I suspect our greatest strength actually lies in some of these simple ideas that we joined with other nations in inscribing in the preamble and articles I and II of the United Nations Charter after World War II, because how other people act in a given situation will turn a great deal on what is in their minds and what they think we are all about.

And we have found, in instance after instance, that these common commitments to the great notions of freedom put into the United Nations Charter are powerful elements in support of the kind of world we are trying to build, when crises come.

And, indeed, I think I can safely report, and accurately report, that at moments of crises there is far less neutralism than one would suppose. And this is partly because most ordinary men and women around the world do believe they understand what kind of people we are and what we are after; and, broadly speaking, they have confidence in what we are after.

I think if the Congress, now that this issue is before it and it has an opportunity to affirm a national policy—if this were not affirmed, this would weaken us at a point at which we draw our greatest strength.

Senator BARTLETT. Thank you, sir.

The CHAIRMAN. Mr. Secretary, isn't it also true, whether we like it or not, that these other countries that we are talking about look to us for leadership in certain fields, including this one?

Mr. RUSK. That is correct, sir.

The CHAIRMAN. And the fact that there may be discriminations in other countries doesn't necessarily mean that we should abandon our purpose to show the kind of leadership that would erase discrimination in the world.

Mr. RUSK. I think, sir, just as has been pointed out here, just as we have been able to report substantial progress on these matters, these same trends are working in other countries where discrimination is present. And in many countries of the free world these problems of racial and religious discrimination are being resolved as we move forward.

The CHAIRMAN. Our positive action toward a firm national policy on this is going to be very helpful to the people in other countries who want to abolish this sort of thing in their countries.

Mr. RUSK. That is correct, sir.

The CHAIRMAN. And they will point to us as leaders in this particular field.

Mr. RUSK. That is correct, sir.

The CHAIRMAN. The Senator from Michigan.

Senator HART. Mr. Secretary, I wish your statement could be made required reading by all Americans, and I wish they could have been in the room this morning. I am sure they would leave with the very deepest respect for you.

I know you are talking about international affairs, and yet I would like to make the comment that the subject matter that concerns us this morning is more in the control of the individual citizen than any other business before the Congress.

Discrimination is just a person-to-person business. And every once in a while people ask me, "What about this thing the President said, 'Don't ask what the country can do for you; ask what you can do for the country.' What are we supposed to do?"

Well, this is what you are supposed to do. It doesn't cost you anything.

You can control this issue more directly; you, the American citizen, can control this issue more directly than anything on the whole list of public business.

And I think you have effectively underscored the world effect of what I do toward my next-door neighb[illegible]re at home.

Mr. RUSK. Senator, if I might comment on your statement which I greatly appreciate: When we talk about the attitudes of people abroad, there is one thing that is getting around abroad which is very helpful, and that is an understanding that in local communities all over the country, north and south, east and west, ordinary citizens are working at this problem in the[illegible]wn way, and are trying to find answers to the[illegible]xtent that private [illegible]izens, individually and in small groups, can do i[illegible]

And I think this is an element of strength in this situation: that it is understood that the ordinary American is concerned about it.

Senator HART. Thank you, Mr. Chairman.

Senator PASTORE (presiding). The Senator from Vermont.

Senator PROUTY. Mr. Secretary, I wish to congratulate you for making a very objective and excellent statement. I find myself in full accord with it.

Mr. Secretary, is it true that in the United Nations Charter, chapter 16, article 105, paragraph 2, these words are found—and I quote:

> Representatives of the members of the United Nations and officials of the organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization.

Mr. RUSK. That is correct, sir.

Senator PROUTY. Is it also true that the section on privileges and immunities of the United Nations Charter adopted by the General Assembly on February 13, 1946, and the agreement of June 26, 1947, between the United Nations and the United States, regarding the headquarters of the United Nations proposed certain privileges and immunities for representatives in the General Assembly?

Mr. RUSK. That is correct, sir.

Senator PROUTY. And included among these they were to be granted immunity from personal arrest or detention, except when violating a domestic law, and they were to be granted such further privileges and immunities as are enjoyed by members of the national legislative body of the nation in which these privileges or immunities are claimed?

In other words, they are entitled to the same privileges in this country as Members of Congress?

Mr. RUSK. That is correct, sir.

Senator PROUTY. Mr. Secretary, if a diplomat assigned to the United Nations is refused equal access to public accommodations, does such refusal operate to impair that diplomat's free movement to and from meetings of the General Assembly?

Mr. RUSK. It does, Senator.

If I could go back quite a few years ago—I am almost hesitant to cite an example of this sort because of the use the other side would make of it in propaganda; but a number of years ago a delegate to the General Assembly, a person of some color, was on his way to the United Nations by an American aircraft, and at his point of touchdown he was given a sandwich in a waxed paper wrapper, and given a seat on a folding canvas stool in the corner of the hangar, while the other passengers on the plane went into the restaurant of the airport and had lunch. That delegate went on to the United Nations, and it was our task to get him to support us in some vital issues affecting human rights in our great struggle with the Soviet Union upon his arrival in New York. That was not easy.

Senator PROUTY. One more question.

Since we are a party to the United Nations agreement, which touches upon the protection of the rights of men, can the President take executive action to end discrimination which has its legal foundation in the United Nations Charter?

Mr. RUSK. Senator, I am not myself a lawyer, and I would not presume to give a legal opinion on that point; but I would, myself, think that the proposals to base these actions on legislation would be in any event far the preferable method of operating.

Senator PROUTY. I agree with you. But I think that is an interesting point.

Mr. RUSK. I think there might be some powers by which the President could himself take steps to protect foreign diplomats in particular situations, if necessary. But I think, since I am not a lawyer, I better not go any further. I just don't know, quite frankly.

Senator PASTORE. You can get a lot of legal advice from this committee, if you want.

The Senator from Oklahoma.

Senator MONRONEY. Mr. Secretary, on pages 9 and 10, I think we all heartily agree with you on the bad effects nationally and internationally that segregation has.

You are not in a position, according to your statement, to agree or disagree with the legislative language being proposed for settlement of this particular problem. Is that correct?

Mr. RUSK. Well, it is just, sir, that I do not consider myself in any way an expert, I am not a lawyer, and these are matters that are being discussed between the committee and the Department of Justice, and I think it would be imprudent for me to go into questions that are better discussed in another way.

Senator MONRONEY. Of course, neither am I lawyer. But I believe we both have a very deep and lasting regard for the Constitution of the United States, for the dual system of government that it provides, that the Federal Government shall have only those powers that are specifically delegated to it.

Mr. RUSK. Right, sir.

Senator MONRONEY. The need to find an answer to this is grave and pressing, but should we risk shortcutting the traditional guarantees of constitutional government by stretching the interstate commerce clause to include business that up to this time in our history has never been thought to be in interstate commerce?

There was no difficulty in desegregating the railroads and airlines, the airports, and various things that are obviously interstate commerce.

But it does become difficult in view of the plain language of the Constitution and the fact that no court opinion has ever reached into this area, to find the specific powers which would enable us to properly enact this bill. Would we be better off, in the eyes of the people of the world, who respect our observance of the Constitution, to solve this problem with a constitutional amendment designed to empower the Federal Government to abolish all bias and prejudice and discrimination, against all citizens in the United States?

Mr. RUSK. Well, I would suppose, sir—within the limits of my remarks about my own qualifications, I would suppose—that there would be adequate authority in the Constitution, under the 14th amendment, and the commerce clause, and perhaps in other parts, to support acts to reinforce such a far-reaching and basic right of an American citizen, a citizen of the United States, on matters of this sort.

Senator MONRONEY. In other words, not tying yourself specifically to language, you feel the interstate commerce clause and the 14th amendment and/or both, do give the Congress the right to pass laws in this regard?

Mr. RUSK. Yes, I think, sir, the recitations that are in the first portion of the Senate bill bring out very clearly why this would be so in terms of the practical situation in which interstate commerce finds itself.

Senator MONRONEY. That is nothing but a preamble and the Attorney General himself said it had no base in law. It is a very distinguished statement of principle, which Congress by resolution, can pass and arrive at a declaration. But the enforcement of the declaration is the thing that causes many of us great worry. The breaking of new ground that has never been thought to be within the powers of the Federal Government, the establishment of police powers and the right to license businesses and other things, are very delicate matters in this duality we have traditionally observed. That is all I have.

The CHAIRMAN. At this point, I think it would be well to mention that there was a letter to the editor of the New York Times, in this morning's paper, by Mr. Herbert Wechsler, the professor of constitutional law at Columbia, who is an eminent authority on these matters, and I think it is so pertinent to the matter before us here, and the questions asked by the Senator from Oklahoma, that I would like permission to put it into the record at this point.

Senator PASTORE. Without objection, it is so ordered.

(The document follows:)

[From the New York Times, July 10, 1963]

BASIS FOR RIGHTS LAW—ADMINISTRATION PROPOSAL ENDORSED AS AGAINST COOPER-DODD BILL

NEW YORK, *July 4, 1963.*

To the EDITOR OF THE NEW YORK TIMES:

In Arthur Krock's column of July 4, he expresses the opinion that there is "a better foundation for judicial acceptance" of the Cooper-Dodd antidiscrimination bill than there is for the administration proposal. To a student of constitutional law this is an amazing proposition.

The Cooper-Dodd bill would forbid racial discrimination in privately owned facilities of public accommodation if and only if they are licensed by the State or local government. Congressional power to enact it thus must rest upon the view that the discriminatory action of the licensed owner is discrimination by the State, for only State action is forbidden by the 14th amendment, which the bill undertakes to enforce.

One need not be a lawyer to perceive that the fact that a State requires a lunchroom to obtain a license as a means of protecting the public health does not make the lunchroom a State agency. Are all private corporations to be viewed as organs of the State because their corporate existence is conferred by their State charters? It puts the matter with excessive charity to say that this is a submission which is most unlikely to persuade the Supreme Court and, what is more important, should not do so. In the entire history of the judicial interpretation of the 14th amendment, only Justice Douglas has accorded the position color of support in an opinion.

REGULATORY AUTHORITY

Against this, the administration bill would draw upon the power of Congress to regulate interstate commerce, the power which has sustained the great regulatory measures of the recent past, including most relevantly the National Labor Relations Act, the Taft-Hartley Act, the Fair Labor Standards Act and much of the agricultural program.

Ever since the thirties, a unanimous Supreme Court has sustained the broad reach of the power over commerce, including not only the direct regulation of practices in commerce, but also the control of conduct or conditions which affect commerce.

There has been no decision in these years that a practice deemed by Congress to affect commerce is beyond the regulatory authority that the Constitution has explicitly confered.

In this state of the constitutional text and its judicial interpretation, there is not the slightest doubt but that the commerce clause provides the better foundation for judicial acceptance of a Federal measure forbidding private racial dis-

crimination. It is, moreover, a foundation which, as the Attorney General has urged, will certainly sustain an application of the measure broad enough to accomplish a large part of its objective.

COMMERCE POWER

Mr. Krock also suggests that the fact that the commerce power is not all-embracing somehow vitiates the moral principal of the proposal by implying the legitimacy of discrimination if interstate commerce is not affected. This, too, is an amazing proposition.

Has Congress implied the legitimacy of local prostitution by confining the White Slave Traffic Act to cases where State lines are crossed? Has it endorsed fraud by limitating Federal prohibition to cases where the mails are used?

Congress endorses nothing by confining its action to the areas committed to its governance by the provisions of the Constitution.

HERBERT WECHSLER,
Harlan Fiske Stone Professor of Constitutional Law, Columbia University.

Senator PASTORE. The Senator from South Carolina may continue.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Secretary, you state that the Communists stress four themes in their radio commentaries on racial tension.

The second of these is that inaction by the U. S. Government is tantamount to support of the racists. You don't agree that there is any merit in this Communist propaganda, do you?

Mr. RUSK. Well, I don't know whether your copy has that word "racists" in quotation marks or not, because it was written that way, but we do not subscribe to that characterization of our society.

I was pointing out what they are saying in their broadcasts and in their propaganda aimed at other nations.

Senator THURMOND. The Communists will say anything to promote their cause, will they not, whether true or false?

Mr. RUSK. That is correct, sir.

Senator THURMOND. Mr. Secretary, by coming before Congress and testifying in this nature, aren't you lending at least tacit support to and approval of this Communist lie?

Mr. RUSK. Why, of course not, Senator. I am here as Secretary of State of the United States to advise the committee of my views as to the relationship between these problems here at home and our foreign policy.

I consider that relationship very grave, and I would certainly hope that no committee of the Congress would ever take the view that a Secretary of State can't come before it without having it said he is supporting a Communist line.

Senator PASTORE. I doubt any committee of Congress does.

Senator THURMOND. That is a Communist lie you stated in your statement, you admit that, don't you, it is propaganda?

Mr. RUSK. I identified this as a Communist statement in my statement, sir.

Senator THURMOND. Mr. Secretary, you make a very commendable and an absolutely correct statement that, except for rare exceptions, nonwhite Americans remain completely loyal to the United States and its institutions.

I agree with that, and have seen it evidenced on many occasions. However, in some instances, I have heard statements made by leaders of the Negro movement which indicate, if not outright opposition to our form of government, at least a disenchantment with our constitutional republic.

Recently, on nationwide television, a Negro leader made this statement:

> Once the Negro is given that—

speaking of full emancipation—

> then America has to change its entire posture. I think it is an inevitable move toward some kind of socialism of a sort.

Do you agree with that statement?

Mr. RUSK. I don't, as it is read to me. I, myself, fully understand why Negroes are pressing very hard for a full recognition of what they consider to be their rights as citizens in our society. And I wish them well in that effort.

But I do not believe that we want to see a situation develop in which extralegal means become attractive to them because they feel that the avenues to full civil rights through the normal process of the law and justice are closed to them.

Senator THURMOND. Mr. Secretary, you mention the recent meeting of the African heads of state at Adis Ababa, at which they condemned racial discrimination, especially in the United States. For what reason do you believe the United States was particularly singled out for special emphasis in their statement?

Mr. RUSK. I think on that occasion it was because the meeting coincided with some incidents here in this country that had created a great deal of world attention. But I think also these African countries, as they have repeatedly made it clear in the General Assembly of the United Nations, have lined up with the United States and other free countries on these great issues of human rights, which are among those that separate us from the Communist bloc.

You will find in the great issues that have been involved there over the years—the last 10 years, say—the great majority of these smaller and weaker nations, many of them nonwhite nations, have voted regularly for the cause which we ourselves have supported.

Senator THURMOND. It would be well if more of the African nations whom we have supported so much with foreign aid would line up with us more in the United Nations, would it not?

Mr. RUSK. The record on that is very good, sir, and particularly on issues in which the Soviet Union or others might be trying to destroy the United Nations itself. We find ourselves working with these countries in almost all of the important issues that come before that body.

Senator THURMOND. It would take too long now, but I disagree with you in great respect on that, as to how well they have stood by us. The record will speak for itself.

Mr. Secretary, do you believe that Congress should be urged to act on some particular measure, because of the threat of Communist propaganda if we don't?

Mr. RUSK. Senator, as I intimated in my statement, I believe that the primary issue is one for us here at home, within our constitutional system, in terms of our own commitments.

I don't think we can create an image abroad unless it fairly represents reality at home. And I believe that, because the rest of the world is so closely watching the United States, the reality at home creates its own image abroad.

I would think, therefore, our primary preoccupation—and I say this even as Secretary of State—our primary preoccupation ought to be with the question of how we resolve these issues in our own society, in terms of the commitments of our own society.

Senator THURMOND. If the Communists don't use one subject matter or pretext on which to propagandize, they will find another, will they not?

Mr. RUSK. They will seek whatever issues they can find, but I hope we could withdraw some issues from their bag of tricks.

Senator THURMOND. You mentioned the Vienna Convention of diplomatic relations and state it provides the receiving state shall take all appropriate steps to prevent any attack on a diplomat's person, freedom, or dignity.

Isn't it true that American embassies abroad have come under attack from mobs more than any other nation's embassies?

Mr. RUSK. I think that we have had our full share. I have not kept score.

We have, I think, reached a point where we can almost predict when certain of our embassies will be picketed or even stoned on particular issues. That is because of a highly organized effort by the Communists, in many countries, to create such demonstrations on occasions selected by themselves.

But I would not suppose that this is a special problem for us compared with others. I think we are exposed to this danger more frequently, because we are the leader in great world issues. But other countries have the same experience.

Senator THURMOND. Mr. Secretary, wouldn't this damage the world image of the countries which have allowed this to occur?

Mr. RUSK. Oh, it does, sir, and we make the most strenuous representations in these situations, particularly where we find there is any negligence or lack of effort on the part of the host country to give our diplomatic representatives and our installations abroad full and adequate protection.

Senator THURMOND. Has any such demonstration or attack ever occurred at any foreign embassy here in the United States?

Mr. RUSK. We have had some picketing of embassies here. I would have to check the record to see whether in the last year or two there has been any violence or any stone throwing or anything of that sort. But we have probems of safeguarding the properties of embassies here. Sometimes demonstrations are made by exile groups in this country; sometimes, on rare occasions, by some of our own citizens. But this is fortunately not a serious problem for foreign embassies in this capital.

Senator THURMOND. Our protection of the embassies here has been exemplary, has it not, and has been greater than our embassies received in some foreign countries?

Mr. RUSK. It has been good here and we try to keep it good. I would suppose that the situation is somewhat easier here in this Nation of traditional law-abiding practice than it would be in some other countries where the institutions are not so well established and where public opinion is more volatile and perhaps even more violent in character.

Senator THURMOND. Mr. Secretary, the two primary cities in the United States in which any foreign representative has official duties

are, of course, New York City and Washington. Both of these cities have laws paralleling the one we are now discussing. Also, the States through which an individual must pass between these two cities now have the same or similar laws.

How many other areas of our country would a foreign diplomat normally be required to visit as a part of his official duties?

Mr. RUSK. Let me start, Senator, by saying that we expect our own diplomats abroad to travel rather widely over the countries to which they are accredited, in order to become familiar with the country and its people, and its economic and other activities. And in order for our diplomats to travel abroad, as is the customary practice in diplomacy, it of course is necessary for us to accord them free and easy privileges of the same sort in this country. I would think the travel of diplomats in the host country is one of the best established practices and traditions of the diplomatic service.

Senator THURMOND. Foreign diplomats have had little trouble in this country, have they not?

Mr. RUSK. We have had a very considerable number of incidents, Senator, a distressing number in my judgment. I would be glad to furnish the committee a list of these, for consideration, if it wishes, in executive session, because some of these, I think, the committee might not wish to make public.

We have had, I think, far too many of these incidents. But again, the situation has been improving through the cooperation of civic leaders and public officials in all of the States. There have been fewer of these incidents in recent years than had been true for a while.

Senator THURMOND. Had the State Department made the proper preparations in those specific instances in which there was trouble?

Mr. RUSK. I indicated earlier we do take some precautions in this matter when we know about the prospective travel. But, Senator, it is deeply disturbing to me to have incidents arise because diplomats find themselves often unexpectedly unable to obtain the accommodations or the courtesies which they would have expected any American citizen would obtain. And this always comes as a startling surprise to them when they suddenly encounter a situation of this sort.

Senator THURMOND. Mr. Secretary, your presentation of the problems created by the unavailability of privately owned facilities to foreign diplomats was most articulate. Is it your belief the remedy should be in the form of national legislation?

Mr. RUSK. It seems to me, sir, in cases which affect travel throughout the Nation and peaceful intercourse with foreign countries and exchange of travelers between us and foreign countries, that this is a national problem, and could suitably be handled by national legislation. I think perhaps the most important part of it is a firm and positive affirmation by the Congress of national policy in this regard, because I do believe that the citizens will, themselves, do a great deal to give effect to such a policy, if it is quite clear that we as a nation are united behind this policy.

I remember, if I may digress for a moment, that all of us who have had direct contact with these problems have gone through somewhat the same experience; that in our youngest years we found ourselves associating with children of another race, in terms of friendship and cordiality, and then as we grew older we developed into a more isolated situation on both sides. We became conscious of the difference be-

tween us, and, understandably, tensions developed. Later many have had the experience of again finding themselves as colleagues of members of another race, whether in a university or on a job or in whatever undertaking it might be. And these tensions therefore dissolve under the common interests and the common associations that come through engaging in the same sort of work.

I think that if it is clear that there is a great national policy that irrelevant considerations should not stand in the way of a citizen's exercise of his rights, it will be discovered that nothing particularly happens when people, all citizens, enjoy similar rights and privileges, in response to or in pay for, shall I say, carrying the same burdens and responsibilities of citizenship.

Senator THURMOND. Mr. Secretary, you are familiar with the 5th and 14th amendments, both of which provide that no person shall be deprived of life, liberty, or property, without due process of law, I'm sure.

Mr. RUSK. Yes.

Senator THURMOND. You do not feel it is a deprivation to a person of his property to force him to use it in a way he does not care to, to force him to sell or to serve to whom he does not wish to sell or serve?

Mr. RUSK. Well, Senator, I——

Senator THURMOND. On privately owned property?

Mr. RUSK. Well, I'm not, again, an expert on the law on these matters, because, at least having attended law school in an early year, I realize there is a lot of law on these questions. But I would suppose that there would be a deprivation to the citizen who is seeking normal public accommodations if he is denied them on the basis of race, and that one who is licensed to extend his services to the public may not be entitled to restrict those services on the basis of race or religion.

Senator THURMOND. Did you know in 1875 a civil rights bill, very similar to this, was passed by the Congress, and in 1883 it was held unconstitutional?

Mr. RUSK. I have heard of that case, yes.

Senator THURMOND. Mr. Secretary, do you believe the sentiments expressed to the State Department by foreign diplomatic personnel and recited by you will be overcome if private owners are forced by the National Government to extend services to such people against their will?

Mr. RUSK. I think it will be overcome to a very considerable extent. I think there might be particular occasions where it is made quite clear, even if the present bill becomes law, that particular individuals are not welcome and this might serve to create some of the same types of problems, but I would think that the affirmation of a great national policy by all three branches of the Federal Government would find cooperation on the part of most citizens and these problems would yield to the knowledge that this is what is expected in America and there would be a steady diminution of this type of tension problem in our country.

Senator THURMOND. Mr. Secretary, is it your opinion that the present level of demonstrations will materially diminish if legislation is enacted?

Mr. RUSK. I have no real way of knowing that, sir. I would suppose that this would be the case, that they would diminish.

Senator THURMOND. Do you think that legislation should be enacted for the sake of ending demonstrations?

Mr. RUSK. I think the demonstrations and the legislation are aimed at the same thing. It is not that one is aimed at the other. I think the problem here is what happens to an American citizen, as he moves about the country, seeking normal public services and public accommodations. I think this is where the point of relationship comes.

And this gives rise to both the problem of legislation and the problem of making known through demonstration attitudes toward restrictions on these rights.

Senator THURMOND. Do you favor the demonstrations that have been held and would you favor demonstrations in the future if this civil rights bill does not pass?

Mr. RUSK. Well, Senator, there are various types of demonstrations. I would not wish to make a blanket statement about all those that I have known about.

But I would say this, sir: if I were denied what our Negro citizens are denied, I would demonstrate.

Senator PASTORE. Do you believe in the Boston Tea Party?

Mr. RUSK. That had a very wholesome effect on the situation.

Senator THURMOND. Is the chairman through or shall I proceed?

Senator PASTORE. Are you through asking questions?

Senator THURMOND. No. I'm not through yet.

Senator PASTORE. Then continue.

Senator THURMOND. Mr. Secretary, would you not agree that the heightened feelings resulting from mass demonstrations which may well be intensified from resentment of a dictation by the Government are likely to result in as many, if not more, injured feelings to foreign diplomatic personnel?

Mr. RUSK. I think it is possible, sir; but I don't believe that is a problem which can be avoided in this situation.

We are faced with some serious problems that go to the heart of the nature of our society, and I think they have to be dealt with. As I indicated earlier, I think the foreign policy aspects of its are, in a real sense, secondary to the great American aspects of it.

Senator THURMOND. Mr. Secretary, there are many who sincerely view proposals for the National Government to force private property owners to extend services on their property to persons against their will as a deprivation of their property rights, without due process of law.

Do you believe that the problems which you have presented here today justify a legislative act which at the very least diminishes freedom in the use of property which each property owner now has?

Mr. RUSK. Well, I could not agree, sir, that such a law would diminish freedom. The purpose of law in a free society is to enlarge freedom by letting each know what kind of conduct to expect from the other. And it is through our laws that personal freedom is not only protected but constantly enlarged, so we can pursue our respective orbits with a minimum of collisions.

I am thinking also of the private rights of those who seek normal public services and accommodations, and are denied them for reasons which I cannot see, for reasons which I don't believe our Constitution can recognize.

Senator THURMOND. You, of course, realize, that if this bill should pass, it would deprive certain people of the use and control of their property as they desire?

Mr. RUSK. There is that element in it; but there is also the element of the basis on which they seek the privilege of conducting business for the public under our legal and constitutional system. I think that, too, carries with it some obligations.

Senator THURMOND. Mr. Secretary, don't you feel in many foreign countries they do not understand the structure of our Government; that the two cardinal principles of this type Government are the separation of powers of the three branches of Government—the Congress, the legislative, that makes the law; the executive, headed by the President, which enforces the law; and the judicial, which interprets the law—and that each is supposed to be a check and balance on the other; and that the purpose of this, as Thomas Jefferson said, was "to prevent any one man from getting too much power"? And, he said, "You cannot trust any man with power. You have got to chain him down to the Constitution." The other cardinal principle is the division of powers between government at the Federal level and government at the State level; and under this second cardinal principle, the States have all powers which have not been otherwise specifically delegated and delineated and listed in the Constitution of the United States and the amendments adopted since the Constitution was written.

Do you feel that people in other countries feel that the National Government here should pass such laws, even though they contravene our Constitution and the jurisdiction of that type legislation is reserved to the States, and was so held in the case of 1883 in the decision of the Supreme Court?

Mr. RUSK. Well, I do believe that there is an incomplete understanding abroad of our rather complex constitutional system in this country.

We frequently, in signing agreements—in almost every case—take care of any reservations required, or any conditions required, by our constitutional system. And there are some issues in our negotiations with foreign governments into which we can go only to a limited extent, because of the Federal character of our constitutional system here.

But I do not believe that there is general understanding either here or abroad that the Federal system itself prevents the kind of legislation that we have in front of us.

Senator THURMOND. Mr. Secretary, I am sure that you will agree it does not take much of a prophet to foresee an act of Congress such as this now before this committee will fail to change individual attitudes, although it is conceivable that the full force of the National Government may compel substantial compliance with the letter of the law.

If offended feelings continue to result from acts or words which fall short of assault or libel when persons use accommodations under protection of a national law, would you recommend national legislation to correct such offensive individual conduct?

Mr. RUSK. I would think that it would be the primary responsibility of the Federal Government to give deep and careful thought to the protection of the rights of citizens of the United States. And I am not pessimistic, Senator, about changes in individual attitudes on questions of this sort; because so many of these individual attitudes

turn on personal experience, personal discoveries about what relations can be, about situations where it becomes obvious that there can be good relations between peoples of different races and religions.

And I would think one of the things that can change personal opinions would be an affirmation by the Federal Government of the great primordial doctrines of our constitutional system.

Senator THURMOND. Mr. Secretary, you stated that the Communists have made a major propaganda issue out of the racial situation in the United States.

Do you have any indication that the Communists have assisted in creating any of the demonstrations or in keeping them going?

Mr. RUSK. I have no direct information on Communist individuals involved in these demonstrations. It would not be the responsibility of my Department to know that. I think another department could better advise the committee on that point.

Senator THURMOND. Would it not be a good thing to find out, possibly from the proper agency of our Government, and then broadcast to the world what the Communists are trying to do here in this country to create dissention, to cause demonstrations, to divide our people?

Mr. RUSK. I think that the rest of the world would put in its proper perspective the knowledge that, at a time when we are trying to find an answer to this great problem here in our own society, the Communists are trying to disrupt and make that search for an answer more difficult.

Senator THURMOND. Mr. Secretary, I have here a news article distributed by North American Newspaper Alliance, on May 30, 1961, more than 2 years ago. It reads as follows:

BERLIN, May 30.—Communist East Germany has opened an American Negro agitation training center in the Saxony industrial city of Bautzen.

The center, masked as the Institute for the Advancement of the Negro Race, seeks to transform the racial unrest in the U.S. South into a powerful Negro nationalist movement.

Communism's new line, according to Western intelligence authorities, is to link the U.S. Negro's fight for desegregation with the African Negro nationalism.

At Bautzen the Communists are training squads of African Negro agitators who, after completing training in East Germany, will return to their home countries to await infiltration into the U.S. Negro population centers.

Trainees are recruited from African "students," several thousand of whom have been brought to East Germany on "scholarships." They include Guineans, Ghanaians, Congolese, and Togolese.

An intelligence officer reported, "Some of those now being trained in East Germany will be going to the United States, sooner or later, in official capacities for the new governments in these African countries, and the rest are to be infiltrated by various means."

The Bautzen center is reported to include several American Negro Communists, according to some estimates as many as 15. It appears that some are deserters from the U.S. military forces. The rest have either visited Europe on tourist status and then slipped into East Germany or have made their way to East Germany from Africa and Asia, where they had been working as technicians or as students.

A propaganda publishing house is being operated in connection with the Bautzen center. It is printing material for distribution in Negro lands calling for solidarity with the U.S. Negro and the "building of a worldwide movement to free the Negro race from white domination."

Intelligence officials attribute the Communist exploitation of U.S. racial tensions to Gerhard Eisler, the former No. 1 American Communist who is now an East German propagandist.

Eisler began urging establishment of such a U.S. Negro propaganda training center at the time of the Little Rock school integration riots in 1957. There was

considerable skepticism concerning the scheme within the East Germany Communist Party, however, and nothing was done until 6 months ago.

The Congolese blowup, together with the simmering U.S. racial tension, helped Eisler win approval for the Institute for the Advancement of the Negro Race.

Eisler's basic strategy, according to intelligence analysis, is to exploit white resistance in the U.S. South to desegregation by Negro nationalism.

Mr. Secretary, to what extent have the results of this Communist effort, and any others of which you are aware, contributed to the massive agitation in recent months?

Mr. RUSK. Senator, as far as that particular effort is concerned, I would have to be advised as to what we know about what in fact that particular organization has been doing.

I have been impressed with the fact that the Communist world has had some serious disappointments and setbacks in the continent of Africa—Guinea, Mali, Congo, and other countries. It seems to me on that continent today the commitment of those countries to freedom is stronger than it has been in some time, because they have had enough to do with the Communist world, both individually—many studied there—and governmentally, through attempts of the Communists to establish a position in Africa, to know a lot about what communism is all about.

As I indicated earlier, I have been deeply impressed by the loyalty of the Negroes of the United States to the United States, even in the face of one of the most harrowing problems which any people has had to face. And I would suppose that there has been Communist effort here. And I am sure there are some Negro Communists, just as there are a lot of white Communists. But it is not my impression that the problem here in this country stems from a direct effort of the Communists to create a problem. The problem was here already, and needs to be solved as an American problem.

Senator THURMOND. Again I join you in commending our Negro people for not joining the Communist Party.

Mr. Secretary, during the last month a directive went out from an airbase in the United States, subject: "Civil Rights Demonstrations," and it says:

To All Personnel of [blank] Air Force Base:

In the event of civil rights demonstrations in this area, similar to those which have taken place in other areas of the South, the following is promulgated in the interest of the welfare of the individual and of the command, because of the possibilities of injury to, or apprehension for, those persons involved:

All personnel assigned to [blank] Air Force Base are instructed that they will not participate in any such demonstration or to otherwise become involved as a spectator or bystander. Areas where demonstrations are in progress are declared to be off limits to personnel assigned to this airbase.

Does that sound like a logical directive to be sent out by an air base?

Senator PASTORE. Do you want him to answer the question after 12 o'clock?

Senator THURMOND. The bell was still ringing. I was hoping he would finish his answer before the bell quit ringing; but since the bell has now stopped, Mr. Chairman, I shall discontinue, because it is 12 o'clock and I believe the Senate is in session.

Senator PASTORE. Mr. Secretary, a short while ago a colleague of mine whispered something in my ear, and I am going to repeat it out loud, because I agree with it.

They feel that you have been one of the most effective witnesses that has ever appeared before this Commerce Committee. They are very much impressed with your facility of expression and with the clarity of your thoughts.

It has been a very exhilarating and satisfying experience for me and, I know, for the members of this committee, who congratulate you and thank you for coming.

Senator COTTON. Mr. Secretary——

(Applause).

Senator COTTON. Mr. Secretary, on behalf of the minority, I would like to say to you I was the colleague who whispered that in his ear; and I meant it.

Senator THURMOND. Mr. Chairman, I want to say I had a few more questions, but I have covered, I think, most of the areas I had in mind, and I shall not ask the Secretary to return.

I do want to make this observation: That I see, as usual, the audience here is packed with civil righters and left wingers, and the outburst that just occurred is not only in violation of the rules, but indicates the pressure that is being brought to pass an unconstitutional civil rights bill.

Senator PASTORE. Witnesses tomorrow will be Mayor Frank Morris of Salisbury, Md., and Mayor Ivan Allen, Jr., of Atlanta. The hearing will be held in this room, room 318, at 10 o'clock tomorrow morning.

Until that time, the committee stands in recess.

(Whereupon, at 12:05 p.m., the committee was recessed, to reconvene at 10 a.m., July 11, 1963.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

THURSDAY, JULY 11, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 10:10 a.m. in the caucus room, Old Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order.

We are pleased this morning to have the Honorable Frank Morris with us, the mayor of Salisbury, Md. Mayor Morris accompanied by Mr. John Webb, chairman of the Salisbury Biracial Committee, and Rev. Charles Mack, who is a member of the committee.

Our colleague and member of the committee, the distinguished Senator from Maryland, is also here. I am sure that he would like to introduce the members to the committee.

Senator BEALL. Thank you, Mr. Chairman. It is a pleasure to introduce Mayor Morris, of Salisbury, Mr. Webb, and Reverend Mack. Mr. Webb is chairman of the biracial committee, and Reverend Mack is a member of the committee. I think Mr. Webb will speak for the committee and the mayor.

The CHAIRMAN. We are glad to have you all here, gentlemen. I notice that the statement will not be the personal statement necessarily from the mayor, but this is a statement of the biracial committee.

STATEMENT OF HON. FRANK H. MORRIS, MAYOR OF THE CITY OF SALISBURY, MD.; ACCOMPANIED BY JOHN W. T. WEBB, ATTORNEY AND CHAIRMAN OF THE BIRACIAL COMMITTEE; AND REV. CHARLES H. MACK, PASTOR OF ST. JAMES A.M.E. CHURCH AND MEMBER OF THE BIRACIAL COMMITTEE

Mr. MORRIS. We have a dual statement. The first part of it is more or less a history we would like to present by Mr. Webb. And then I have a statement at the end concerning my own personal views.

The CHAIRMAN. That will be fine. We will hear first from Mr. Webb, and then we will be glad to hear from you.

Mr. WEBB. Naturally Salisbury is proud to have been asked to appear before this distinguished committee on a problem so critical to our Nation. We of Salisbury are also proud of what our community has accomplished in the field of race relations. We hope that our experiences can aid you in your deliberations, and other communities that share the same perplexing problems.

At the same time all of us in Salisbury recognize that we have at most made only a beginning, and that a long hard road lies still ahead.

We have not achieved as much as we would like to have achieved up to now in solving racial problems and there is effort ahead that dismays the strongest. But we are confident that we have built in Salisbury an honest and a solid foundation of mutual confidence and cooperation between the races, and that further progress will be easier and more rapid because of that base.

We understand that the committee is interested in exactly what Salisbury has achieved so far. In order to understand this, the committee should know a little of our background. Metropolitan Salisbury is a community of about 25,000 people in the predominantly rural section of Maryland known as the Eastern Shore. Of this population about 30 percent is Negro. It is tidewater southern in its traditions and in its customs, although Salisbury is the principal business center of its area, and has some industry. Until the very recent past, the community had deeply rooted and historic segregation in the conventional southern mold.

An interracial commission was appointed by the mayor of Salisbury, predecessor of Mayor Morris, in September 1960. It became countywide in its responsibility in January 1962. Shortly prior to its appointment, the principal downtown lunch counters had agreed to serve on a nondiscriminatory basis. There were some integrated churches, and some integration of employment in isolated instances. But to all intents and purposes, the lines of segregation seemed hard and fast when coordinated work began on racial problems.

The commission was, and is, composed of responsible leaders of all the segments of the community, both Negro and white. At its first meeting, it established as its objective, the genuine and bona fide integration of the community, and since then the commission and community have consistently worked toward that objective. In composition, the commission is biracial, bipartisan, and completely independent and autonomous. It has had the unswerving support of the political authorities, especially Mayor Morris, but without any attempt to control. The program has also had the backing of practically every organization—business, charitable, and religious, Negro and white. There has been a coordinated community effort.

As of the present moment, two and a half years later, all the major eating establishments in Salisbury serve any patron without discrimination, and have so served for more than 2 years. Generally, the small eating places also serve both white and Negro, but, quite frankly, our time and manpower are limited and consequently we have never run a check on every dispenser of food to find his policy. Our limited checks indicate that most have fallen into line with the major restaurants voluntarily, and, when we have gotten a report on discrimination, we have always to date been able to get the proprietor to adopt a nondiscriminatory policy. There is not an absolutely clean slate, however. We have a known holdout, not a restaurant in the accepted sense and probably not included in the scope of your bill, on which we are still working, and there have been minor departures from total integration which the commission has temporarily condoned, for practical reasons not here material, and which are now ended.

In the field of lodging, every hotel and motel accepts any lodger without discrimination. This is applicable to the pools at the motels as well. This policy has been in effect for more than a year.

Entertainment is not as complete. Both major theaters seat without discrimination, but one second-run house did not on our last check. We are working to open bowling alleys. The only place for indoor athletic events and other public affairs seats without discrimination, but this is county owned and has so seated since it was opened a few years ago.

In the shops, Negro customers have been accorded the same treatment as whites at least since the last war.

This is a résumé of the Salisbury situation which would appear to be affected by the bill which the committee is considering. Let me briefly complete the picture. In the area of voting, the Negro has had the franchise for many years. The schools are controlled by the county board of education. In September 1962, five of seven elementary schools were affirmatively integrated in all six grades—in other words, Negro children living in the particular school district and in those grades were assigned by the board to the school, and out of an all-Negro school in the predominantly Negro area. Additional schools and grades will be integrated in similar fashion this fall. These are steps in a phased program which will result ultimately in complete integration of all schools.

Commission studies resulted in the formation of a committee by the mayor which will recommend a policy for provision of decent low-cost housing. The commission has been working since last fall toward establishing a nondiscriminatory policy of hiring and promotion throughout the community. The major retail stores put on Negro sales personnel before Christmas, and this has now been followed by all the supermarkets. Now other major stores have either followed suit or are trying to find qualified Negroes to hire. The commission now has pledges also from almost every other major employer in the community along the same line. It will not be easy to put Negro and white on an identical basis for hiring and promotion at every level, but we think we have made the major breakthrough.

Your counsel has asked the effect of all this on community stability and on business progress.

As far as the community is concerned, certainly there are whites who think the program has moved too fast, and some who do not want it at all. Obviously also, there are Negroes who think it should have moved faster. We all are agreed, however, that peaceful progress is both more fruitful and more permanent. We therefore have tried to move with care, so that white racists can find no appealing cause. This seeming caution could have been a cause for complaint by the Negro community, but the Negroes, and their leaders, have shown great understanding and trust.

As a result of this, which I like to call responsible leadership, Salisbury has not had any demonstrations or any racial incidents of any consequence at all, and I think that Salisbury today, from both the white and Negro point of view, is remarkably stable in its racial situation, especially considering the highly publicized violence that has taken place in other places.

I am not saying that Salisbury can be confident of its ability to avoid strife forever, because like every community, Salisbury has its share of hotheads and malcontents, or immature and unthinking, both white and Negro, and potential demagogs or rascals to arouse them.

But I do believe that all responsible people, white and Negro, in Salisbury and out, who know the Salisbury story, want to see this community solve its racial problem as it is trying to do, and to this end will aid it to be an island as a hope and an example.

On the business side, without question, the program of integration has not hurt the business of the community. We do not have figures to quote, but no restaurant owner has lost substantial business as a result of integration. If any suffered a drop in trade immediately after integration, it has been recovered, and several report substantially greater volume. This is an interesting fact, because the Salisbury restaurants draw patrons from considerable distances, and until recently only the Salisbury places served Negroes. This is either a great tribute to the tolerance of the Eastern Shore man, or direct disproof of the claim that integration ruins business, because, while Negroes patronize the Salisbury eating places, their trade cannot account for any substantial volume.

The hotels and motels do not trace any business change to integration, and the stores which have employed Negro salespeople report no related business loss.

I cannot say that there have not been problems and complaints, from both white and Negro. But these have been small, and usually handled by the local proprietor without difficulty.

Our method of approach to integration may have helped in these solutions. In most early cases a group of business competitors have all integrated simultaneously. The major restaurants were the commission's Salisbury pioneers, although they were preceded by the lunch counters by more than 6 months. Each restaurant signed an agreement to serve without discrimination, reserving the right to impose proper conduct on all customers. When all had signed, each was given a photographic copy of the signed agreement. If any one complained about service to a Negro, he was shown the agreement. The same device was used with the motels.

We integrated on a citywide basis at first, but Salisbury is a small city. No restaurant is more than 10 minutes by car from its farthest competitor, and most are closer. But when restaurants were integrated, drive-ins were not. I do not see a completely valid line of distinction, and I know that those eating places which were not included when the major restaurants integrated in early 1961 did not suddenly prosper because they were segregated. In retrospect, I am not at all sure that an integration facility by facility would have made any real difference in any restaurant's business, but I know that, as a practical tactic, it would have made our task impossible when we were persuading the restaurants to integrate in late 1960 and early 1961, and the motels in 1962.

Certainly there is a real fear of integration while competition remains segregated, but our later experiences indicates to me that it is given undue weight. And there would be no need to integrate at once on a citywide scale, in a larger community; the community area within the city would certainly be broad enough.

I hope that what I have said has been of some help to this committee. All that we have done has been without any statute or ordinance to prescribe a code of conduct. It is the result of the determination of a community to solve for itself a tremendous prob-

lem in human relations, and the cooperative effort of the whole community, Negro and white, working together with trust and understanding toward this common goal. All of us have personal views on this bill before you; we do not take an official position, however, because Salisbury has already largely achieved the integration which the bill seeks to achieve. But if our experience can help our Nation in this critical period, we offer it gladly.

I believe Mayor Morris has a personal opinion so far as the bill is concerned which he would like to read to this committee if the chairman would permit.

The CHAIRMAN. We will come to the mayor in just a moment.

I do want to ask you a question. This committee, as I understand it, was not set up by any law. Or was it by city ordinance? Or was it a voluntary group?

Mr. WEBB. The commission was really established by fiat of the mayor, sir.

The CHAIRMAN. The commissioner's committee?

Mr. WEBB. It was the mayor's committee. He simply designated a group, originally of approximately 15. I can't tell you the figure precisely.

The CHAIRMAN. There was no State law or local law that gave it any official status other than the mayor's fiat?

Mr. WEBB. That is correct.

And the original appointment was simply a letter from the mayor: "I'm appointing you to my committee on interracial problems." That was the extent of the authority.

The CHAIRMAN. We have the same thing in my city of Seattle. The mayor appointed a committee, although we have a very stringent State law on this matter, so they can work within the law and use the law as a residual right of enforcement; they will do certain things with the background that you have done without the background of the State law. Is that correct?

Mr. WEBB. Yes. We had no law, only the force of moral persuasion, and, we like to think, the character of the people who worked together.

The CHAIRMAN. Thirty States do have the laws, but as I understand it, Mr. Beall, Maryland does not.

Senator BEALL. That is correct.

The CHAIRMAN. I was interested in your statement. You say in retrospect you would have some doubts as to whether you could have done the fine job that you have been doing if you were required to do it, or if you decided to do it facility by facility. This would have been difficult, would it not?

Mr. WEBB. It would have been extremely difficult. In the early stages, the first group with whom our commission worked were the proprietors of the major eating establishments. They felt very, very strongly that unless all of them integrated together, they could not, none of them could integrate, even those who wanted to go ahead with it at that point themselves as a matter of personal policy. Unless we had gotten that coordinated agreement we could never have taken the first step that we did.

The CHAIRMAN. Hasn't the experience been, where you have a great portion of the owners to agree to cooperate with you, whether they be from motels, restaurants or otherwise, that if there are a few hold-

outs, then it becomes a real problem for those people in the same business who want to cooperate?

Mr. MORRIS. I think it is partially correct, very definitely.

I think one of the things which my predecessor did which helped this situation very definitely, and the same thing that we have done in our community, any time we had a big job to do, we got the biggest people in the community to do it. When you have your true community leaders who not only lend their moral support but put their shoulder to the wheel, even the big jobs come a lot easier.

We found this true not only in the racial field, we found it in the field of a new hospital, libraries, civic center, whatever it is.

The CHAIRMAN. When you begin a community enterprise you get the leaders first because they have more persuasiveness and influence on the others in the same line of activity.

You say you have—

a known holdout, not a restaurant in the accepted sense, and probably not included in the scope of the bill on which you are still working, and there have been minor departures from total integration which the commission temporarily condoned for certain practical reasons.

I don't like to put you in the position of making this public, if you do not wish it. The committee would be interested in your statement when you say "probably not within the scope of this particular legislation." Could you say what type of activity this is? I don't want to jeopardize your good work. Maybe you would like to keep it quiet.

Mr. WEBB. Senator, I'm an attorney, and the last thing that I would offer to this committee is advice on the constitutional problems which are here. I don't feel that I am competent, and I certainly haven't had the opportunity to do the study.

But if this is based on the commerce clause, and if the test is substantial within the path of interstate commerce, then there is a very serious question as to whether this particular institution to which I am referring would fall within that.

The CHAIRMAN. So when you refer to this establishment, you are thinking about some of the legal aspects rather than the practical aspects?

Mr. WEBB. I'm speaking essentially of the legal aspects when I say it is not within the scope of the bill.

The CHAIRMAN. Then you say that—

both major theaters seat without discrimination, but one second-run house did not on the last check. And we are working to open bowling alleys.

Are they now segregated?

Mr. WEBB. Yes, sir.

The CHAIRMAN. Do you have separate bowling facilities?

Mr. WEBB. There isn't to my knowledge. Mr. Mack could answer the question as to whether there are bowling facilities for the Negroes. I don't believe that there are.

The CHAIRMAN. Do most of the bowling alleys have lunch counters or snackbars?

Mr. WEBB. Snackbars.

The CHAIRMAN. Most of them do, don't they?

Mr. WEBB. Yes.

The CHAIRMAN. I'm not a bowler——

Mr. WEBB. I'm not either, sir.

The CHAIRMAN. In any case, you are working on that now. But would there not be facilities in most large bowling alleys other than bowling, Mr. Mayor?

Mr. MORRIS. Our bowling alleys both have snackbars, the two of them. Both those bowling alleys are located away from other type businesses. The hours of the snackbar are the same as those of the bowling alleys, and as a consequence no one would stop in there, so to speak, to get a coke. They would go there solely to bowl.

The CHAIRMAN. The only place for indoor athletic events and other public affairs, seats without discrimination, for this is county owned and therefore you have better control.

Mr. WEBB. Yes, sir.

The CHAIRMAN. What about the athletes in your high school, or your athletic events that take place? I'm quite interested in that. We have many cases where we allow integration in order to look at an athletic event. When you look at the players you sometimes see segregation in its absolute sense.

Mr. WEBB. There has been segregation. I would have to limit this, sir, to the high school.

The CHAIRMAN. What about the Salisbury high schools?

Mr. MORRIS. Reverend Mack can answer that question.

The CHAIRMAN. Reverend, could you do that for us?

Reverend MACK. I can help you on the high school proposition. We have had on a very small basis the exchange of games with the Wicomico High School and our high school, and we have had one or two baseball games and basketball. There has been a small basis of interchange there.

The CHAIRMAN. Do you mean that the two teams have gotten together?

Reverend MACK. Yes.

The CHAIRMAN. What about segregation on a team? Does that still exist?

Mr. WEBB. Yes.

Reverend MACK. At present we——

The CHAIRMAN. You say "we." Have you your own high school?

Mr. WEBB. Yes. There is a Negro high school and a white high school.

The CHAIRMAN. You have played a few games with the white high school?

Mr. WEBB. But the integrations of the schools has not reached the level of the high schools at this point.

Reverend MACK. Until September.

The CHAIRMAN. So therefore there would be no eligible Negroes to play on the Salisbury High School in any event, and no white athletes to play in the Negro high school?

Reverend MACK. That is correct.

Mr. WEBB. That is correct, sir.

The CHAIRMAN. Are they close together?

Reverend MACK. They are close.

Mr. WEBB. Physically they are about halfway across town apart. That is about the best way I can answer you, sir.

The CHAIRMAN. Don't students on one end of the town, maybe white, go across town to the white school or vice versa?

Mr. WEBB. Yes.

The CHAIRMAN. They may not go to the closest school because of this segregation; is that correct?

Mr. WEBB. That is correct. The high schools are still segregated, and the Negro students, wherever they may live, go to the Negro high school and the white students to the white high school.

The CHAIRMAN. You have gone so far, you state, that you had integration up to the sixth grade?

Mr. WEBB. In five of the seven elementary schools in Metropolitan Salisbury as of this moment, and it will be increased by three additional elementary schools in the fall, and two more grades. It will incorporate the junior high schools in the fall.

The CHAIRMAN. So that what we call junior high schools—I don't know what you call them in Maryland—and high schools proper are still segregated?

Mr. WEBB. As of this moment. The junior high schools will be integrated in the fall.

The CHAIRMAN. When you state in the beginning that Salisbury was founded in somewhat of a background—I forget your exact words here—of traditions and customs based on times past, which we hope we can correct, you had some serious trouble in that town in the thirties, did you not?

Mr. WEBB. We are ashamed to admit that that is the case, sir.

The CHAIRMAN. So you didn't start with a community that was somewhat, let's say, a normal U.S. community in this respect. You started with a community where the tensions have been high for some time.

Mr. WEBB. In the early thirties, there is no question of it, sir.

The CHAIRMAN. You say you are 30 miles from Cambridge. I am not familiar with the geography. Would you be south or north?

Mr. WEBB. We are south. We are located approximately midway of the peninsula called the Eastern Shore, just below the Delaware line.

The CHAIRMAN. I don't want to ask you about the situation there because that is none of your responsibility, only that of the citizens of Maryland.

Mr. WEBB. This is in another county.

The CHAIRMAN. There are two different counties?

Mr. WEBB. Yes.

The CHAIRMAN. I don't think I have any further questions right now.

Do you want to hear from Mr. Morris? I wanted to get this background and now we will hear from the mayor.

Mr. MORRIS. So much for the present facts on Salisbury. What follows is personal, and my own comments on the legislation before the committee. To me, the bill as now drafted ignores the most important factor—people.

In my judgment, the objective everyone wants is an atmosphere where race no longer matters. This cannot be done by law, but only by men. Yet when you have a law, you take men out of the picture and substitute the police court or, in this case, the district court.

Progress in racial problems must come from the hearts and heads of people. If we had had in 1960 such a law as this before you, Salisbury would not be where it is today.

I do not question the need for a law such as this in some communities, but under this proposed law, there is no inducement to a community to solve its own problems, or to compel its leadership to take up its fair load. There is no inducement for the blacks and whites of a community to start the talks that are the real hope of future solution. Instead, social barriers are removed with no medium for easing the shock.

If a community is genuinely trying to solve its problems, it should be assured the opportunity to continue. Each community has its own problems, which require different answers. Even to a community such as our own, this bill could be dangerous in the hands of an agitator. One real demonstration, and racial progress of years can be destroyed. The protection against such setbacks is itself local progress toward integration.

My suggestion is that there be a flexibility in this bill, some kind of safeguard to promote and protect local biracial cooperation in solving the community's problems. How this can be done is something that I am not prepared to suggest. I only know our own experiences. Tempers are high, and there are both white and Negro extremists who are not always responsible. Legislation should provide the tools that can be used to attain the ends the legislation is intended to achieve as well as establishing the standard of conduct.

The CHAIRMAN. We appreciate your suggestion, Mr. Mayor.

I do want to state that under the bill, at least in my interpretation, initial reliance is placed on enforcement of State laws as they exist and on community services before the Attorney General can bring suit. We have to exhaust that means. This might give you the flexibility that you are talking about. This is a matter for the committee to examine.

Surely I think I would speak for every member of the committee that we have no intention of either denying or not encouraging some of the things to be done such as you folks have done. This is what I conceive to be part of the bill.

Of course you may have different situations. In many States we have had this law on the books for years, even more stringent laws than this. This is a mild law compared to my State where we have serious criminal penalties involved. However, we have had no problem with it.

Mr. MORRIS. I certainly concur with what you say as regards the statute. Tensions are higher now, and this law is looked at more stringently today.

The CHAIRMAN. In your particular area.

Mr. MORRIS. Throughout the whole country. Particularly in our area; more than ever before.

The CHAIRMAN. One Senator testified that a residual right of enforcement is essential for the achievement of rational peace through conciliation and mediation. In other words, this is the backstop to conciliation and mediation. I'm sure you agree with that.

Mr. MORRIS. Very definitely.

The CHAIRMAN. Does the committee want to ask any questions, or do you want to hear from Reverend Mack?

Do you have a statement you would like to make, Reverend, to add to this?

Reverend MACK. One of the things we have enjoyed on our committee is the fact that we have agreed at all times, as we have sat together. Mayor Morris and I were talking about the statement that we had on the end, and we agreed that in Salisbury we have been able to solve many of our problems by sitting around the table and getting a solution to them. We feel that that is the best method if it can be done.

We concur, Mayor Morris, on having some flexibility in the bill. But for God's sake, have some bill, something to fall back on in the case where everything is stopped, where people are sitting around not doing anything about the situation at all.

We are very happy with what we have been able to get done in Salisbury and we are moving to a complete solution to our problems. But there are many places and we have many people who are not content to sit around the table and not concerned about solving the problems that are existing. Therefore, we must have some type of bill, some type of law, that will give some type of fire underneath those particular people.

The CHAIRMAN. We do not seek to discourage in any way, by implication or otherwise, the kind of a job you have done, because even if a law, I'm sure you will agree, is passed, we are still going to have some problems. It is the residual right of some kind of enforcement that probably helps mediation, conciliation, and coordination, just as you are achieving, because as you point out, 30 miles away it is not adequate.

Mr. MORRIS. Your wording of the backstop, I think, is real good. However, I don't believe this should be used as the first line of defense.

The CHAIRMAN. Do the members of the committee have any questions?

Senator Monroney?

Senator MONRONEY. I'm very interested in the fact that you mention that all citizens——

The CHAIRMAN. Sen. Monroney, before you proceed, the Chair wants to recognize the Congressman from the district who is here with us today, and who has a very deep interest in the problems that have been proposed here.

We are glad to have you here.

Mr. MORTON. Thank you, Mr. Chairman.

The CHAIRMAN. Your brother is on this Committee.

Senator MORTON. This isn't another "damn dynasty," I'll tell you that. [Laughter.]

The CHAIRMAN. I'm sure, whether it is a dynasty or not, your brother can give both you and me some good advice about what is happening, which I understand takes place in dynasties.

We are glad to have you with us.

Mr. MORTON. Thank you, sir.

The CHAIRMAN. All right, Senator Monroney.

Senator MONRONEY. I was very interested in the statement which was made that the colored citizens of your county have been allowed

to vote freely and without any impediment. That has gone on since 1960, I believe you said, in your prepared statement. Is that correct?

Mr. WEBB. No, sir.

The franchise for the Negroes, at least in our section—and I believe throughout Maryland—has been granted freely, without any restriction for at least 50 years.

Senator MONRONEY. I couldn't tell. I thought it was rather recent, but you said the Negro franchise has been effective for many years. So it is legal, historic, and accepted. They vote in about the same proportion as the white citizens vote in the elections?

Mr. WEBB. Yes, and there has never been any problem at all in that regard. There is no poll tax, no restriction of any kind, Senator Monroney.

Senator MONRONEY. In my State they equally vote in the same percentage as white people vote without any impediments, poll tax, literacy test or otherwise. Our integration problem has been minimized. It hasn't gone away but it has been minimized by the fact that the voting right is the equalizer. In one place certainly the colored man is equal in his citizenship rights and that is in determining to elect the officials who represent him. And therefore the abuses which occur in some sections where no progress has been made in desegregation is easier to overcome because of this equality at the polls.

Would you say that has been an important factor in your successful desegregation in your county?

Mr. WEBB. Senator, the only way that I can answer you is that this was not one of the irritants between the races to which we had to direct our attention when we started trying to resolve our problem in anticipation of what history, or what the newspaper today, shows was going to come.

Senator MONRONEY. If in all sections of the United States the colored people were freely allowed to vote, and voted in the proportion of their numbers to the proportion of whites, and were able to register and did register and exercise that franchise, don't you think that our problems of working these matters out would be greatly expedited?

Mr. MORRIS. I think anybody running for political office feels that everybody has a vote. I think you grease the wheel that squeaks the loudest. If there is a vote in there we are going to appeal to those people and we are going to try to satisfy that group of people, whoever they are. I think what you say has a definite bearing on it.

Senator MONRONEY. It takes out the hothead element actually, because one is always able to lose a great many votes by being intemperate. Therefore you tend toward a more temperate approach, I would think, in matters that are highly charged with rational relations.

The statement that you make refutes some of the testimony we had from the Attorney General and from his people, where you state specifically in your experience that when you have been able to get the major restaurants to come along voluntarily, the rest have fallen into line rather easily.

The testimony earlier in these hearings has been that unless everybody, big, little, great and small, agree at the same time, that it is an

impossibility to work these matters out. This was testified to by the Justice Department as being their experience in various places where they had demonstrations and great difficulty.

Mr. WEBB. Senator, I can answer you again only in this way: We are talking from the basis of our own personal experience, but we have to put this into the context of the time.

We started working with the restaurants in the fall of 1960 and at that time tempers were not as short, lines were not as drawn, and the situation was enormously easier than it is today in communities that have this problem of discriminatory service.

Senator MONRONEY. Have you had any sit-ins or threat of sit-ins in 1960, as it may or——

Mr. WEBB. We have had one suggestion of a lunch counter sit-in in the spring of 1960 which never materialized beyond a threat. That was the spark that started the community thinking that it was time for us to start doing something about it and anticipating and correcting the difficulties, anticipating trouble, so to speak, instead of letting it come to us and then trying to solve it after it had come.

Senator MONRONEY. Would you say your job was easier then because there had been no widespread demonstrations and you were working voluntarily with both races to try to settle the problem before trouble occurred?

Mr. WEBB. It is our feeling, sir, and here I think I speak for practically everyone who has worked with us in this problem, that any kind of an outburst or demonstration or an incident of even minor proportions above just a little trouble, can cause lines to be drawn that make solution of these problems infinitely more difficult.

We in Salisbury are very fearful of any kind of an incident occurring in that community because we fear, as I said and as I believe Mayor Morris said, that this could very well destroy all that we have accomplished. These things can get out of hand so quickly.

Senator MONRONEY. I would like to ask Reverend Mack: Do you feel that in matters of desegregation of facilities, accommodations such as restaurants and hotels, that to be successful in a community operation that there must be 100-percent compliance, or that substantial compliance, say 75 or 80 percent, would effectuate most of the desires for adequate accommodations and relieve the situation caused by the denial of access to these accommodations to colored travelers or colored people of that community?

Reverend MACK. I would like to answer that by saying that we have a solution in Salisbury that we got the major restaurants to decide to serve all people. The rest fell in line. I don't believe if our city would have been twice the size that it is now, if we had 25 percent or 30 percent of the restaurants who were continuing their segregated practices, even though you had 65 percent of them open, I don't think we would have been able to avoid the situations that we have avoided.

When we got the petition signed we had the restaurants that anybody would have wanted to go to, or take their family to. We had the signature of those restaurateurs on that line, and so we didn't have that to face.

But I feel very greatly where you would have 25 or 30 percent of the restaurants continuing a segregated pattern that we would be able to avert a strike.

Mr. WEBB. Senator, might I supplement that a little to clarify my own statement?

When I speak in terms of minor establishments I'm talking in terms of the corner drugstore with six or eight stools at the soda fountain in the areas that are outside the general pedestrian traffic, what I would classify as the neighborhood drugstore. I'm not talking about the restaurants that hold themselves out as restaurants.

Reverend MACK. May I just give an example of what I am referring to?

Senator MONRONEY. Yes.

Reverend MACK. We have a drive-in that insists on continuing that particular practice of segregation. Princess Anne is 14 miles on the farther side of us going toward the Virginia line. Many of the students from the Maryland State College who take part in demonstrations in Cambridge, and what have you, pass through Salisbury right by this particular drive-in. That has been one of our concerns, that we might be able to open this particular drive-in in order that those students might not stop there, because with all of our major restaurants open, they are still looking at that particular place every time they pass. Why is it that this place continually keeps its segregated pattern?

Senator MONRONEY. And a demonstration against that might spread.

Reverend MACK. It could spread, yes.

Senator MONRONEY. Putting it on the other side, would you feel that if 15 or 25 percent remained segregated, this would cause those who had desegregated to return to segregation again because of business and economic pressure?

Reverend MACK. In our case, as we have checked with our restaurateurs, they haven't had any decrease in their patronage by desegregating. I think most of our people are very happy now that they were able to solve the problem the way they solved it. I don't think there would be any chance of them wanting to revert back to their old pattern.

Senator MONRONEY. The thing I was trying to get at was the holdouts, the 15 or 20 percent. Would that be sufficient economic pressure, loss of business by those who were desegregated, to cause some slippage in opening all places to all races?

Reverend MACK. I feel there would be a threat to it if the community were large enough to have some major restaurants failing to comply with the request. But in our situation they were so small hardly no one passed by anyway. So we are just working on that.

But if you are in a place where you have major restaurants actually continuing the pattern, I feel like it would be a threat to the whole program.

Senator MONRONEY. As I understand, the State of Maryland has a law on accommodations, which I believe is effective now, is it?

Senator BEALL. We have a law.

Senator MONRONEY. On the Eastern Shore?

Senator BEALL. On the Eastern Shore. We have a statewide law on equal accommodations. The Eastern Shore excepted themselves, and Salisbury is the largest city on the Eastern Shore.

Senator MONRONEY. So what you are doing is done without the benefit of State law. But you stated, I think, Reverend Mack, that you

felt it was necessary to have a backup law, either Federal or State, in order to insure a continuing interest and effort in desegregation? Is that correct?

Reverend MACK. That is correct.

Senator MONRONEY. I believe the mayor stated that as well, even though he voiced the opinion that the good would be achieved voluntarily, but the law may be necessary to move or keep this thing moving in areas where it is rather severe.

Reverned MACK. May I just add one thing? I think there should be some protection for committees who are trying to work out their solution peacefully. I think maybe the courts or someone should decide if you are making sufficient progress, or if you're actually solving your problem. I don't think you should be threatened continually when you are working like the dickens to try to solve the problem and then somebody is continually calling you Uncle Charlie, Uncle Tom, or something.

I think you should have some protection from the law, a bill or something in regard to when you are trying to solve it yourself.

Senator MONRONEY. Do you mean that if the committees and groups voluntarily are working, as you are working there, that there should be some protection written into the law providing that the Federal law would not be applicable to that community——

Reverend MACK. No, I don't say that.

Senator MONRONEY (continuing). As long as progress is being made?

Reverend MACK. I think that every man feels like he is free. For instance, we have been working night and day in our community trying to stay ahead of any demonstrations or any problem. If, for instance, someone comes in and decides we are not working fast enough, or we are not doing it the way they wanted to do it, and so they are free to, as a citizen, go in and attack us, or go on in and start any type of demonstration that they want. I think if a group of people in a community are working on the problem and they are getting solutions to the problem, there should be something in the law that those people should be protected and allowed to go on and solve their problem in a peaceful way.

Senator MONRONEY. You can't pass a law against picketing or demonstrations. Under the Constitution, people have that right.

Reverend MACK. That's right.

Senator MONRONEY. The biracial committees would have to discourage that by proving that their work is effective and that they are trying their best to achieve these ends with a minimum amount of friction.

That is all that I have, Mr. Chairman.

The CHAIRMAN. That is exactly what the law says on that point. On page 9, section 5(e):

In any case of a complaint received by the Attorney General, including a case within the scope of subsection (d), the Attorney General shall, before instituting an action, utilize the services of any Federal agency or instrumentality which may be available to attempt to secure compliance with section 4 by voluntary procedures—

That is the community services—

if in his judgment such procedures are likely to be effective in the circumstances.

Reverend MACK. Thank you, Mr. Chairman.

The CHAIRMAN. That would be a further restriction on this bill, where they would look at a community—I would hope this would be so—like Salisbury, and say, this surely comes under this section.

Reverend MACK. I got a chance to read this bill last night after I came here from prayer service, so I kind of missed that part of it.

The CHAIRMAN. If that language is not strong enough, I would be the first one, with other members of the committee, to make absolutely clear what we mean.

They speak of "Federal agency" and they mean the community service relations. That is a point that you brought up and I'm sure we can work that out.

Mr. WEBB. If I might point out in supplement to that, Senator, the practical working difficulty which concerns me, at least, in this legislation, is that someone who is not, in my mind at least, responsible, and really genuinely seeking rational betterment but is seeking something else for some selfish motives—and unfortunately there are some such individuals—the bill gives him a legal ground to demand of some noncomplying restaurateur, for example, that he serve him. Then if the restaurateur refuses to serve him, there is nothing to prevent him from mounting a demonstration and mounting full-scale attack which could have been eased by voluntary action if there were some kind of a compulsion.

We get into the area——

The CHAIRMAN. He could do that now.

Mr. WEBB. He could do that now, but he does not have the legal backing.

The CHAIRMAN. The Attorney General could surely dismiss, or not entertain, let's say, such a complaint as that. The Attorney General has discretion to act.

Mr. WEBB. The problem, sir, is not the action by the Attorney General of the United States or by the appropriate State or local authorities. The problem is the demonstration itself and the attendant offshoots which it can cause on the emotions of the community.

The CHAIRMAN. I would suggest that that can be done now and is happening now.

Mr. WEBB. It can, and it is, sir.

The CHAIRMAN. Senator Morton, do you have any questions to ask your brother?

Senator MORTON. I notice you mentioned in your statement, Mr. Webb, bowling alleys as offering a problem on which you are working. This bill actually, as I understood the Attorney General's testimony a week ago Monday, would not deal with bowling alleys. So your efforts will have to be above and beyond.

The CHAIRMAN. They will have to be voluntary in that case. I forgot that. The Attorney General did mention that, in his legal interpretation, this bill wouldn't deal with bowling alleys. So you could do it on a voluntary basis.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Mayor, you made a very excellent statement here when you said:

> This cannot be done by law, but only by men. Yet, when you have a law you take men out of the picture and substitute the police court or, in this case, the

district court. Progress in racial problems must come from the hearts and heads of people. If we had had in 1960 such a law as this before you, Salisbury would not be where it is today.

I think that is an excellent statement. I think that represents my position in this matter, that you cannot legislate some things that have to come from the hearts and minds of people.

Furthermore, I think that under the Constitution, as the distinguished attorney, Mr. Webb, has argued this bill could not be sustained on the interstate commerce clause.

For instance, a local barber shop or restaurant or a local business serving local people certainly should not come within the interstate commerce clause. I believe you would agree to that?

Mr. MORRIS. Yes.

Senator THURMOND. And I believe your attorney would agree to that. Isn't this a matter that primarily should be left to each community, certainly to the State? We should not try to force a national law through Congress because conditions are different in each State, as you say, even in each community, and because of the question of the constitutionality of it?

Mr. MORRIS. I think what you say is very true. If it would happen in the local and State level, then we would not need the Federal law. But basically speaking, we have had almost a hundred years to work out something, and the initiative has not been taken by the local citizens or by the State citizens to perform this. That is the reason in the next paragraph that I say there:

I do not question the need for a law such as this in some communities.

But in our own particular community, I think maybe we have been a hundred years too late in getting started, but we did get started 3 years ago, and we have made great progress.

If the law had been put on the books in 1960, and we tried to conform with it in 1960 and 1961, it would be a different situation. We have taken it on a gradual basis; we have not depended on the courts to enforce it. We have picked our key citizens; we have picked outstanding business people, outstanding lawyers, merchants, outstanding ministers, people from every walk of life, who are thinking people and desire to bring about an atmosphere which we can get along with. That is where our strength has come from.

In addition to that, we have kept the press informed of what we were doing. The press has been a part of our committee. It had no voice as such, but they were brought in on everything as we went along. As a result, we have had 100 percent cooperation of the press. They have printed the facts they thought were facts, and they have left other things unsaid, because they knew we were working toward that atmosphere. If we have this kind of atmosphere, we don't need the law.

However, if Salisbury should stop tomorrow and say, "We are through with trying to work out our problems," then I do believe that there should be some compelling force by law, through the courts, to force us to get on the movement again.

Senator THURMOND. As you say here, "If we had had in 1960 such a law as this before you, Salisbury would not be where it is today."

Mr. MORRIS. If the law——

Senator THURMOND. In other words, a law that was forced would raise tensions, would it not?

Mr. MORRIS. Very definitely. And tensions are much higher today than in 1960.

Senator THURMOND. The best way to approach the subject is locally, through the people, through the hearts of the people, and not try to pass a national law that would attempt to force people to do things and would result in tensions.

Mr. MORRIS. As long as there is good intentions, and actions, and results on the part of the local people.

Senator THURMOND. And that would vary——

The CHAIRMAN. If that was true, then the law wouldn't apply.

Mr. MORRIS. Then, you wouldn't apply the law.

Senator THURMOND. In different communities some are way ahead of others and therefore it is a matter that really should be worked out in each community, isn't it?

Reverend MACK. May I?

The CHAIRMAN. Yes, Reverend. Go ahead.

Reverend MACK. I was in agreement with Mayor Morris about the situation having to come from the hearts and minds of people, but if you would indulge me just a moment, if you would let me use a Biblical reference here, when God decided to deliver the children of Israel from Egypt, he sent Moses to talk to the heart and mind of Pharaoh. When God found out Pharaoh was not going to listen to the heart and mind, God had to drown all of them in the midst of the Red Sea.

There are people, I don't know whether they don't have hearts or minds, but they are not even going to think with their minds and they are not going to let their hearts be touched with the situation that is existing.

They have gone in the old pattern so long, so many years, that there are communities that never would sit down and work on a situation as we have tried to sit down in Salisbury.

And so, unless there is some type of law that demands that citizens of America be treated as citizens, regardless of race, creed or color, it is not ever going to be done and you can leave it therefore to a hundred years for the communities to do something about it, and they haven't done anything about it; they won't do in another hundred years, unless there is some law that demands that a citizen of America be treated as a citizen regardless of his race, creed, or color.

Senator THURMOND. Mr. Chairman, I have no more questions.

Thank you.

The CHAIRMAN. The Senator from Nevada.

Senator CANNON. Mayor, Salisbury is only a short distance from Cambridge. I wonder if you would be able to comment on how the recent developments in Cambridge have affected that city's economy.

Mr. MORRIS. From the business standpoint?

Senator CANNON. Yes.

Mr. MORRIS. I am engaged in the wholesale plumbing, heating, and supply business in Salisbury, a family-owned business. We have a branch store—we have seven of them, and one is in Cambridge. Our own particular business in there, we sell to the plumbing and heating contractors. We do not sell to the retail public. Our business there

has dropped very substantially, as much as 80 percent off from when it was on its peak, as far as the demonstration.

Also, our council in Salisbury has the district manager of the Acme Stores. Their food business in Cambridge dropped as much as 30 to 40 percent during the peak of the demonstrations.

I have been told by a shoestore manager, a national chain shoestore manager, that he was working on his quota, and he worked on a quota basis—I had one conversation with the gentleman, so I am going secondhand with it, so to speak—anyway, he was going on a quota basis, and on his quota, he was 165 percent ahead of his quota for the first 4 months. And then the freedom riders came into town, and his business dropped and within the next 3 months he was down to less than 40 percent of his quota. He had gone from 165 down to 40 on a yearly quota.

Definitely the demonstrations have a real effect. Certainly when demonstrations are at their peak, you are not going to take your family, normally speaking, down on the street to see what is going on. You are going to leave your children home. You want your wife to stay home. If you have to go some place, buy something, or do something, you do only the necessities. And if you can avoid the area that is troubled, you are going to avoid it. It very definitely has an effect.

In fact, I don't know of any business that won't feel the effects of it, at least indirectly. Many will feel it directly. But whether it be a doctor, a lawyer, merchant, or anybody, they are going to feel it sooner or later.

Senator CANNON. You completely disagree with Reverend Mack as to the necessity for legislation, as I understand your views. You feel that you couldn't have gotten where you are had there been this type of legislation on the books?

Mr. MORRIS. We don't disagree completely. We agree to the extent that we believe the legislation is necessary in areas where there is no good faith being shown and progress being shown. But we feel that legislation maybe should put more emphasis and give more protection to areas which are making an effort and are showing progress.

I can't say that we really made progress in the country, because we all know what the situation is. We know how long it has gone on.

I don't think our fathers were as tolerant and as understanding as we are, and I am hopeful that our children will be more understanding and tolerant of the situations than I am.

We must continue this progress at a faster pace than we have in the last hundred years.

Senator CANNON. You feel that if the law had been on the books, you could not have made the progress that you made in your community?

Mr. MORRIS. If the law had been put on the books in 1960, then our progress, I do not think, would have come as smoothly or as easily and as far as it has today.

Senator CANNON. Thank you, Mr. Chairman.

The CHAIRMAN. What you are saying, in effect, is there should be a law which would take care of these communities that haven't been doing what you have been doing.

Reverend MACK. That is right.

The CHAIRMAN. But that if there is such a law, there should be what we like to call the flexibility to encourage communities to do what you are doing.

If every community was like Salisbury, you wouldn't need anything. If every community and every State had done what 32 States have done in the Union, we would not do this.

I think I know exactly what you mean. The law isn't going to cure everything. You are still going to have problems. I think on page 9, section 5(e), we are trying to encourage people to do in other small communities what you are doing. I think all of you will agree with me that it is very difficult if you have a community of a million people, a metropolitan center. Do you agree with me? I see you do.

Mr. MORRIS. I won't comment. I don't know what a metropolitan center is. However, in every community, even a million people, there are neighborhoods and there are conscientious people who work it out. Certainly it can be worked out on a local level even in big cities, as the mayor at Atlanta, I understand——

The CHAIRMAN. Off the record.

(Discussion off the record.)

Mr. WEBB. Senator, if I might try to explain my understanding of what Mayor Morris is saying, you have to cast all this against this historical perspective. In 1960 the pressure of the Negro movement was on the restaurants and the eating places, if you will recall.

The CHAIRMAN. Yes.

Mr. WEBB. Had there been a law such as the law which is presently before this committee at that particular time, it would have been very difficult to get the type of individual working toward the solution of the problem that the mayor was able to get, because of the situation as it existed in 1960. These restaurants and eating places, and what is before the committee today is only one segment of a tremendous problem which we have to face.

We have to work in all the areas of that problem as we are working in Salisbury. We need to work successfully in that area the type of leadership that I think we have found in Salisbury in the other communities of the country.

I think the mayor is simply saying that as the situation existed in 1960, the leadership would not have been available had this bill been in existence. The leadership is tremendously necessary today to work at future problems, and there are communities which even with the lessons of the last 2½ years have for one reason or another not been able to produce the leadership. And in those communities I, for one, can see no objection to such a law as this being imposed.

The CHAIRMAN. Thank you very much.

Senator Hart?

Senator HART. Senator Monroney was inquiring about the effect of voting rights, fully exercised by Negroes in your community. I understand that there is full opportunity and there has been for many years in your community for the Negro to vote.

What is the situation in Cambridge with respect to that?

Mr. WEBB. Senator, I must confess that I am not completely familiar with all the facets and aspects of the situation in Cambridge. But as far as voting is concerned, there has been the same situation

with respect to the Negro franchise throughout Maryland at least for 50 years.

In the early 1900's Senator Gorman attempted to put in a literacy test as an attempt to perpetuate the Gorman machine. That was defeated. The Negroes had voted freely prior to that time. It was defeated prior to that time, and they continued to vote. That would be equally true in Cambridge, and I believe throughout Maryland.

Senator HART. So that full opportunity to vote exists in both communities. And it would not, therefore, be logical that one can avoid this kind of crisis merely by having the fullest franchise. You avoided it, but Cambridge hadn't.

Is that a logical suggestion?

Mr. WEBB. Senator, I have not really thought too much about this voting, to be honest, for 2½ years. My thoughts have been directed entirely toward helping with the assistance of Mr. Mack, later Mr. Morris, and a number of other people, to pilot Salisbury through these perilous times, and problems that were not immediate problems for us are things that I frankly haven't given very much thought to. I am sorry, sir, I really can't answer that question.

Senator HART. I am curious as to the drive-in that the Reverend described that is passed every time a Maryland State student goes by, where there is not integration. How in Heaven's name do you segregate a drive-in?

Reverend MACK. Just on service. They let you drive there, but they don't serve you.

Senator HART. I beg your pardon?

Reverend MACK. Just on service. They let you drive in, but don't serve you. They pass your car when they come out to the car, just pass by and serve others and leave you.

Senator HART. Michigan now has a very distinguished citizen who is a graduate of Maryland State. Perhaps the finest lineman in the National Football League, Roger Brown. I am just curious as to what would have happened if Roger Brown had driven in and they wouldn't serve him.

Mr. MORRIS. Maybe he should have tried, Senator.

Senator HART. Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Prouty?

Senator PROUTY. I have no questions.

The CHAIRMAN. We thank you all very much.

I think you have contributed a great deal here. Your suggestions regarding this voluntary effort are of real importance to this committee.

Mr. Webb, if you will look the bill over again and if you have any ideas on how we might improve the language for what we really intend, as we pointed out here, we would be glad to have them.

If you are a practicing lawyer you might have a little keener knowledge of this thing that some of us here who are lawyers, but haven't practiced for a long time.

Mr. WEBB. Senator, I earn a living as a practicing lawyer. Sometimes I wonder, particularly in the last 3 to 4 months, whether my profession is not this particular area here, and not the law. But I would hope to return to it.

The CHAIRMAN. You may qualify as an expert on this before you are through. Thank you very much, gentlemen.

Mr. WEBB. Thank you, gentlemen.

The CHAIRMAN. Congressman Morton, do you have anything to add to this?

Mr. MORTON. Yes, Mr. Chairman, just on this question of voting. There seems to be some question in the minds of the members of the committee as to whether the Negro citizens on the Eastern Shore can vote and are encouraged to vote. The answer is emphatically "yes." Both political parties have organizations which are constantly trying to register these citizens the same as anyone else.

There is no question whatsoever, in all nine counties of the Eastern Shore, about this voting. They are encouraged to vote. We wish we could get more of them on the books, and we wish we could get more of them to the polls. This is true in both parties, a little bit truer, I think, in mine.

[Laughter.]

The CHAIRMAN. Can I ask this question, Congressman?

Mr. MORTON. Yes, sir.

The CHAIRMAN. I suppose we could ask our good colleague, Senator Beall. I wasn't quite clear how the State could pass a law, an accommodation law, and the Eastern Shore be excluded.

Senator BEALL. The Maryland Legislature last year passed an equal accommodations law, but they also permitted, and it is not uncommon in Maryland, to let certain counties exclude themselves. Baltimore City and other large counties have equal accommodations statewide law. They exempted some 11 counties out of 23. We also have the liquor laws in Maryland. We have 23 counties and Baltimore City and 24 different liquor laws in Maryland. Each county writes its own laws.

Senator HART. This is what is meant by the "Free State," Senator.

[Laughter.]

Mr. MORTON. Senator, this is known in the State of Maryland as the "exercising of senatorial courtesy."

Mr. WEBB. This, sir, is traditional through long Maryland tradition, that any county may exempt itself from the effects of a State law if it so chooses.

The CHAIRMAN. I hope that doesn't spread.

Mr. WEBB. I am not sure that wasn't settled nationally in 1865.

The CHAIRMAN. If it spreads nationally, we will be in trouble, serious trouble.

Mr. WEBB. It doesn't apply to taxes, sir.

Mr. MORTON. Thank you, Mr. Chairman.

The CHAIRMAN. Do you have anything further?

Senator HART. I was curious about State taxes.

Mr. WEBB. It does not apply to taxes, or criminal law, or there are some emergency measures, statewide laws to which it does not apply, corporate laws, criminal law, tax law.

The CHAIRMAN. Does the State accommodation law have criminal penalties?

Mr. WEBB. It is basically an equity procedure, sir.

The CHAIRMAN. Does it have criminal penalties?

Mr. WEBB. I don't think it does. If it has criminal penalties it proceeds under the—I am ashamed to confess, sir, that I don't know what the public accommodations bill as it came out of the legislature was.

The CHAIRMAN. You were excepted?

Mr. WEBB. We were excepted and never got into it. May I say we were excepted, not through an action of the three of us sitting here at the table, not through any deliberate position which our commission took, but this was the considered judgment of the elected representative and senator from our county.

The CHAIRMAN. Thank you very much. We appreciate you all coming.

We still had hoped the mayor of Atlanta would be here. He did have air trouble, so we will have to hear him later. The hearing will resume tomorrow in this room at 10 a.m. The first witness will be the Governor of Mississippi, Ross Barnett.

(Whereupon, at 11:27 a.m., the hearing in the above matter was adjourned to reconvene at 10 a.m. on the morning of July 12, 1963.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

FRIDAY, JULY 12, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 10 a.m. in the caucus room, Old Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order.

The Chair wants to announce first that it is unfortunate we don't have a larger hearing room in the two buildings than this. There is, of course, a great interest in these hearings. We would like to accommodate all of the people who would like to come in. I am afraid we are just about loaded this morning to capacity. Unless there is an objection from the committee members, I am going to have to ask the fellows at the door to have them wait outside. In case somebody leaves, others can take their place. It is almost too crowded now. I am sure you people will understand that we would like to accommodate everybody but we just can't.

I would appreciate it if you would be as quiet and as orderly as possible so that we might hear the witnesses and proceed with this important business.

The witnesses for this morning's hearing, and the sessions that follow on Monday and Tuesday, have been recommended to the committee by the Senator from South Carolina, Mr. Thurmond. Mr. Thurmond has some witnesses that he thinks will contribute a great deal to this matter, so we have called them at his request.

The committee adopted this procedure to insure that when the final decisions are made they will be done on the basis of the full record with all the views that should be considered. We want to consider all views on this matter.

The Governor of Mississippi was to have been the first witness this morning. He is on his way up here, I understand, with the Senator from Mississippi, Senator Stennis. It will be about 20 minutes before he gets here. We want to take advantage of that time.

We had listed another witness today, Mr. Sam. Hicks of the Eagle Hurst Ranch, of Huzzah, Mo. He has a very short statement. We would be glad to hear from him to fill in until the other witnesses arrive.

All right, Mr. Hicks. We will be glad to hear from you.

STATEMENT OF SAM. H. HICKS, EAGLE HURST RANCH, HUZZAH, MO.

Mr. HICKS. Mr. Chairman, I have a statement I would like to make before this committee.

My name is Sam H. Hicks; address, Eagle Hurst Ranch, Huzzah, Mo. That is in Crawford County, near St. Louis. I was born in Jeffersonville, Ind., in 1892. I am 71 years old.

This statement is made of my own free will, and my trip to Washington is at my own expense.

I'm a director of the North St. Louis Trust Co., for 8 years; president of the Steelville Telephone Co., 10 years; I own the Cuba Locker and Ice Plant, Freezall Food Locker, Eagle Hurst Ranch, a 3,000-acre farm and cattle ranch, and the Eagle Hurst Ranch Resort for the last 28 years. I was associated with the Hobart Manufacturing Co. of Troy, Ohio, from 1925 to January 1 of this year, from which I have retired. My connection was for 25 years as western manager, having at the same time for 38 years one of the few available franchises granted by that company. While having retired on January 1 of this year, I have retained my financial interest and close connections with that company.

The great growth and financial success of this company over the years is the background of experience that I am incorporating in a book which I had hoped to give the title "An Opportunity in a Democracy." However, should the proposed bill S. 1732 become law, the title of this book then would have to be changed to "An Opportunity That Existed When We Did Have a Democracy." Also, it is doubtful the experience quoted in this book would be of any future value. It would be very misleading and ambiguous.

With reference to the resort business, one of several interests I hold and operate, with approximately a million-dollar investment, namely, Eagle Hurst Ranch Resort, it has been operated as a desirable, first-class family resort for 28 years by refusing admittance of a minority group of undesirable white people. Recent guests at this resort numbered 121, of which 119 stated emphatically they would not return on a reservation they have for 4 days early in September if we were forced to admit colored people or change our present policy of not admitting the minority group of undesirable white people.

This same feeling has been expressed by practically 100 percent of our regular guests, both individuals and families. You can readily see, any law that would curtail the rights of private citizens to continue to operate their business as in the past, to protect their investment, would definitely compel the liquidation of such businesses.

Our clientele are not travelers. They are accepted by reservation only, and these reservations are acknowledged in writing, with such restrictions set forth as we feel to be in the best interests of our business. A copy of such reservation is attached herewith.

We employ approximately 30 persons at the resort, besides retaining office headquarters in St. Louis, with employees.

We have helped, in the past, a large number of both young men and women to work their way through school and college through employing them at the resort. We spend a great deal of money in the maintenance and upkeep, purchase of food, advertising, both direct and newspapers, and, of course, in taxes paid.

I am not prejudiced against any color, race, or religion——

Senator THURMOND. Mr. Chairman, I see now we are going to have people here today who are going to try to express themselves, as just occurred then, by gasping at a statment that was made by the witness that he had no prejudice against colored people. I kindly request the chairman to keep strict order. It is against the rules not to do so.

I would kindly urge the audience to respect these rules.

The CHAIRMAN. The point of the Senator from South Carolina is well taken. I hope that the audience here today will observe the rules. The Chair announced in the beginning that he hoped you would cooperate with him in observing the rules; otherwise the Chair will have to enforce them.

Go ahead.

Mr. HICKS. Thank you.

I'm not prejudiced against any color, race, or religion. Neither am I a disgruntled Republican trying to embarrass the administration. I am, and have been, an active Democrat for 50 years, liberal with both my contribution of dollars and personal efforts in behalf of what I felt our Democratic Party stood for: Real personal freedom.

There is a very serious danger that the proposed bill, S. 1732, if passed, would violate a right that our present laws hold sacred, the right of free enjoyment of property.

Because of the indefinite nature of the administration's proposals, as indicated during the hearings before the House Judiciary Committee, the Attorney General was very vague as to the line that would be drawn between those having sufficient traffic in interstate commerce to be covered by the bill and those facilities that would be too limited in the scope of their operation to be covered. Many thousands of small businessmen are at a standstill today, having built those businesses by sweat and, in many cases, at great financial sacrifice, anxiously awaiting some definite word from this Congress for their survival.

I should like to refer specifically to the following parts of this bill, S. 1732:

PROHIBITION AGAINST DENIAL OF OR INTERFERENCE WITH THE RIGHT TO NONDISCRIMINATION

SEC. 4. No person, whether acting under color of law or otherwise, shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 3, or (b) interfere or attempt to interfere with any right or privilege secured by section 3, or (c) intimidate, threaten, or coerce any person with a purpose of interfering with any right or privilege secured by section 3, or (d) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 3 * * *

CIVIL ACTION FOR PREVENTIVE RELIEF

SEC. 5. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 4, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted (1) by the person aggrieved * * *.

S. 1732, section 2, paragraphs (b) and (c) are very vague. They refer to "Negroes and members of other minority groups." Just who are the other minority groups referred to? Is each individual that has his pet peeve to decide if he is one of those minority groups?

The civil action would be the same as a license by the Federal

Government to use a blackjack by some disgruntled or so-called minority group, to be used on the person complaining with absolutely no justification, though such nonjustified complaint would create publicity and point a finger of scorn at a small businessman and could be sufficient publicity to cause his business to suffer and, in many cases, cause him to go bankrupt as he would be unable to function and otherwise survive publicity and the mighty hand of the Federal Government.

Such a law could only be administered in the same manner as the East German Communists operate: by building a wall around its people.

In conclusion, I sincerely trust this Congress will not be stampeded or blackjacked by so-called minority groups through their threats and rebellious actions toward individuals, businesses, and local governments.

That is the end.

The CHAIRMAN. Thank you, Mr. Hicks.

Does the Senator from Oklahoma have any questions?

Senator MONRONEY. Do you have any idea how many of your guests are from outside the State?

Mr. HICKS. A very small proportion, sir. We are close to East St. Louis, Ill: There would be a small portion of them from that section.

Senator MONRONEY. None that are in transit; is that correct?

Mr. HICKS. No, sir; we only take them by reservation.

Senator MONRONEY. You refer to undesirable white clientele. What does that classification include?

Mr. HICKS. Well, sir, drunks——

Senator MONRONEY. Gamblers?

Mr. HICKS. Such people as may come in in that manner; primarily drunks.

Senator MONRONEY. But your bar against minority groups would extend to colored in totality; is that correct?

Mr. HICKS. We bar no one that we feel would be a proper person for our——

Senator MONRONEY. But all colored people would be excluded? Even college professors?

Mr. HICKS. I beg your pardon?

Senator MONRONEY. All colored people would be excluded?

Mr. HICKS. We have not excluded them. Fortunately, we have not had the occasion.

Senator MONRONEY. You have had no applications?

Mr. HICKS. No, sir.

Senator MONRONEY. But if you did receive them, the policy of the resort, as I gather from your statement, would be complete segregation?

Mr. HICKS. At this time, yes.

Senator MONRONEY. You feel that the resort is covered by the bill?

Mr. HICKS. Sir, the bill is so ambiguous, I wouldn't know. I don't think anyone would know.

Senator MONRONEY. I have repeatedly questioned the basis on which the Attorney General has urged passage of this bill, that is, the interstate commerce powers granted to the Federal Government under the

Constitution. Would you feel that your resort is in any way affecting interstate commerce?

Mr. HICKS. I wouldn't know. As I say, I have studied this bill so much that it would be very difficult, and I would be rather afraid to operate under such a bill, being so ambiguous I wouldn't know whether I was violating the law or not.

Senator MONRONEY. Your position—is it similar to the testimony we had yesterday from the people of Salisbury? They have done a very fine job of desegregating lodges, hotels, eating places, on a voluntary basis. They felt that they would be handicapped some by law if they had to urge people to do it; that they would stay back and wait for the law to be effective rather than cooperate voluntarily as they have done.

Is it your position that you are not concerned either way? You feel that segregation is necessary and you would want that continued?

Mr. HICKS. Sir, I can only go by the clientele: 119 out of 121 in one particular group volunteered to make that statement, that they would not come to our place.

Senator MONRONEY. So you would not like it either through cooperative action of citizens to try to bring about relief from the difficulties that we suffer under segregation, or the law. Either one would be contrary to your point of view?

Mr. HICKS. Senator, I much prefer that the Federal Government not try to regulate an individual's business and let us work our own business.

Senator MONRONEY. But you would still be opposed to trying any cooperative means of obtaining desegregation in the line of business that you pursue in the resort?

Mr. HICKS. I'm always cooperative with anything that is good for our country.

Senator MONRONEY. That is all that I have, Mr. Chairman.

The CHAIRMAN. The Senator from Kentucky, do you have any questions?

Senator MORTON. This one phrase, "undesirable white people," and then I see——

Incidentally, we are neighbors. I'm right across the river from you in Louisville. My birthplace is New Albany.

You also give your own political affiliation. This "undesirable white people" doesn't mean Republicans, does it?

Mr. HICKS. Well, sir, we have very few Republicans in our country.

Senator MORTON. I found that out. [Laughter.]

Mr. HICKS. I would like, if you will, the statement that I have left out of here—I did not want to—I'm using my own initiative in this.

At a recent bank meeting this problem that we have right now before Congress is affecting our operations in the bank with small business people in making loans and so forth, very much, in that we do not know where we stand as to what types of these small businesses are liable to remain in business if such a law is passed. It is making it quite difficult in making loans to such people.

The CHAIRMAN. You are aware, Mr. Hicks, that a law I consider even more stringent than this on this particular problem exists in 32 States.

Mr. HICKS. This same law, sir, was tried to pass in our State of Missouri and it was just defeated by the congress there.

The CHAIRMAN. It does exist in 32 States. Missouri does not have it?

Mr. HICKS. That is right.

The CHAIRMAN. Do you employ people in St. Louis?

Mr. HICKS. No more, sir. I retired for that reason.

The CHAIRMAN. Are you familiar with the fact, however, that St. Louis and Kansas City have local laws?

Mr. H[illegible]. Yes, sir.

The CHAIRMAN. When you speak of undesirable whites, I believe you used the word——

Mr. HICKS. Yes, because that is a minority group.

The CHAIRMAN. In not admitting the minority group of undesirable white people, whom do you mean?

Mr. HICKS. There is a class of people that roam around hunting places to stay overnight, and so forth and so on, and, in particular, drunks.

The CHAIRMAN. By this you don't mean a minority group of white people. You mean you pick them out as individuals?

Mr. HICKS. Individuals, but they are certainly a minority of the white people.

The CHAIRMAN. When you speak of minority groups——

Mr. HICKS. That is right.

The CHAIRMAN. Race and——

Mr. HICKS. Yes.

The CHAIRMAN. Do you exclude any white people because of race or creed?

Mr. HICKS. No, not whatever. We never ask their race or their religion at all.

The CHAIRMAN. In your place?

Mr. HICKS. No, sir.

The CHAIRMAN. When you speak of undesirable white people, you mean that the individual who may come in——

Mr. HICKS. That is correct.

The CHAIRMAN. You would reserve the right?

Mr. HICKS. That is why I used the term minority, because they are certainly in the minority.

The CHAIRMAN. You would reserve the right not to take them?

Mr. HICKS. That is right, and we reserve the same right to remove them from the place if they become obnoxious.

The CHAIRMAN. You would have to have that right.

Mr. HICKS. That is right.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Hicks, I presume from what you stated, you started out as a young man in very modest circumstances, and what you have today you have earned it through the great American system of private enterprise?

Mr. HICKS. I started in the great State of the gentleman over here, in the hills of Kentucky. I went to Berea College. Yes, sir, and as an orphan; there is no group that has helped me in any way, shape or form.

Senator THURMOND. Did you start as a young man of moderate [illegible] did you inherit a fortune, or have you made what you have

today through hard work under the American system of private enterprise?

Mr. HICKS. Very moderate. I went to St. Louis 52 years ago and walked the streets for 7 days without anything to eat.

Senator THURMOND. You walked the streets of St. Louis without anything to eat?

Mr. HICKS. Yes, sir, and it wasn't indigestion.

Senator THURMOND. Today, I believe you state you are director of the North St. Louis Trust Co.?

Mr. HICKS. Yes, sir.

Senator THURMOND. You are president of the Steelville Telephone Co.; you are the owner of the Cuba Locker and Ice Plant; you are the owner of the Freezall Food Locker, St. Louis, Mo.; you are the owner of the Eagle Hurst Ranch; you are the owner of the Eagle Hurst Ranch Resort; and you have been associated with the Hobart Manufacturing Co., a $77 million business, from 1925 to 1963?

Mr. HICKS. Yes, sir.

Senator THURMOND. And these things you have earned and brought about because of your initiative and your talent and the opportunities presented you under the private enterprise system that exists in America?

Mr. HICKS. That is right, sir, and that is to be the title of my book that I am writing, "An Opportunity in a Democracy."

Senator THURMOND. And you are writing a book called "An Opportunity in a Democracy" to show what a person can do who is willing to work and use his talents and his initiative and who is willing to apply himself to his business?

Mr. HICKS. That is correct. And that the future still exists for him.

Senator THURMOND. Now, Mr. Hicks, if this bill should be passed, forcing upon businessmen the edict of the National Government that they are going to have their business controlled, that they are going to be told how they are to handle their businesses, to whom they can sell, to whom they can serve, do you feel that that will destroy the initiative and the things that helped you to accomplish what you have done?

Mr. HICKS. Without any question of doubt.

Senator THURMOND. Mr. Hicks, I observe that you are very much concerned over the use of private property.

I presume that you feel that the highest human right of man is the right of private property and its protection against trespass and confiscation, do you not?

Mr. HICKS. Yes, sir.

Senator THURMOND. I presume that you feel that human rights are based on property rights to a large extent, do you not?

Mr. HICKS. Very definitely.

Senator THURMOND. I presume that you feel and know from history, and from the record of the Communists, that in all Communist countries which have destroyed property rights, you will find that human rights followed them down the drain, have they not?

Mr. HICKS. Yes, I do.

Senator THURMOND. Mr. Hicks, if this bill should be passed, is it not the entering wedge for the Government to control private property?

Mr. HICKS. I don't think there is any question of doubt but what that is a starting of it.

Senator THURMOND. If the Government, this great Central Government that has given you so many opportunities and enabled you to accomplish what you have, can tell you to whom you can sell and to whom you have to serve, then can't they also go further and tell you the rates that you may charge?

Mr. HICKS. That is right, and the men that you are to serve over your dining table.

Senator THURMOND. And will not also they have the right and go further and tell you the type of menu that you may have to serve?

Mr. HICKS. That is correct.

Senator THURMOND. Will they not possibly go further and tell you who you have to hire and who you can fire?

Mr. HICKS. Correct.

Senator THURMOND. Will it not result, if this is carried to a conclusion, in the complete domination of private property by the National Government, which is equivalent to socialism?

Mr. HICKS. That is my version.

Senator THURMOND. Mr. Hicks, I observe you stated that this resort you have now, that the people who come there prefer to be with people of their own race, and that of the number you had recently, 121, 119—all but 2—stated that if it were integrated, that they would not come back?

Mr. HICKS. That is right.

Senator THURMOND. So, therefore, would this not be a destruction of your private property if the National Government should pass a law of this kind?

Mr. HICKS. Yes, sir.

Senator THURMOND. Would it not be a confiscation or the taking of your private property by the National Government if they can cause you to lose 119 out of 121 clients whom you have had to visit you there and give you business?

Mr. HICKS. That is our feeling.

Senator THURMOND. I believe you now said you employ 30 persons at this resort, besides your office force in St. Louis?

Mr. HICKS. Yes, sir.

Senator THURMOND. If your business closes, what would happen to these employees?

Mr. HICKS. Well, some of those employees are part-time college people that we have helped to put through college year after year. There would be no further jobs for them, because I would close my business.

Senator THURMOND. I believe you, of course, in a business of this kind would naturally spend a large amount of money for food, maintenance and upkeep, for advertising, and taxes and things of that kind. Would all of these businesses be handicapped and destroyed so far as your business is concerned if this law passes?

Mr. HICKS. Yes, and between two or three other resorts in our area, we nearly support that community.

Senator THURMOND. You practically support that community?

Mr. HICKS. That is correct.

Senator THURMOND. What would happen to this community then if your business is forced to close by the passage of a law like this by the National Government?

Mr. HICKS. Those people would have to go on Federal relief.

Senator THURMOND. Mr. Chairman, I again ask to have order in the room.

The CHAIRMAN. I am going to have to ask the audience to maintain order. I know that all of you do have some feelings about the witness' statements, and you express them. We are so crowded in here we have to abide by the rules strictly, and I hope you will.

Senator THURMOND. I observe you stated in your statement that this civil action would be the same as a license by the Federal Government for the use of a gun or blackjack to be used by some disgruntled so-called minority group, to be used as a personal complaint with absolutely no reason or justification, though such nonjustified complaint would create publicity and point a finger of scorn at a small businessman and can be sufficient publicity to cause his business to suffer and in many cases cause him to go bankrupt as he would be unable to financially and otherwise survive publicity and the mighty hand of the Federal Government.

Mr. HICKS. ——

The CHAIRMAN. Let him answer that question.

Mr. HICKS. Yes.

The CHAIRMAN. I am going to ask the audience to please maintain order. We are going to have to clear most of you out of the room if you don't, because it is so crowded.

Thank you.

Senator THURMOND. Mr. Chairman, I merely said what he said. I was preparing to ask a question.

The CHAIRMAN. He said yes.

Senator THURMOND. He answered prematurely.

The CHAIRMAN. Excuse me.

Senator THURMOND. That is the statement you made, I believe, Mr. HICKS. Correct.

Senator THURMOND. Mr. Hicks, if the National Government goes into a field of this kind, isn't it invading the 5th and the 14th amendments to the Constitution which provide that no person shall be deprived of life, liberty, or property without due process of law?

Mr. HICKS. That is my version.

Senator THURMOND. So under the Constitution, what right would a person have to come down and control your private business and take over your business, so to speak, and dictate how it would be operated?

Is there any provision that you know of in the Constitution to that effect?

Mr. HICKS. None whatsoever.

Senator THURMOND. Mr. Hicks, in 1875, did not the Congress pass a law similar to this, and in 1883 the Supreme Court declared it invalid and unconstitutional under the 14th amendment?

Mr. HICKS. I believe so, yes.

Senator THURMOND. Mr. Hicks, why is it felt by those who are promoting this bill that the Supreme Court today would go against the decision in that case and declare this law constitutional?

Mr. HICKS. I see no reason for it.

Senator THURMOND. Mr. Hicks, doesn't the principle of stare decisis still prevail in this country, that we will stand by the previous

decisions until new facts are brought out to change the situation such that the Court should reverse itself?

Mr. HICKS. Yes.

Senator THURMOND. Mr. Hicks, I believe the Legislature of the State of Missouri refused to pass a law of this kind, did it not?

Mr. HICKS. That is right. Recently.

Senator THURMOND. And although the city of St. Louis and maybe some other cities in the State of Missouri have such a law, the people as a whole in the State of Missouri, do not want this kind of law and their representatives in the legislature refused to pass it?

Mr. HICKS. As they indicated so, the legislature refused to pass it.

Senator THURMOND. So if the National Government passes this law as indicated here, will that not be forcing on all the people of Missouri a law they do not want?

Mr. HICKS. Most of the people, yes.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Does the Senator from Alaska have any questions?

Senator BARTLETT. Mr. Hicks, have any Negroes ever stayed at the Eagle Hurst Ranch Resort?

Mr. HICKS. No, sir.

Senator BARTLETT. Have any ever sought admittance?

Mr. HICKS. I didn't hear you.

Senator BARTLETT. Have any ever tried to?

Mr. HICKS. Over telephone only.

Senator BARTLETT. Have any American Indians ever stayed at the resort?

Mr. HICKS. No, sir.

Senator BARTLETT. Have any ever sought to?

Mr. HICKS. No, sir.

Senator BARTLETT. That is all.

The CHAIRMAN. The Senator from New Hampshire? He was out of the room.

Senator COTTON. No questions, Mr. Chairman.

The CHAIRMAN. The Senator from California?

Senator ENGLE. Mr. Hicks, we have a public accommodation law in California which is tougher than the one here proposed.

The Senator from Washington, the chairman of this committee, has stated several times that Washington has a public accommodations law which is tougher than the one here proposed.

We have a great many places such as yours in the State of California that cater to various groups. This Eagle Hurst Ranch Resort, I would assume is a guest ranch. Is that what it is?

At any rate, as far as our experience indicates in California, we haven't had our people operating similar types of establishments going broke because of the existence of a California law that is at least as strong and stronger than the one now proposed. Why is that so?

Mr. HICKS. You can do many things in California that we don't do.

Senator ENGLE. You think it is a difference in the complexion of the population, is that it?

Mr. HICKS. I think it is a difference in the population, because you have an overgrowth from all over the country. We have more native

people in our State that have been raised, born, and made a living, and educated in that State.

Senator ENGLE. Do your guests come from Missouri exclusively?

Mr. HICKS. I would say 95 percent.

Senator ENGLE. We have a tremendous minority population in California.

Mr. HICKS. I know you do.

Senator ENGLE. I have the second largest Mexican city in the world, outside of Mexico City itself. I have the second largest Chinese community, outside of the Far East, and we have a very large Negro community, especially in Los Angeles and in the east bay of San Francisco, the bay area.

We haven't had our people going broke and having to close their establishments. That is the reason I ask you this question. Can you tell me why they will go broke in Missouri and not in California, and my folks came from Missouri.

Mr. HICKS. We are not competing, trying to compete with anything in California. We have a very fine high-class family place which we are trying to keep in that manner. We are not competing with any other types of businesses whatsoever.

We perhaps could make a whole lot more money if we took everybody in, but we are not that hungry.

Senator ENGLE. Just one further question, Mr. Chairman. In reading this bill, are you convinced that you would fall within it?

Mr. HICKS. It is so ambiguous I couldn't tell. But I would be afraid to operate if that bill was passed, because the bill in itself, I doubt—I listened to the Attorney General's version of it, and I couldn't get anymore out of it than I know is my own feeling about it, that I would hate to operate under it under the statute or status that the bill is in itself, and particularly that part of the bill where you can indict a man for just about anything that some disgruntled person might want to indict him for, the same as suing him.

Senator ENGLE. Do you mean to say that you would go out of business even before that question was tested in the courts?

Mr. HICKS. I didn't say I would go out before that was tested in the court, but I would hesitate to put any additional investments in it to operate on the version of what might happen with it.

Senator ENGLE. Thank you, Mr. Chairman.

Thank you, Mr. Hicks.

Mr. HICKS. Thank you.

The CHAIRMAN. The Senator from Vermont.

Senator PROUTY. Mr. Hicks, you said you were a lifelong Democrat. I'm a lifelong Republican, and for that reason I don't wish to engage in any prolonged colloquy, because it might take on partisan overtones. I do have one or two questions I should like to submit.

You say in your statement that your clientele are accepted by registration only, and that a copy of the registration form is herewith attached. Now, I don't find that form.

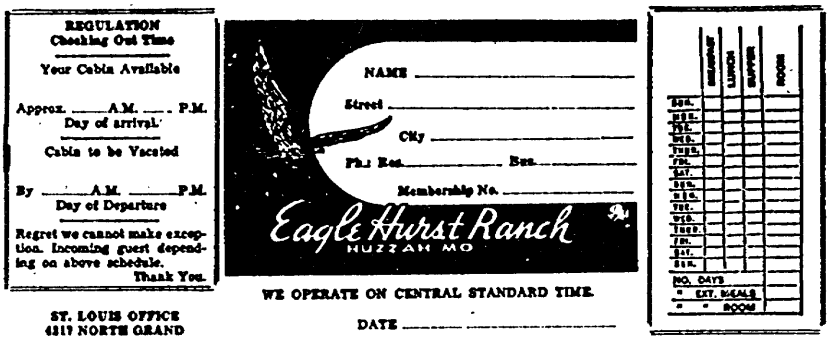
The CHAIRMAN. We have it right here and we would be glad, if there is no objection, to put it in the record.

Mr. HICKS. I have some additional ones if you wish.

The CHAIRMAN. Would you leave a few additional ones?

Mr. HICKS. Thank you.

(The matter referred to is as follows:)



REGULATION
Checking Out Time

Your Cabin Available

Approx. ____A.M. ____ P.M.
Day of arrival

Cabin to be Vacated

By ____A.M. ____P.M.
Day of Departure

Regret we cannot make exception. Incoming guest depending on above schedule.
Thank You.

NAME _____
Street _____
City _____
Ph.: Res. _____ Bus. _____
Membership No. _____

Eagle Hurst Ranch
HUZZAH MO

	BREAKFAST	LUNCH	SUPPER	ROOMS
SUN.				
MON.				
TUE.				
WED.				
THUR.				
FRI.				
SAT.				
SUN.				
MON.				
TUE.				
WED.				
THUR.				
FRI.				
SAT.				
SUN.				
NO. DAYS				
" EXT. MEALS				
" " ROOMS				

WE OPERATE ON CENTRAL STANDARD TIME.

ST. LOUIS OFFICE
4819 NORTH GRAND
CEntral 9644

DATE _____

We wish to acknowledge your reservation request. Cabin No. _____ has been assigned you subject to required deposit as shown below.

You will arrive for Breakfast ☐ Lunch ☐ Dinner ☐ Date.....

You will depart after breakfast ☐ Lunch ☐ Dinner ☐ Date.....

— Your meals will be prepared as per above dates. — and charge made accordingly.

Reservation originated by — Letter ☐ Phone ☐ Other _____ Rec'd by _____

Number of Persons in Party and Rates:

Number of Men ☐ Women ☐ Children under 10 years ☐ Infants ☐

Rates Per Day: Adults.....; Children under 10 years .....; Infants .....

Rates Per Week: Adults.....; Children under 10 years .....; Infants .....

Will Arrive Via. Auto ☐ Bus ☐ Approximate Time: .....A.M.; .....P.M.

A Deposit of $ _____ must be made AT ONCE to ST. LOUIS OFFICE. Otherwise Reservations cannot be honored.

Deposit To Be Mailed ☐ Rec. Cash ☐ Check ☐ Date Rec'd St. Louis _____ At Ranch _____

Any changes in or cancelling of Reservations may be made only through our St. Louis office.

NO PART OF THIS RESERVATION MAY BE CANCELLED, UNLESS SUCH INTENT IS GIVEN IN WRITING, AND RECORDED AT OUR ST. LOUIS OFFICE 48 HOURS IN ADVANCE OF EXPECTED ARRIVAL. OTHERWISE, YOU WILL BE RESPONSIBLE FOR ALL CHARGES INCURRED FOR THE NUMBER OF PEOPLE AND FULL TIME RESERVED.

DEPOSIT REFUND CLAIMED BY REASON OF CANCELLATION OF RESERVATION MAY BE MADE ONLY AT THE DISCRETION OF THE MANAGEMENT.

WE RESERVE THE PRIVILEGE TO SELECT OUR CLIENTELE.

This Reservation is made with the understanding that the rights and privileges granted the guest thereunder, may be revoked by Eagle Hurst Ranch if, in the opinion of the Management, such reservation is detrimental to the best interests of the Ranch.

Unless immediately informed otherwise, we assume the contents of this acknowledgement is in accordance with your approval. We will do all possible to make your stay at Eagle-Hurst a most enjoyable one.

In the case of group or organization reservations, the proper leader or officer shall duly acknowledge approval of this reservation, by signing and returning one copy to our St. Louis office.

Please present this Reservation on arrival.

Very truly,
EAGLE-HURST RANCH

Signed: _____

By .....

Senator PROUTY. Mr. Hicks, you suggested also that you are connected with a bank which is faced with some problems, or will be faced with some problems if the proposed legislation is enacted into law. You also referred to a minority group of undesirable white people. Do any members of that minority group do business with your bank?

Mr. HICKS. I do not know, sir. I'm not a teller of the bank in any manner, shape, or form.

When we talk of a minority group of white people, we know if a man should come in drunk, or boisterous, or such as that, we feel that we have that right to refuse him or to put him out of the place.

That is what we determine a minority group of whites.

Senator PROUTY. Do you exclude members of any race from doing business with the bank?

Mr. HICKS. No, sir.

Senator PROUTY. That is completely integrated?

Mr. HICKS. That's right, yes. There is no reason for that, no.

Senator PROUTY. Thank you.

The CHAIRMAN. The Senator from Nevada.

Senator CANNON. Thank you, Mr. Chairman.

Mr. Hicks, you indicated that you are a director of the North St. Louis Trust Co. Is that a lending organization?

Mr. HICKS. It is a bank and trust company.

Senator CANNON. Do you make any discrimination there in the people to whom you make your loans?

Mr. HICKS. No, sir.

Senator CANNON. And you, of course, naturally make a profit from that?

Mr. HICKS. Except the only discrimination we make there is a good loan.

Senator CANNON. As president of the Steelville Telephone Co., how many customers do you serve by that company?

Mr. HICKS. We have about 2,300.

Senator CANNON. Do you have any discrimination in your service there?

Mr. HICKS. No, sir.

Senator CANNON. Do you serve anybody who puts up the money; is that right?

Mr. HICKS. That's correct.

Senator CANNON. And I presume that you have made some money out of the telephone company over the years, have you not?

Mr. HICKS. We are operating in the black, the only one in the State of Missouri. Independent, that is.

Senator CANNON. What about the Cuba Locker and Ice Plant. How big an area does that serve?

Mr. HICKS. That serves about half of a county.

Senator CANNON. And do you make any restrictions there as to the people you serve?

Mr. HICKS. No, none whatsoever.

Senator CANNON. You serve anybody who is willing to pay the fee?

Mr. HICKS. That's right.

Senator CANNON. What about the Freezall Food Locker in St. Louis?

Mr. HICKS. That is the same thing, that is a freeze locker and processing plant.

Senator CANNON. You serve anybody who is willing to pay for the service there?

Mr. HICKS. Yes.

Senator CANNON. And your ownership in these businesses are some of the things that have helped you to acquire the position in the community that Senator Thurmond described recently? Is that correct?

Mr. HICKS. I assume so.

Senator CANNON. What about the Eagle Hurst Ranch? You say 3,000 acres of grazing and cattle raising?

Mr. HICKS. Yes.

Senator CANNON. Do you engage in any of the Government-support programs?

Mr. HICKS. I have never taken one single dollar from the Government in my entire life for any purpose.

Senator CANNON. In the way of support prices?

Mr. HICKS. No, sir, never. I wanted to be an independent operator. I want nobody to interfere with my business.

Senator CANNON. What about the Eagle Hurst Ranch Resort? Do you have any loans there that are insured?

Mr. HICKS. I don't owe any man in the world a dollar.

Senator CANNON. Have you ever had any loans through any source that have been insured in part by the Federal Government?

Mr. HICKS. Never, never.

Senator CANNON. You have not participated in any of the Federal programs——

Mr. HICKS. Never, never in any Federal loan, in any way, shape, or form.

Senator CANNON. Do you think that there would be a legitimate basis of distinction if a person were accepting loans through SBA or other types of loans?

Mr. HICKS. No, certainly not.

Senator CANNON. You wouldn't see any point of distinction there at all?

Mr. HICKS. No. That is a good law and it has its place.

Senator CANNON. And would you see any point of distinction if a person who had a FHA loan, let's say——

Mr. HICKS. No, none whatever.

Senator CANNON (continuing). On their ranch?

Mr. HICKS. We take FHA loans in the bank.

Senator CANNON. Of course, FHA loans are made possible by the taxes that everybody pays, irrespective of race, color, or creed.

Mr. HICKS. That's right.

Senator CANNON. But you still think that there should be a distinction, then, in the areas of service?

Mr. HICKS. I didn't get that question.

Senator CANNON. You still think there should be a distinction, though, in the areas of service as to people who will or will not serve, based on their own particular desire?

Mr. HICKS. Well, yes.

A man has a right to make his loan where he sees fit, and if he is a good risk, whether by the Federal or by the independent bank.

Senator CANNON. In your Eagle Hurst Ranch Resort, do you have any type of exclusive license there from the State licensing agency?

Mr. HICKS. The only licenses that we have there are for sanitation and operation. We have a county license to operate, the same as any small business, or any business would have.

Senator CANNON. Are those nonrestrictive licenses so that anyone could go in who was willing to make an investment and secure that type of license?

Mr. HICKS. Well, that is for any business, yes; whether a grocery store or filling station.

Senator CANNON. What about a restaurant? Is that a restrictive license?

Mr. HICKS. No; it is not a restricted license. The only license is, of course, your sanitation license.

Senator CANNON. Do you serve liquor there?

Mr. HICKS. No, sir. We do not serve or permit it.

Senator CANNON. You don't have a license for that?

Mr. HICKS. No, sir; we don't. And that is one of the classes of people who we consider undesirable, is those people who want to make use of that.

Senator CANNON. Would you consider that your business is affected with interstate commerce?

Mr. HICKS. At the present time, no.

Senator CANNON. I think you said in answer to a question of Senator Engle that approximately 90 percent of your customers came directly from St. Louis?

Mr. HICKS. Ninety or—better than 90 percent, I believe.

Senator CANNON. Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from Michigan.

Do you have any questions?

Senator HART. For the benefit of those who drink and those who don't drink, I think we ought to get the record straight. This bill would prohibit discriminatory treatment on account of race and color, religion, or national origin. You have been emphasizing the drunkard. This bill doesn't prohibit you in any way from excluding the drunkard.

Mr. HICKS. I have no objection, sir, to what the bill sets forth. I do, in its penalties set forth, of having someone to use his own judgment as to whether you have discriminated or that you are thinking about discriminating, as it says in here, where the wrath can be brought down upon your head for that thinking.

Senator HART. I'm not sure that I understood the answer.

Do you support a bill that would enable a Negro serviceman, traveling under military orders, to get shelter in your inn?

Mr. HICKS. No; not in my place, because of the nature of the business in itself. He would not be, for any reason, to come there, because it is by reservation only.

Senator HART. That was a circular answer but I think the answer is you wouldn't give him shelter. You don't want to be compelled to.

Mr. HICKS. That's right. I don't want to be compelled to give anybody shelter, any person.

Senator HART. Long before there was a Federal Government there were inns. One of the obligations of the innkeeper was to shelter the traveler. Somehow or another in the course of centuries we have lost touch with the very traditional, very old common law obligation.

And for the life of me I don't see why you would want to write a book about "An Opportunity in a Democracy" unless you could put into that book a chapter that would describe the opportunity that a Negro citizen in a democracy could enjoy. I would think you wouldn't want to write a book unless you could state, honestly, in it that color of the man's skin in a democracy ought not and does not bar him from equal treatment.

What kind of book would it be? It would be a mislabled book, wouldn't it?

Mr. HICKS. I have no objection to the man's color. I do have an objection to the Government passing a law that says, to regulate my business the way I want to operate it. Any business. That is my objection.

Senator HART. Thank you very much.

The CHAIRMAN. The Senator from Maryland.

Senator BEALL. I have no questions.

The CHAIRMAN. Are there any further questions by members of the Committee?

[No response.]

The CHAIRMAN. Thank you, Mr. Hicks. We appreciate your testimony. You can be excused.

The Chair first wants to recognize the presence in the committee room of one or two of our colleagues here: The Congressman from Mississippi, John Bell Williams—we are glad to have you—and the distinguished Senator from Wisconsin, Mr. Nelson. We are also glad to have him. And we are also glad to have our colleague, John Stennis, from Mississippi, who would like to have the opportunity, I believe, of introducing our next witness.

We would be glad to have you come forward, Senator Stennis, and do so.

Any Members of Congress who happen to be here, if I don't happen to notice you, you're privileged to come up here with the committee. We have some chairs for you if you wish.

Senator Stennis.

Senator STENNIS. Mr. Chairman and members of the committee, it is my pleasure as well as a privilege to present to this committee Governor Barnett of Mississippi. Governor Barnett has for a long time been one of the outstanding lawyers in our State, in fact in that part of the country, at one time president of our State bar association. He went directly from the trial courtroom, you might say, to the Governer's office.

He has a great knowledge of the Constitution of the United States, and, of course, of his own State, and he believes fervently in that Constitution. He carried this knowledge of constitutional law to the Governor's office with him, as well as carrying his faith and belief in its principles.

He has been very active as a Governor in many ways. He is a man of strong beliefs and convictions. He has a record of fine achievements over the years, both in and out of the Governor's office.

I have not had a chance to read his statement, but I know it will be excellent and outstanding. I believe he will be helpful to this committee. I'm delighted that he can be and is here.

Governor, you are in the hands now of a very fine group. I'm very glad indeed to present you to them.

The CHAIRMAN. Thank you, Senator Stennis.

Governor, we are glad to have you here. I'm sure you, as well as the Senator from Mississippi, will contribute a great deal to the legal problems that we have facing us.

I might say for the record that the committee did send an invitation to all 50 Governors. Some of them have responded. Others, of necessity, can't be here right now. I don't know how many others will want to testify. Some have designated their attorneys general to come.

We are pleased to have you. You have a statement which we will be glad to hear at this time.

STATEMENT OF THE HONORABLE ROSS E. BARNETT, GOVERNOR OF THE STATE OF MISSISSIPPI

Governor BARNETT. Thank you, Senator Magnuson and Senator Stennis, and other distinguished Senators.

I am grateful for this opportunity, gentlemen. It is indeed kind of you gentlemen to permit me to be here today to express our views from Mississippi on this important issue.

I believe it is permissible to refer to my notes, is that right?

The CHAIRMAN. Yes, you can either do that, or read your full statement. We will be glad to hear you.

Governor BARNETT. Thank you.

Gentlemen, we are facing one of the most critical times in the history of our Nation. Minority groups in our country have taken to the streets to agitate, to demonstrate, to breach the peace, and to provoke violence calculated to blackmail this Congress into passing legislation in direct violation of the U.S. Constitution. You have been forced to consider this legislation through the pressure and blackmail of mobs in the streets.

The President of the United States and the Attorney General have encouraged demonstrations, freedom rides, sit-ins, picketing, and actual violations of local laws, both the State and municipal.

What is happening in our Nation today fits the pattern of what has been happening throughout the world insofar as the Communist activity is concerned. When we compare the Communist tactics with a Cuba, a Laos, a Berlin, a Vietnam, a Haiti, or other parts of the world, Communist tactics are to create a crisis and then let it cool off.

Communist tactics are to create crisis and then leave the scene with heartaches, turmoil, and strife. The same tactics are being practiced in the United States through a Birmingham, and letting it cool off; a Jackson, Miss., and letting it cool off; a Danville, Va.; a Cambridge, Md.; riots in Philadelphia; and in New York City. It's the same old Communist offensive of attack with a hammer and then withdraw.

Attack with a hammer and then withdraw—each time causing more ill will, more racial unrest and pushing a wedge further between existing good relations of the people of this great Nation.

Gentlemen, it is the divide, disrupt, and conquer technique. The passage of this civil rights legislation will positively and unmistakably, to my humble way of thinking, provoke more violence, not just in the South, but throughout all areas of this Nation. I am thoroughly convinced that this is a part of the world Communist conspiracy to divide and conquer our country from within.

The Communists are, therefore, championing the cause of the Negroes in America as an important part of their drive to mobilize both colored and white for the overthrow of our Government.

There are those who are so anxious to hold high the banner of the civil rights issue that they fail to read some of the writings on the banner. They fail to realize that the Communist Party hopes to incite civil insurrection in the South with the purpose of then fanning the flames into a holocaust in the northern racial strife areas.

To date, they have been disappointed and defeated by the due process of law in the South, where law-enforcement agencies and level-headed citizens have been able to contain the aggravations of the outside racial agitators.

Gentlemen, it is obvious to many of us throughout the country that the racial agitation, strife, and conflict that has been stirred up throughout our Nation is largely Communist inspired. Racial agitators in Mississippi and leaders of demonstrations in other States have backgrounds that have made many of us, including our local police officers, State investigating agencies, and the FBI, to be concerned about the real motivation behind these so-called civil rights leaders.

Your passage of this legislation will be no cure-all for the problems that this Nation faces because of racial strife and horrible conflict. The passage of this legislation will, however, mean the complete end of constitutional government in America and result in racial violence of unimaginable scope.

Gentlemen, to my humble way of thinking, the Constitution of the United States is the only thing that stands between the people of America and dictatorship. Even the New York Times has said that "with every Negro advance, momentum for more violence and agitation increases, not decreases."

This legislation is so all inclusive and so sweeping in its scope that it has been termed by many as the "white slave bill."

Gentlemen, you have all learned through your personal experiences that to try to appease, to try to accommodate, or give concessions to the demands of the arrogant leads only to additional conflicts and additional problems which you didn't face before.

Certainly, you are familiar with the results of our policy of appeasement toward Cuba and Laos. The passage of this civil rights legislation will lead us into an area of conflict between the races, the like of which we have never known before. There will be no end to the constant pressure for more and more and more. Gentlemen, I am sincere when I say that.

The Attorney General has stated that the passage of this bill would move the problem of so-called discrimination in public accommodations out of the streets and into the courts. I certainly question this statement. The Attorney General has been personally responsible for helping to put mobs in the streets and I can prophesy that this legislation, if enacted, will put hundreds of thousands of white businessmen in the streets.

The purpose of government should be to protect the individual and to see to it that no one interferes with his private property. The present administration seems to have adopted the very heart of the socialistic philosophy that the private rights of men are to be tolerated only at the suffrage of the State.

What we are seeing today is a grasp for power by certain men in public office who would give to an all-powerful Central Government full control over all phases of the lives of our people. I see this legislation as an attempt by greedy minorities to prostitute the purpose of law and government as a protector of private property, and to use the law to plunder the property of others.

If you pass this legislation, you are allowing a minority in our country to force itself upon the majority of the citizens of this great

Nation. What and where are the rights of the majority of this great Nation?

The powers of the Attorney General under this legislation will be so sweeping and so encompassing as to comprise a serious threat, in itself, to the safety and stability of this Nation.

The Attorney General in his testimony has stated:

I think that it is an injustice that needs to be remedied. We have to find the tools with which to remedy that injustice.

In other words, regardless of the Constitution, he, through his legislation, asks for the power to run roughshod over the rights of every individual and dictate to every citizen what he could or could not do with his private property or his private business. Where is the equal protection of the law?

I challenge the newspapers and news media of our country to awaken the man on the street, the small businessman throughout this Nation, all those who respect law and order, to the fact that this legislation is an open attack on the rights of every individual to the control of his personal and private property.

Every citizen has the right to own and operate his own business as he sees fit without interference from any source. To give to an all-powerful Central Government the right to force the owner of a private business to unwilling do business with anyone creates a new special right for a minority group in this Nation that destroys the property and personal rights of every citizen.

Senator Russell has stated and the press has failed to report, I understand:

Our American system has always rejected the idea that one group of citizens may deprive another of legal rights and property by process of agitation, demonstartion, intimidation, law defiance, and civil disobedience. Every Negro citizen possesses every right that is possessed by any white citizen. But there is nothing in either the Constitution or in Christian principles or commonsense and reason which would compel one citizen to share his rights with one of another race at the same place and at the same time. Such compulsion would amount to a complete denial of inalienable rights of the individual to choose or select his associates.

Gentlemen, what could be more discriminatory than to give one particular class of citizens the privilege of bypassing the normal channels of justice, which other citizens must follow. Under this proposed legislation, any agitator or troublemaker or crank could bring the owner of any business establishment into Federal Court by merely writing a letter to the U.S. Attorney General. The agitator or crank would be represented, at no cost to himself, by the officials and attorneys of the Federal Government. If this legislation passes, American citizens will have no rights in the ownership and use of their private property, unless they use it in a way that the Federal officialdom considers to be consistent with the so-called public interest. Today, it seems to many Americans, the demands of the racial agitation groups fix official opinion as to what is the public interest. Tomorrow, the public interest could well be something else. It could even invade the home—or even the bedroom of the individual.

The legitimate purpose of government to my humble was of thinking, gentlemen, is to protect a man's home as his castle. Does not this same basic American constitutional fact of life apply equally to a man's own private business? The legislation you have under con-

sideration would actually use Federal police power (as exemplified in our system of Federal courts) to destroy a man's personal property simply to satisfy racial minorities. Can there be no end to the current insanity that would compel the mixing of races in social activities to achieve what? You can name it yourself.

The head of the NAACP here in Washington, D.C., where Negro criminal violence against white people is creating something akin to a reign of terror—just think of what happened last November 25, on Thanksgiving Day, when hundreds of people were injured, crippled, totally knocked out, jaw bones broken, and many others as a result of an attempt to mix the races—said on a national television program in early May of this year, that Negro violence is coming and that the NAACP will promote the violence if whites do not immediately give the Negro what he demands. What does he demand? Does he honestly know just what he really wants? Whatever he may want will not come as a result of this or any other proposed legislative act. You can be certain of that basic fact. The race problem can never be solved by passage of laws, by encouraging court edicts, or by breaches of the peace.

I know of one establishment in the State of Mississippi that actually has gone out of business on account of an attempted mixing of the races.

I have said that the free enterprise system has contributed much to making our Nation great and that many establishments would go out of business if they were required to integrate the race. I am prepared to give you one specific example in Mississippi.

Mrs. Marjorie Staley of Winona, Miss., has operated a restaurant as a Continental Trailways Bus Terminal for quite a while. Apparently, she was making good. She had a good business, but she was told to either integrate or close the business. She chose to close her business rather than integrate. As a matter of fact, when you investigate this case you will find that she attempted to integrate for about a week or two, and the white customers quit coming to her place of business and the Negroes also quit coming to her place of business. And so she had to close. Neither wanted to come.

It is my understanding that Trailways officials had been directed by the Justice Department to warn her to either close or integrate. She has approximately $20,000 of equipment in the restaurant. She had seven or eight people employed—three whites and three or four, or probably five, Negroes. She had a payroll of $2,000 per month. Now her business is closed, seven or eight people, Negroes and whites, are out of employment, and she has $20,000 worth of equipment on her hands.

Prior to the time she closed this business, which was about 2 or 3, or maybe 4, weeks ago, she served both white and colored in separate compartments—one for the whites and one for the Negroes. Apparently, everyone was happy the way it was being operated. Everyone was well pleased—customers as well as employees, and the owner, Mrs. Staley.

This is one example that neither Congress nor the courts can change attitudes, nor can you change customs. And that not only applies in Winona, Miss., gentlemen; please remember, gentlemen, it applies in New York, it applies in many, many other States, and I think in

every State in this great Nation of ours. You can't change attitudes and you can't change customs by the passage of laws.

Mrs. Staley is a widow and earned her livelihood operating her restaurant.

There is a Communist nation just 90 miles from our shores and yet, with this and all the other problems we face as a nation, the whole attention of the Congress and our Nation at this critical era in history is diverted to this tragic and misnamed civil rights legislation. Perhaps this is all a part of a great conspiracy to divert our attention to this domestic issue so that we may neglect other and far more important matters.

Gentlemen, I have done some research on this matter. I have done quite a bit of legal research on the constitutionality of this proposed legislation.

Section 3 of Senate bill 1732 provides that all persons shall be entitled, without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of hotels, motels and numerous other private business enterprises.

Section 2(h) provides that alleged existing discriminatory practices:

> * * * take on the character of action by the States and therefore fall within the ambit of the equal protection of the 14th amendment to the Constitution of the United States.

Section 2(i) takes the position that Congress has the right to enact this proposed legislation in order to remove alleged burdens on and obstructions to commerce under the commerce clause of the Constitution of the United States.

Gentlemen, from my investigation, I have reached the conclusion that Congress does not have the power to enact this legislation under the 14th amendment to the Constitution of the United States.

The businesses sought to be controlled are purely private in character and as such fall within the ambit of what is commonly known as "free enterprise." Every loyal conservative American has a deep and abiding faith in our free enterprise system. It is one of the things, gentlemen, that has made our Nation great. He also stands ever vigilant to protect the citizen's right to own, control, and operate his private business as he sees fit. The right to do business or to decline to do business with any individual is an inseparable part of said citizen's right to operate and control his privately owned business. If this right is destroyed by the Federal Government, the citizen has been deprived of one of his inalienable rights just as surely as though the Federal Government had confiscated his physical personal property.

The 14th amendment to the Constitution of the United States provides:

> No State—

and I want to call your attention especially to the words "no State"—

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It should be noted that the 14th amendment is a prohibition against State action. It is not a prohibition against the action of one citizen against another. Each individual has a legal right to discriminate against another individual if he so desires. Any control over such individual action by the operation of a private business lies wholly within the power of the State legislatures under the 10th amendment to the Constitution of the United States. Some States, of course, have passed legislation similar to this; some have not. Each State has the right to make its own decision, to make its own laws.

Mississippi has taken no action on this question. In our State the owner of each business is free to make his own decision as to whom he will serve.

Eighty years ago in *United States* v. *Nichols*, entitled the *Civil Rights* cases, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the Supreme Court of the United States held sections 1 and 2 of the Civil Rights Act of 1875 unconstitutional. Said acts provided that all persons in the United States were entitled to the full and equal enjoyment of accommodations, advantages, facilities, and privileges of inns and places of amusement. In holding that Congress had no right to pass such a law under the 14th amendment, the Court said—I am quoting from 109 U.S., page 3, 27 Law Edition, page 835. The Court said:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.

In pointing out the reasons Congress had no such power and why such attempted legislation on the part of Congress was repugnant to the 10th amendment, the Supreme Court said:

> And so in the present case, until some State law has been passed or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the 14th amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts under State authority.
>
> • • • • • • •
>
> Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them.

Gentlemen, I have a letter in my file from the president of the Bar Association of Florida, in which he said he and many other lawyers in the State of Florida are becoming very much concerned about the whittling away of the rights of the States. He said:

> Governor, if it continues, if we continue to whittle away the rights of the States, the States will soon be mere provinces, like they are in some other countries.

And he is very much concerned about it, along with millions of other Americans.

I will resume quoting:

> It is absurd to affirm that, because the rights of life, liberty, and property, which include all civil rights that men have, are, by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation

which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking.

* * * * * * *

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the 14th amendment on the part of the States. It is not predicated on any such view. It proceeds ex directo to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States.

* * * * * * *

In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society toward each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law, and the amendment itself does suppose this, why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theaters? The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the 10th amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

That is the end of the quote. The *Civil Rights Cases* arose out of the denial by a hotel of its accommodations to persons of color and the denial by theaters of their accommodation to colored persons. In 1959, you recall, a Howard Johnson Restaurant denied service to Charles E. Williams, a colored attorney for the Internal Revenue Service. He brought suit claiming that such action violated the Civil Rights Act of 1875 and the commerce clause of the Federal Constitution. In this same case, *Williams* v. *Howard Johnson Restaurants*, U.S.C.A. 4th, 268 F. 2d 845, the court reaffirmed the doctrine of the *Civil Rights Cases*, and said:

Sections 1 and 2 of the Civil Rights Act of 1875, upon which the plaintiff's position is based in part, provided that all persons in the United States should be entitled to the full and equal enjoyment of accommodations, advantages, facilities, and privileges of inns, public conveyances, and places of amusement, and that any person who should violate this provision by denying to any citizen the full enjoyment of any of the enumerated accommodations, facilities, or privileges should for every such offense forfeit and pay the sum of $500 to the person aggrieved. The Supreme Court of the United States, however, held in *Civil Rights Cases*, 100 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835, that these sections—

Which I have just read—

of the act were unconstitutional and were not authorized by either the 13th or 14th amendments of the Constitution. The Court pointed out that the 14th amendment was prohibitory upon the States only, so as to invalidate all State statutes which abridge the privileges or immunities of citizens of the United States or deprive them of life, liberty or property without due process of law,

or deny to any person the equal protection of the laws; but that the amendment did not invest Congress with power to legislate upon the actions of individuals, which are within the domain of State legislation.

From a legal point of view, it is perfectly clear that Congress does not have the power to control the activities or to direct the activities of private business owners under the 14th amendment.

Congress does not have the power to enact this legislation under the commerce clause of the Constitution of the United States.

I understand that some are considering the 14th amendment. Some are considering basing it on the commerce clause. Some are considering basing it on both the 14th amendment and on the commerce clause.

Article I, section VIII, clause 3, provides:

The Congress shall have Power * * *
To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. * * *

No one can reasonably contend that the operation of a hotel, restaurant or drugstore in the State of Mississippi or any other State constitutes commerce among the several States. The Supreme Court of the United States clearly and unmistakably did not think so in the *Civil Rights Cases*, because it said.

Has Congress constitutional power to make such a law?

It asks that question.

Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments.

The last three amendments referred to were the 13th, 14th and 15th. The commerce clause was a part of the Constitution from its inception. The Supreme Court, therefore, said that no one would even contend that Congress had the power to pass such laws prior to the adoption of the 13th amendment.

Of course, the right to control commerce among the States includes the right to control interstate transportation, and Congress has done so in this field by title 28 U.S.C.A., section 3(1), which forbids a carrier to subject any person to undue or unreasonable prejudice or disadvantage in any respect. The right of the Congress to deny discrimination incident to interstate commerce has been upheld in a number of cases. (*Mitchell* v. *United States*, 313 U.S. 80, 61 S. Ct. 873, 85 L. Ed. 1201; *Henderson* v. *United States*, 339 U.S. 816, 70 S. Ct. 843, 94 L. Ed. 1302.) In like manner, the Supreme Court has also held that certain State action constituted an unlawful burden on interstate commerce in this field. (*Morgan* v. *Virginia*, 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317.)

In the *Civil Rights Cases*, the Supreme Court recognized the power of Congress to regulate public conveyances passing from one State to another, and said:

And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

It is clear, therefore, that the Supreme Court was not unmindful in the least of the power of Congress under the commerce clause when it decided the *Civil Rights Cases* and when it held that no one would

even contend—it uses those words, "that no one would contend"—that Congress had the right to pass this type of legislation under the commerce clause or prior to the adoption of the 13th, 14th, and 15th amendments.

Who would seriously contend that the operation of a restaurant on Capitol Street in Jackson, Miss., or any other street in any other State of this great Nation, could be classified as commerce among the several States? If such action constitutes commerce among the States simply because some of the products handled were manufactured outside the State of Mississippi, every act of every citizen in every State could be controlled by Congress on the same identical basis. The Constitution should not be stretched—I will admit it has been stretched entirely too much thus far. The States have witnessed the whittling away of the rights of the States for many, many years in several particulars, and it has really and truly assumed a lot of power, gentlemen, that it did not have a right to assume under the Constitution of the United States, and particularly under the 10th amendment to the Constitution of the United States.

So I say to you gentlemen, it should not be stretched entirely out of shape in an effort to reach what is believed by some to be an evil, the correction of which is a matter for each State to make its own decision.

Gentlemen, I believe in the States controlling and directing their own activities. I wouldn't dare project my ignorance in telling the people of the State of Ohio what the people there ought to do, because I don't know what their problems are. I am not familiar with their problems. They know more about their problems than the people of Washington know. They know the people. They know the attitudes of all the people of Ohio.

I wouldn't dare tell the people of Nevada what they ought to do. They have local gambling in Nevada. Most States don't believe in that, but it is none of my business what Nevada does. If they want to pass legislation realizing gambling issues, that is Nevada's business, that is not Mississippi's business. And, strangely, I don't think it anyone else's business.

Gentlemen, if New York wants to integrate and end up with a mongrel race, that is New York's business. If Mississippi or Alabama or Georgia and other States want to segregate their races, gentlemen, and maintain the purity and integrity of both races, that is their business. I am a firm and an unwavering believer in the rights of the States, and gentlemen, just as sure as 2 and 2 are 4, when we take away the rights of the States to control and operate their own affairs, when the laws of Government become mysterious and remote, I might say remote, when the Government becomes remote to the people of any State; gentlemen, the people lose interest.

And the people are deprived of their most precious freedom—the right to control and operate their own internal affairs.

When the States lose their rights to control and operate their motels, restaurants, and other places of business, they have lost their most precious freedom. The people have lost their most precious right, their most precious freedom.

This issue, gentlemen, was raised in *Williams* v. *Howard Johnson Restaurant*, *supra*—that is, the attempt to take away the rights of the

States—and was held not to fall within the commerce clause of the Constitution. The Court said in that particular case:

The plaintiff makes the additional contention based on the allegations that the defendant restaurant is engaged in interstate commerce because it is located beside an interstate highway and serves interstate travelers. He suggests that a Federal policy has been developed in numerous decisions which requires the elimination of racial restrictions on transportation in interstate commerce and the admission of Negroes to railroad cars, sleeping cars, and dining cars without discrimination as to color; and he argues that the commerce clause of the Constitution (art. I, sec. 8, clause 3), which empowers Congress to regulate commerce among the States, is self executing so that even without a prohibitory statute no person engaged in interstate commerce may place undue restrictions upon it.

The cases upon which the plaintiff relies in each instance discloses discriminatory action against persons of the colored race by carriers engaged in the transportation of passengers in interstate commerce.

In every instance the conduct condemned was that of an organization directly engaged in interstate commerce and the line of authority would be persuasive in the determination of the present controversy if it could be said that the defendant restaurant was so engaged. We think, however, that the cases cited are not applicable because we do not find—

May I stress that—

we do not find that a restaurant is engaged in interstate commerce merely because in the course of its business of furnishing accommodatons to the general public it serves persons who are traveling from State to State.

Gentlemen, if that isn't clear as crystal, that a restaurant cannot under any circumstances be considered to come under the commerce clause:

As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discused above and, thus, is at liberty to deal with such persons as it may select.

Gentlemen, that is the U.S. Supreme Court speaking. It is clear and it is unmistakable.

Neither the fact that some customers of an establishment may be traveling in interstate commerce nor the fact that some of the goods sold may have been purchased from outside the State constitutes commerce subject to control by Congress. In *Elizabeth Hospital, Inc.*, v. *Richardson*, U.S.C.A. 8th, 269 F. 2d 167, the Court held that the treatment of some patients who were traveling in interstate commerce did not destroy the purely local character of the services furnished by the hospital, and said:

The fact that some of plaintiff's patients might travel in interstate commerce does not alter the local character of plaintiff's hospital. If the converse were true, every country store that obtains its goods from or serves customers residing outside the State would be selling in interstate commerce. Uniformly, the courts have held to the contrary. (*A.L.A. Schecter Poultry Corp.* v. *United States*, 1935, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570; *Lawson* v. *Woodmere*, 4 Cir., 1954, 217 F. 2d 148, 150; *Jewel Tea Co.* v. *Williams*, 10 Cir., 1941, 118 F. 2d 202, 207; *Lipson* v. *Socony-Vacuum Corp.*, 1 Cir., 1937, 87 F. 2d 205, 265, 267, certiorari granted 300 U.S. 651, 57 S. Ct. 612, 81 L. Ed. 862 certiorari dismissed, 301 U.S. 711, 57 S. Ct. 788, 81 L. Ed. 1364.)

Congress is now asked to control the operation of country stores and hotels on the theory that their operation constitutes commerce

among the several States. The statement of the proposition, gentlemen, to my humble way of thinking, is absolutely so ridiculous that it need not be further refuted.

It is my understanding that the Attorney General of the United States has suggested to this committee that it disregard the decision of the Supreme Court of the United States in the *Civil Rights Cases*. I have always been under the impression that it was the duty of the Attorney General of the United States to advise congressional committees as to the present status of the law, the law as it exists today, the law as it exists when bills are introduced and when they are being considered by committees. I do not believe he has the authority to recommend to you that you exercise, on behalf of the Federal Government, power which the Supreme Court has specifically and unquestionably held to be unconstitutional.

In conclusion, I would like to ask certain Members of the Congress two questions:

(1) How long do you plan to bow to the unreasonable and unconstitutional demands of selfish minorities in your State?

(2) When do you expect to begin to represent the great majority of your own people?

Another question naturally follows—how far do you think the great white majority of this Nation will stand to be pushed?

Gentlemen, they have been pushed just as far as they are going to take it. The average American citizen, I have them coming by my office from every State in this Nation by the hundreds every day. I have over 150 letters and telegrams in my office today from all over this great Nation on questions similar to this.

The people of this Nation are disturbed. The people of this Nation are shocked. The people of this Nation, gentlemen, are absolutely disappointed.

Another thing; I have received many telephone calls from citizens in every State of this Nation. From California I have received many, many hundreds of calls. I have received many calls in the last few days. And I say to you seriously that our fine citizens have stood just about as much of this minority insanity as they can take. They are not going to take much more of that kind of punishment, gentlemen.

Gentlemen, you are just about to hear from the great, silent, substantially white majority of the people back home. You probably are hearing from them daily, day after day.

When John Doe and Ole Joe Q. Doakes on Main Street in every city, town, village, and crossroad in your State finds out exactly what is really in this legislation—just what the present U.S. Attorney General and the Negro minorities want today—turmoil will really break loose in this Nation.

It will break loose, gentlemen, not only in the South, but in all sections of this Nation. This is not a question of the Southern States by any means. It is a national question. It is a question for the American people, that they are all interested in.

It is not just the State of Mississippi, or Alabama, or Florida, or Georgia, or other Southern States. This is a national problem, and the people all over the State, this Nation, are vitally interested in preserving the great traditions that our forefathers so graciously handed down to us—a finely balanced Government.

Gentlemen, if you think 500,000 Negroes marching on Washington is something, you pass this legislation, and you'll find out what 100 million angry white Americans will do. It will bring them to Washington.

Please think deeply on these matters, gentlemen. I have no selfish motives on earth in this matter. I am vitally interested in this great form of government of ours which I think is the greatest form of government that has ever been promulgated for the people's benefit.

I am grateful to our forefathers for providing this great Government. But please think deeply on these matters. Think seriously as to how much the white man will take in having his rights chipped away with new legislation such as this and by each decision of the Federal courts. Are there no rights of the individual sacred today in this country?

Equality in a social sense is attainable only in total slavery. Justice Brandeis, who was a great justice of the U.S. Supreme Court, said, and I quote, "One of the inalienable rights of men is to be let alone." And you know so many times the government that serves best is the government that serves least. This certainly applies to the hard-working, small businessman.

Why should not the individual, who has worked to produce his own business, who has worked to build his own little motel, have the right for his restaurant or any other place of business, why should he not have the right to decide whom he will serve, why should he not have the right to decide with whom he will associate, and whom he will perform on his premises?

What we are about to experience in our Nation today is tyranny of the mob. The intent of this legislation is to steal away the fundamental rights of man toward man and manage his own private property as he pleases. It is to take away the right to manage and control and direct his own property as he sees fit.

The President and Attorney General are sowing the seeds of hate and violence. The Nation could reap a bloody harvest, which we certainly do not want. We want peace. We want to avoid bloodshed. We want to avoid turmoil. We want to avoid strife in every way that we possibly can. We want to keep good relations with the Negro race throughout the Nation, with others throughout the Nation.

Gentlemen, the Nation could reap a great bloody harvest if this bill should pass. Gentlemen, if you pass this civil rights legislation, you are passing it under the threat of mob action and violence on the part of groups and under various types of intimidation from the executive branch of this Government. This legislation must be defeated if this Nation is to survive as a constitutional republic of sovereign States.

Gentlemen, if we are going to have a strong National Government, we must have strong State governments. This legislation must be defeated, gentlemen, because it will help contribute to a more centralized government, and everywhere they have had centralization of government where it has gotten too centralized, those nations have weakened, they have crumbled, they have fallen.

Gentlemen, the decisions is yours. May God have mercy on your souls.

Thank you.

Senator MONRONEY (presiding). Thank you, Governor, for appearing here with your statement. I have appreciated the research that you have done, particularly on the interstate commerce matter, and our rights under that to pass Federal laws affecting what has heretofore been considered strictly local business.

I do find it very difficult, however, to sit here and not question very strongly your statement in the next to the last paragraph, "The President and Attorney General are sowing the seeds of hate and violence," and also that the Attorney General and the President have been encouraging demonstrations, freedom riders, picketing, and actual violation of local laws.

My information, and that which we received here, is that the President and Attorney General have tried to discourage these matters, aside from the Executive duties which compel any President to enforce the laws of the land, as the Supreme Court has interpreted them, whether you or I or others might agree or not.

I wonder if you have any evidence, other than the statement made in your text here, of sowing seeds of hate and violence, and the encouragement of demonstrations, to back up this charge that you could inform the committee about.

Governor BARNETT. Yes, sir, Senator Monroney. I have specifically in mind, if your Honor please, the speech that the President of the United States made recently in which he said, in substance, that the Negro is not being treated fairly, is not getting his just views, or words to that effect, and what else can he do except to resort to the streets. Those are similar words that the President of the United States made, and since that time, I think we have had a lot more demonstrations.

Senator MONRONEY. I can see no interpretation of that language that would encourage it. It recognizes the fact that Negroes have the constitutional right to demonstrate against what they consider to be the slowness of obtaining their rights.

But, I do feel that unless there is greater proof than that of the charge that the President and the Attorney General took part in encouraging these demonstrations, I, as one member of the committee, would disagree strongly with that part of your statement.

Also, I would be inclined to disagree with that part of your statement in the first page where you stated, "I am convinced that this is part of the world Communist conspiracy to divide and conquer our country from within."

Obviously, demonstrations of any kind in a democracy tend to upset the equilibrium of relationships. But I do not feel that anything has thus far been shown that these demonstrations are a part of a Communist conspiracy or a world plot to cause America to be weakened. Rather, I think they are indigenous to the people who are seeking more rights under what they suppose to be, and I believe are correct in assuming, the Civil War amendments that granted them certain privileges, especially in voting rights and other matters of that kind.

I wonder if you have anything to add to your statement that would indicate that these demonstrations are a part of a Communist conspiracy, or whether they are merely outbreaks of native American citizens who are using the streets to protest denial of rights that they believe they are entitled to.

Governor BARNETT. Yes, sir.

Senator, I specifically have in mind one thing. You recall that Martin Luther King has been a leader in the marches, the demonstrations of the agitators, particularly in the South, and probably some in the East. I have a photograph here that was printed by the Georgia Commission on Education, and I have confidence in those people, the Commission of Georgia on Education. In this picture there is Martin Luther King at a Communist training school. And this picture was made of Martin Luther King, of the Montgomery boycott and the Birmingham riots, backed by certain people.

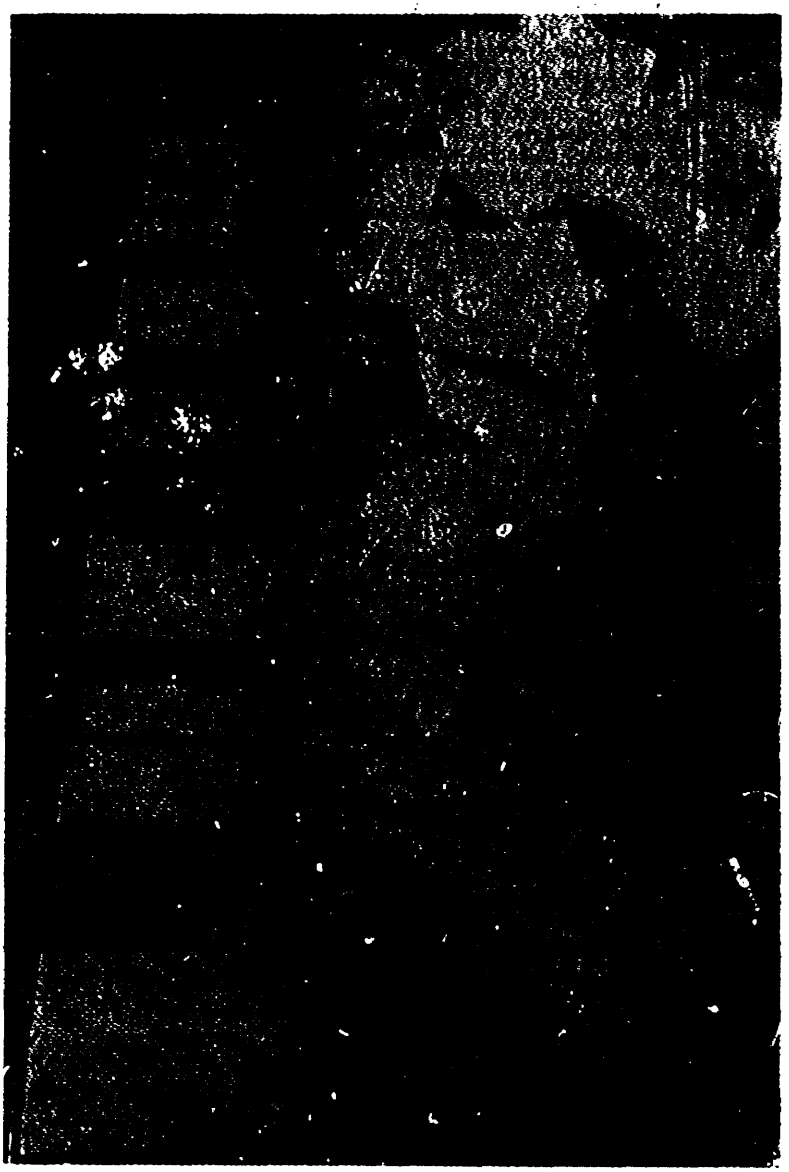
Second, Abner W. Berry, of the Central Committee of the Communist Party, is in this same picture, and I think you will recognize his picture when you see it, with Martin Luther King sitting on the front row; Aubrey Williams, president of the Southern Conference Education Fund, a part of this picture, with Martin Luther King, the Southern Conference Education Fund, of which Aubrey Williams is president, the transmission belt in the South for the Communist Party. Myles Horton, director of Highlander Folk School for Communist Training at Monteagle, Tenn., is in this picture, along with Rev. Martin Luther King, and Berry and Aubrey Williams and others.

And the Commission on Education of the State of Georgia called these the "four horsemen" of racial agitation have brought tension, disturbance, strife, and violence in their advancement of the Communist doctrine of "racial nationalism."

May I offer this for the record, Senator?

Senator MONRONEY. That will be accepted.

(The document follows:)



MARTIN LUTHER KING AT COMMUNIST TRAINING SCHOOL

Pictured (foreground):

(1) Martin Luther King of the Montgomery boycott and the Birmingham riots, backed up by the Kennedys,
(2) Abner W. Berry of the Central Committee of the Communist Party,
(3) Aubrey Williams, president of the Southern Conference Education Fund, Inc., the transmission belt in the South for the Communist Party,
(4) Myles Horton, director of Highlander Folk School for Communist Training, Monteagle, Tenn.

These "four horsemen" of racial agitation have brought tension, disturbance, strife, and violence in their advancement of the Communist doctrine of "racial nationalism."

—Reprint from Georgia Commission on Education.

Governor BARNETT. It is my idea that the very thing, the identical things that Martin Luther King, Berry, Horton, and others I have mentioned, they are trying—that is the very idea of the Communist Party, to create turmoil, to create strife, to bring about hatred, to bring brother against brother, to bring race against race, and finally, split the people, divide and conquer.

Sir, I believe that deep down in my heart that that is exactly what they are doing. Some of them may be ignorant of it, but that is what is happening, sir.

Senator MONRONEY. Would you identify the publication of which that is a part?

Governor BARNETT. I would be happy to do that.

Senator MONRONEY. Identify the publication.

Governor BARNETT. Georgia Commission on Education. That is a reprint.

Senator MONRONEY. A part of the official government of Georgia?

Governor BARNETT. Yes, sir, it is.

Senator MONRONEY. It is a branch of the State government?

Governor BARNETT. Yes, sir, it is. That is my understanding.

Senator MONRONEY. Have you ever inquired of J. Edgar Hoover or the FBI or the House Un-American Activities Committee as to the records of any of these men who have appeared in these demonstrations to verify whether or not they have a long history of Communist affiliation or association with Communist-controlled groups?

Governor BARNETT. I have no evidence from J. Edgar Hoover on that, Senator, but I would like for the——

Senator MONRONEY. He is the foremost authority on this.

Governor BARNETT. I would like for the committee, if I am not out of order, to write him and ask him if it isn't the tactics of the Communist Party and create turmoil among the races, and to stir up hatred and turmoil and to divide and conquer.

I believe he will unquestionably say that that is the purpose, that is what the Communists are teaching.

Senator MONRONEY. No one is denying that. I have seen it around the world. But what I am trying to find out is whether these individual demonstrations are Communist led, Communist planned, or whether they are merely the American citizens of color who are protesting for rights which they feel the Constitution guarantees to them. I think this is the difference. Certainly the Communists from any viewpoint, no matter where, profit by this disorder. But I feel, and I think it has been repeatedly brought out by witnesses before this committee, that the colored people who are demonstrating in these

cases are demonstrating because of their own feeling that they have been denied certain American rights which they seek. And it is not a Communist operation, although any demonstration may help in a way the Communist cause. Demonstrations of any type help Communist causes, whether it is by one group of citizens or by another.

I don't believe the members of this committee feel that there is any Communist conspiracy involved in the present demonstrations that have been going on in the United States.

Governor BARNETT. Yes, sir.

Senator THURMOND. Mr. Chairman, I would disagree with your statement there. I personally do feel that there is some Communist conspiracy behind the movements going on in this country.

Senator MONRONEY. The committee will be glad to have any witnesses. We would like witnesses, I think, from the FBI, and we would like witnesses that you would care to present. But I do feel that we would be doing ourselves and the Nation a great disservice by trying to brush off or sweep this problem under the rug by saying that the protests, the disturbances, and demonstrations are a part of some conspiracy overseas and that there is no deep-seated, purely American feeling that is involved in their creation.

Senator THURMOND. Mr. Chairman, I would not say that there is not a deep feeling on the part of a great many people in these demonstrations. I feel there is. And I feel that a great many of these people who are demonstrating are sincere in their actions during these parades, and so forth. But I still say that these parades, in my judgment, are inspired by the Communists, and I think it is part of the international conspiracy of communism.

Senator MONRONEY. Does the Senator have some witnesses he would like to suggest, beyond those he has already called?

Senator THURMOND. We expect to call some witnesses on various subjects. I don't know whether I will call any on this. I have reason for what I say.

Governor BARNETT. Senator, if I am not out of order——

Senator MONRONEY. Not at all.

Governor BARNETT. May I request this honorable committee to ask Edgar Hoover if the people in this particular picture are Communists; if any of them—Martin Luther King is on the front row, along with Berry, and others, and Williams—if any of them are Communists, and if so, what were they doing at Monteagle, Tenn. I would like so much to have an answer from him.

Senator MONRONEY. This committee would like to hear from J. Edgar Hoover on this and on the lifetime record of Martin Luther King or anybody else who is charged with being a Communist. This is very important to the committee, and we would like to have the full basis of evidence and not one picture as a basis to make our final determination.

(The following letter was subsequently received for the record:)

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., July 23, 1963.

HON. WARREN G. MAGNUSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: This is in response to your inquiry of the Federal Bureau of Investigation concerning the charges made at the hearings on S. 1732 that the

racial problems in this country, particularly in the South, were created or are being exploited by the Communist Party.

Based on all available information from the FBI and other sources, we have no evidence that any of the top leaders of the major civil rights groups are Communists, or Communist controlled. This is true as to Dr. Martin Luther King, Jr., about whom particular accusations were made, as well as other leaders.

It is natural and inevitable that Communists have made efforts to infiltrate the civil rights groups and to exploit the current racial situation. In view of the real injustices that exist and the resentment against them, these efforts have been remarkably unsuccessful.

I hope that this provides the information you were seeking.

Sincerely,

ROBERT F. KENNEDY,
Attorney General.

Governor BARNETT. Senator, may I say this. Very few Mississippi Negroes have demonstrated. They bring them in by the truckloads from other sections. They bring them in from New York. We don't know who they are.

The Negroes in Mississippi actually refuse to associate with them. But there are a few; they pick up a few. They picked up some in Greenwood, Miss., recently, and they talked to them for 2 or 3 days, and then they get them in a frenzy. They pass the plate and they get the money, and then they are gone, leaving turmoil and strife in their path.

I think when we look into the situation carefully and find out that a large number of these very people who are demonstrating are some who are actually Communists.

I have records, gentlemen, I would be glad to send you, of the many convictions against people who have been brought to Greenwood, Miss., and who have testified. I mean who have demonstrated in the streets of Greenwood. Several—I will write you if that is suitable, and give you the backgrounds of some who have demonstrated. You will see the type and the character of people who are the agitators coming to our State.

Our Negroes in Mississippi don't pay much attention to them. They didn't pay much attention to the "freedom riders."

Senator MONRONEY. We would be happy to receive any information you might give us.

Governor BARNETT. Yes, sir.

Senator MONRONEY. Senator Cotton, the ranking minority member.

Senator COTTON. Governor, I join in bidding you welcome to this committee. It is always a privilege to have a Governor of a great State appear before us, and the welcome would be yours anyway, but it is doubly so when you appear with our esteemed colleague, John Stennis.

There are two or three questions I must ask you, however. One point I would like cleared up, because I am a little confused by the evidence before our committee.

One page 7 of your statement you say that—

control over individual action by operators of private business lies within the power of the State legislatures. Some States have passed legislation on the subject, some have not.

And then you go on to say, and I quote, in the middle of page 7:

Mississippi has taken no action on this question. In our State the owner of each business is free to make his own decision as to whom he will serve.

In the memorandum on a State by State review of State law submitted to this committee by the Attorney General of the United States appears this notation:

Mississippi: Statute 4065, section 3, compliance with the principles of segregation of the races.

And then, in parentheses, by explanation:

(Public officials required to prohibit integration of the white and Negro races in public facilities or accommodations.)

I find myself confused. Is there a statute in Mississippi that requires public officials to prohibit and prevent integration of white and colored in public facilities and accommodations?

Governor BARNETT. Senator, not pertaining to private ownership. The laws of our State with reference to private ownership, motels, hotels, restaurants, the subject matter here that we are considering, there is no prohibitory law in Mississippi against an individual excluding certain people from restaurants, motels, hotels, or other places of accommodation. It is entirely up to the owner of that particular business as to whether or not he, the owner, wishes to accommodate certain people.

Statute 2046.5: under the subject of business customers, patrons, or clients—the right to choose—penalty for violation:

1. Every person, firm, or corporation engaged in any public business, trade, or profession of any kind whatsoever in the State of Mississippi, including but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barbershops, beauty parlors, theaters, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon, or serve any person that the owner, manager, or employee of such public place of business does not desire to sell to, wait upon, or serve: *Provided, however*, The provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

May I introduce this, Senator?

Senator MONRONEY. That will be received in the record.

(The remainder of the statement follows:)

2. Any public place of business may, if it so desires, display a sign posted in said place of business serving notice upon the general public that "the management reserves the right to refuse to sell to, wait upon or serve any person," however, the display of such a sign shall not be a prerequisite to exercising the authority conferred by this act.

3. Any person who enters a public place of business in this State, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

4. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall not affect any other portion of this act. (Mississippi Code—1942; Crimes—Title II.)

Senator COTTON. We know that you are a busy man with many responsibilities. Would you be willing, subject to approval of the Chair, to have someone connected with your attorney general's office, or your office, give to this committee a copy of and an explanation, so we can understand you clearly, of statute 4065.3, because if in this mem-

orandum from the Attorney General of the United States, there is information which is causing us to reach unfair conclusions, I think it should be cleared up.

Would you be willing to have that prepared and filed with the committee?

Governor BARNETT. Senator, I will be delighted to have that done the early part of next week. You should get a brief from the attorney general of Mississippi not later than, say, Wednesday of next week. Would that be satisfactory?

Senator COTTON. Any time.

Senator MONRONEY. The record will be kept open. I am sure we will be having hearings that long.

Governor BARNETT. I will see that it is done.

(The material referred to was not received prior to the time the hearings were printed.)

Senator COTTON. I have just one other point, Governor, that I feel I must raise for your consideration, and your answer. And I do it with complete friendliness and courtesy to you as the Governor of a great State.

Incidentally, may I say to you that I happen to represent a State where Yankees live. I represent a State which has very few racial problems. The people of my State are keenly interested in civil rights, but their approach is a thoughtful approach rather than an emotional approach which must sometimes, of necessity, prevail on each side of this question in other sections of our country.

I happen to be one of the members of this committee, I will say to you frankly, who has serious misgivings as to the power or the advisability of Congress seeking to control private property. However, I must say to you, Governor, that there is a subject upon which I have no misgivings whatsoever. More than 90 years ago the Government of this Nation gave a solemn pledge to the Negroes that they should have full political rights, full rights of citizenship, including the right to vote, provided they are able to comply with the same requirements that members of other races are required to meet.

On March 8, 1960, 3 years ago, I made a statement on the floor of the Senate, and in the preparation of that statement I secured certain information. I have attempted to bring it up to date, but have not been able to secure the exact present figures. But I think, Governor, you should probably expect to be asked this question, and I feel compelled to ask it.

I call your attention to the fact that as of 3 years ago in 15 counties of the State of Mississippi, there were no Negro voters, although in those 15 counties there resided 52,000 adult Negroes, and that in 11 counties in Mississippi, with an aggregate Negro population of 42,000, there was a grand total of 58 Negro voters.

You have made a very able and well-documented argument to this committee about the precise question before this committee, the matter of control of public-accommodation facilities. However, speaking as one member of the committee and as one very openminded in this matter, I cannot be quite as impressed by your presentation with the knowledge that this situation exists in the matter of the political rights of minorities.

I have been one to go very slowly in dealing by law with the social status of people in this country, but I believe that 90 years is too long

a time to wait for this Federal Government to give to the Negro his full voting privileges. I would like to ask you what the situation is today in your great State in the matter of Negro voters.

Governor BARNETT. Senator, I will be glad to try to answer that. In our State the population, the Negro population, is now about 43 percent. It was about 50-50, white and Negro. But today it is about 43 percent Negro and 57 percent white.

You know there are certain requirements, Senator, that a man has to meet before he is a qualified elector in the State of Mississippi. He has to be able to read and write; he has to certify that he has never been convicted of an infamous crime; the unlawful sale of intoxicating liquors in the last 5 years; and certain other requirements; and to be of good moral character. He has to prove those things, and a few other things, that are requirements.

He has to pay a poll tax of $2.

Senator, the Negroes don't have a right to vote. Neither do the whites. It is a privilege, the way I term it. If they want to exercise the privilege, they may vote in Mississippi.

A Negro can go before the registrar in the circuit clerk's office—and he is really the registrar—and if he meets the test, then he votes. If he fails to meet the test, and he is dissatisfied with it, then he can appeal to the executive committee, the county committee, then he can appeal to the courts.

You would be surprised the number of Negroes in Mississippi—and I believe I can say in the South—that don't really have an ambition to vote, Senator. They don't seem to want to vote.

For instance, I have prosecuted a Negro by the name of Goldby. It went to the Supreme Court five or six times, stayed in court 7 years. One of the questions on appeal was that we didn't have a Negro on the jury in Mississippi. And Federal Judge Cox, of Oxford, Miss., took testimony and the testimony showed that over a period of about 20 years, only three offered to register.

They have a right to register. They have a right to vote. And I don't know of any circuit clerk in Mississippi who discourages Negroes to vote.

There are probably now about 30,000 Negroes who are voting in Mississippi. Of course, that is not in proportion to the whites. I will admit that. Many of them, of course, are not educated. Many of them don't have any ambition to go to school. But we are trying, Senator, in every way that we know how, to educate the Negro.

For instance, in the last 12 years, since 1950, the State of Mississippi has spent $100 million in building classrooms for schools—whites and Negroes. Local authorities have spent $90 million in the construction of school facilities.

Sixty-three percent of that money has gone into the Negro schools, although they have only 43 percent population. And 37 percent of that $190 million has gone into the white school facilities.

You would just be surprised to see a lot of the Negro schools, public schools, high schools, and colleges in Mississippi, really and truly they are better in some instances than the whites', in particular, in some of the large towns in Mississippi.

And I will say this, Senator, to show you how the Negro enjoys living in Mississippi, 90 percent of those who finish high school and

college remain in the State of Mississippi; 25 percent of our homes are owned by the Negro population; 25 percent.

In Mississippi we think that we treat the Negro much better than they do in a lot of States. For instance, I will give you one specific example. In Mississippi we have 1 Negro schoolteacher, Senator, to every 135 Negro people. Not pupils, but just Negro citizens.

South Carolina is about the same, and Georgia and Alabama and other Southern States, 1 Negro teacher to every 135.

In New York there is only 1 Negro teacher to every 500 Negro citizens.

In Ohio there is only 1 Negro teacher to every 485 Negro citizens.

We are doing what we can with the finances that we have to educate the Negro. We spent millions of dollars in the last 2 or 3 years during our administration, Senator, in making Jackson State College a No. 1 institution, and it qualified last year. And it won the championship of the Nation. Jackson State College, a segregated Negro college. And believe me, they are proud of their teams; the Negroes are proud of their team.

I gave all of them a certificate of appreciation in the Governor's office after they had won the national championship.

There are many Negroes who are wealthy in the State of Mississippi.

The CHAIRMAN (presiding). The audience will please refrain.

Excuse me Governor. With the visitors here we will have to maintain as much decorum as we can for the witness. Thank you.

Go right ahead.

Governor BARNETT. I will say one other thing. The Negroes pay 10 percent of the taxes; the white people pay 90 percent of the taxes. But in the last 12 or 14 years the Negroes have actually received a lot more money than the whites in trying to educate them so they can become better citizens.

We work side by side, Senator, with Negroes in Mississippi. We don't have any trouble with the Negroes in Mississippi. It is outsiders coming into our State, gentlemen, who are creating the trouble.

Senator COTTON. Governor, I appreciate the thoroughness and the deep sincerity of your statement. Again I say that no person living in a far distant State can fairly judge the problems which are, as you have brought out in your statement, obviously of a different character.

I am not questioning your own personal interest and kindness, and the kindness of the people of Mississippi, to the Negroes. In fact, I sat in the Appropriations Committee of the Senate a couple of years ago and heard John Stennis fight with sweat on his forehead for an appropriation dealing with tuberculosis, to which his colored people were particularly susceptible, he said, and they needed that Federal help. He fought for it as I have never heard a man fight in the Senate.

But Governor, you have described, and I am delighted to hear about, the educational opportunities that you are affording Negroes in Mississippi; about the increasing excellence of their schools and of the higher institutions and their colleges; of the property they own; the taxes they pay. It is very difficult for me to understand that with that degree of education that there are still counties in Mississippi with thousands of Negro residents where either not a single Negro or only a baker's dozen ever vote.

Certainly more than that are educated to the point where they can pass a literacy test. Certainly if they have that education and own

property and pay taxes, there must be some of them who develop an interest.

If there is no difference in the test that is applied to a white man and Negro in qualifying to vote; if there is no intimidation or fear placed upon them; if they are rapidly, and in large numbers, receiving the benefit of education, it is hard for me to understand where whole counties, with thousands of Negro residents, have in some cases none and in some cases only 53 out of 42,000—53 actual voters. Of course, I don't know why I am getting so excited about the vote down there. If they vote they will vote Democratic anyway; I know that. [Laughter.]

But I feel very strongly, Governor, that when you come to this committee on the question which is specifically before it—and I am talking about a different question, but one which will be attached immediately to any bill that comes out of this committee to the floor of the Senate—I just can't, even with your very fine explanation, quite accept the conclusion that out of those vast numbers of Negroes having school facilities, holding property, and paying taxes there should be such a very, very small number who can't secure the privilege or dare to exercise the privilege of casting their vote. That is all that I wish to cover unless there is any comment you wish to make. I won't pursue this further.

Governor BARNETT. The same tests in all the registrar's offices in the State of Mississippi are given to both of the races. Identical same test. And if anyone has been discriminated against, I don't know anything about it, frankly.

Senator COTTON. Would you tell me this, Governor: You have expressed yourself very ably and very forcefully, and you have from me, at least, a certain amount of agreement about the power of the United States being used to deal with private property rights and with a person's control of his own business. Do you believe, however, that further steps should be taken by the Federal Government to insure a fair chance to vote, an equal chance to vote without fear, without intimidation, by every colored citizen in every State in this Union?

Governor BARNETT. Senator, I think the proposition of the privilege of voting is a matter that should be within the exclusive jurisdiction of each State.

Senator COTTON. Now wait a minute; wait a minute. The Constitution of the United States very clearly indicates and it has been so interpreted by the Supreme Court—I am talking now about voting in national elections, the election of Congressmen, the election of Senators, the election of the President of the United States. I recognize the fact that if a State chooses to hold the election of is own officers in a separate election, they may have some control over it. It is questionable whether it can be reached by the Federal Government. But I am talking about voting in national elections, and that I submit to you, Governor, is clearly within the purview of our Constitution.

Governor BARNETT. Senator, they have the right to vote. It is a privilege if they want to exercise that privilege. And if they exercise the privilege, if they are qualified, if they are people of good character, if they are people who pay the poll taxes to help keep the schools going, if they haven't been convicted of a crime, if they meet all of the requirements, they can testify—I mean they can absolutely

vote. It is just a matter of whether or not they can meet the requirements.

Senator COTTON. Forgive me, and I don't want to press you and most certainly I wouldn't seek to embarrass especially you, a Governor of a State for whom I have great respect, but that is not quite the answer to my question. Subject to a careful scrutiny of the form of the legislation, if God gives me strength and keeps me alive until we vote in the Senate, I intend to vote to further strengthen, as has been requested by the President of the United States, and to make more rapid and effective the laws to guarantee every political right on an equal basis, every political right of every citizen.

Now you have quite justifiably and with a very fine argument suggested that I should not vote in this committee and on the floor of the Senate to reach the arm of the Federal Government into the control of private premises. But I think it is only fair for me to ask you if you go along with me that the Federal Government should make fully effective the right to vote in Federal elections of all citizens; that there shall be only one class of citizens as far as voting and political rights exist in this country.

Can you go along with me or do you disagree?

Governor BARNETT. Senator, they already have that right. They have the right to vote. It is a matter of the Negro coming to the registrar's office and convincing the registrar, who is elected by the people, that he is qualified, that he can meet the test. It is a privilege, and if he can qualify, he can vote in Mississippi just the same as anyone else can vote.

Senator COTTON. There are pending now, I believe, are there not, actions before the courts by the Civil Rights Commission, or by someone representing them, against certain registrars in your State, and I don't expect any State to have perfect public officials everywhere and every place.

This is a matter of enforcing the right. And you and I agree on the right. Do we agree that the Federal Government should see to it that that right is enforced in Federal elections?

Governor BARNETT. Senator, I don't think so, because it would be whittling away another right that belongs to the States.

Senator, if we continue to whittle away the rights of the States, we are going to finally end up with a powerful central government.

And when we do that, I think we will be in jeopardy.

I think the Federal Government already has passed legislation along that line. I don't recall just what, but it doesn't go that far.

I think it is a matter, Senator—excuse me.

Senator COTTON. It has passed such legislation, and I was one who supported it, although I did not support title III in the bill passed by the Congress. I believe the main question now left is expediting the enforcement by securing more rapid court action. But I don't want to go into these technicalities.

I thank you for the frankness of your answers. I again express my pleasure at hearing you testify before this committee, and I trust you know my questions were asked not in a hostile way but to try to meet squarely some of these issues I think should be met.

Governor BARNETT. Thank you.

The CHAIRMAN. Off the record.

(Discussion off the record.)

The CHAIRMAN. Governor, I have some questions I want to ask, but I will forego them until the rest of the members of the committee have asked theirs.

There is one thing I think we ought to clear up, and I'm sure that you didn't intend to imply this in one part of your statement to the committee. You say "you"—and I assume you mean by "you" the Members of Congress and the members of this committee—"have been forced to consider this legislation through pressure and blackmail of mobs in the street."

Congress is not forced to do anything that they don't think is necessary to do, or that they don't think is in the best interest of the United States. We are a legislative body, and we have a responsibility to consider legislation. Civil rights legislation of all kinds has been considered in Congress almost continuously. I think the first bill I introduced in the Congress of the United States when I came here 26 years ago was a bill on the poll tax. And I have been voting and discussing civil rights legislation on and off for at least that length of time.

We are not forced to consider any legislation. It happens that this legislation was sent up by the President of the United States, and we have the responsibility and surely the courtesy if a Chief Executive determines that this problem is sufficient to consider legislation, to do so. And I'm sure that you don't want to leave the impression that Congress is being forced to do anything.

Governor BARNETT. No, sir, I don't mean at all that anyone is being forced. What I had in mind is all the pressure that is going on, turmoil, and demonstrations. I know that the Congress and Senators will use their own judgment and not the judgment of minority groups. I know that.

The CHAIRMAN. I appreciate that, and I'm sure you didn't want to convey that impression.

Governor BARNETT. You are considering it in this kind of an atmosphere, I should say.

The CHAIRMAN. Sometimes these demonstrations pinpoint a problem, and bring it to attention to a greater degree than at other times.

You will find this Congress, and I know many Congresses, are not forced or blackmailed into anything. If anyone thinks that by demonstration or not doing things in a peaceful and proper manner with responsibility, proponents or opponents of legislation are going to help their cause, they are sadly mistaken.

The Senator from South Carolina, I believe, is next.

Senator THURMOND. Thank you, Mr. Chairman.

Governor Barnett, you have made a magnificent statement. You have the reputation for being an able and outstanding and a distinguished lawyer. In my judgment the argument you have presented here this morning opposing this bill is unanswerable.

If this bill should be considered from the standpoint of the 14th amendment, the decision of the Supreme Court in 1883 would have to be overruled, would it not?

Governor BARNETT. Yes, no question about that. That is the law today. That decision would have to be overruled.

Senator THURMOND. If this bill were passed, it would practically be equivalent, as you said, to Congress, the Federal Government, controlling every act of every citizen in every State, would it not?

Governor BARNETT. Yes. It would control their actions in many, many ways.

Senator THURMOND. I believe the Attorney General—I don't want to be unfair to him—I think he insinuated, if he didn't say, and so did Mr. Burke Marshall, the Chief of the Civil Rights Division in the Department of Justice, that the Supreme Court today would or might overrule the decision of 1883.

But in 1959, just 3 years ago, in the case of *Williams* v. *Howard Johnson*, decided by the Fourth Circuit Court of Appeals, it was held in these words:

> We do not find that a restaurant is engaged in interstate commerce merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from State to State. As an instrument of local commerce the restaurant is not subject to the constitutional and satutory provisions discussed above, and thus is at liberty to deal with such persons as it may select.

That was the decision of the Fourth Circuit Court of Appeals saying that a business is at liberty to deal with such persons as it may select.

So if this bill is passed here today, this would be an attempt to upset, would it not, the finding of the court, of the Fourth Circuit Court of Appeals in 1959?

Governor BARNETT. Yes. It would have to reverse or overrule the decision in the *Williams* v. *Howard Johnson* case.

Senator THURMOND. If it were held constitutional, of course, which I doubt——

Governor BARNETT. Yes.

Senator THURMOND (continuing). It seems to me, Governor, in the case of *Elizabeth Hospital* v. *Richardson*, where the court held that the treatment of some patients who were traveling in interstate commerce did not destroy the purely local character of the services furnished by the hospital, the court made this significant statement:

> The fact that some of plaintiff's patients might travel in interstate commerce does not alter the local character of plaintiff's hospital. If the converse were true, every country store that obtains its goods from or serves customers residing outside the State would be selling in interstate commerce. Uniformly, the courts have held to the contrary.

And numbers of cases are cited there. Isn't that good law and hasn't that been the law throughout this country from the time the Constitution was written in 1787 and adopted subsequently?

Governor BARNETT. Certainly that has been the law ever since this Nation was formed and since the Constitution was written. And it is the law today.

Senator THURMOND. And if this bill should pass, it would be as you said on page 14 of your statement:

> The Congress would be controlling the operation of country stores and hotels on the theory that their operations constitutes commerce from the several States.

Wouldn't that be a ridiculous construction for the Congress or the Supreme Court to take under the interstate commerce clause?

Governor BARNETT. Yes, it would.

Senator THURMOND. Would it not be an impractical position for the Congress or for the Court to take of the interstate commerce clause?

Governor BARNETT. It certainly would.

Senator THURMOND. Would it not create tensions and tend to divide our people in this country when this is so unnecessary?

Governor BARNETT. Unquestionably it would.

Senator THURMOND. In your statement you said: "Equality in a social sense is attainable only in total slavery," with which statement I heartily agree. That is one of the propaganda tools used by the Communists, that we must have equality. They don't speak of freedom. If you have freedom, that very freedom itself prevents equality, does it not?

Governor BARNETT. Yes, it does.

Senator THURMOND. Doesn't that prevent people who have more ambition and more energy and more initiative to develop themselves physically, to develop themselves mentally, or spiritually, and would it not impede people who wish to forge ahead? As the gentleman, Mr. Hicks from Missouri, said this morning, he started with nothing and now he has a business, one business alone worth a million dollars, and many other businesses.

Wouldn't his type of philosophy, if adopted in this country, tend to destroy our private enterprise system?

Governor BARNETT. Yes, it would. Many businesses would certainly fold up. They would go out of business, just like the lady of Winona, Miss., went out of business recently.

Senator THURMOND. If this legislation is passed, would it not be equivalent to confiscating a man's property in violation of the 5th and 14th amendments to the Constitution, which provide that no person shall be deprived of life, liberty, or property without due process of law?

Governor BARNETT. Yes.

Senator THURMOND. Governor, I can ask you many questions, but your statement is so excellent, it is so comprehensive, it answers so well the questions that have been raised in these hearings, that I think I shall not proceed further.

I would like at this time, Mr. Chairman, in response to a question that came up a few moments ago when the Senator from Oklahoma was presiding, as to what effect the Communists or Communists infiltration is having on demonstrations throughout this country, to place in the record at this time a statement by the distinguished Senator from Mississippi, Mr. Eastland, in the Congressional Record of May 25, 1961.

The CHAIRMAN. Without objection, it is so ordered.

(See app. VI.)

Senator THURMOND. I shall read just one paragraph of this at this time.

Mr. EASTLAND. Mr. President, the agent provocateurs who have descended upon the Southern States in the name of "peace riders" were sent for the sole purpose of stirring up discord, strife, and violence. "Peace riders" is a revered Communist term, an old Communist technique. The movement was masterminded and directed by an organization known as the Congress of Racial Equality, called CORE. This organization is the war department of those who sell hate, collect donations, and sow the seeds of discord in this country. Since its inception, its creed has been lawlessness and its tactics have followed the pattern set by Communist agitators the world over.

Prior to the sit-in demonstrations that started in the Southern States in 1960, CORE confined its activities to cities in the North and border States, and received little public notice. With the advent of the lawless sit-in, it

moved in and took over the direction of the whole movement. Steve Allen signed a recent fundraising letter given wide circulation by CORE—

And so forth.

This CORE circulation together with the NAACP have been the leaders in these demonstrations, have they not?

Governor BARNETT. Yes, they have.

Senator THURMOND. I think the article that I have just placed in the record about CORE, its leaders, and the Communist connections of its leaders will be of interest to the members of this committee, and to the people of these United States.

I also offer for the record an article appearing in the Congressional Record under date of February 1956, subtitled "Subversive Character of NAACP," by Representative Gathings, of Arkansas, which shows the Communist affiliations and connections of the NAACP leaders.

The CHAIRMAN. Without objection.

(See app. VII.)

Senator THURMOND. And I would like to say further that another organization, known as Southern Conference Educational Fund, which has been labeled by the Internal Security Subcommittee of the U.S. Senate as a transmission belt of the Communist Party, United States of America, has been active, too. There is one called Carl Braden and one Anne Braden who are field representatives for this Southern Conference Educational Fund, who have been traveling all over the South organizing demonstrations.

This Carl Braden recently served a Federal prison term for contempt of Congress when he refused to tell the House Un-American Activities Committee whether or not he was a Communist.

Mr. Chairman, I had hoped to get it here by now, but I shall place in the record later, the background and the Communist relations and connections of some of the leaders of the NAACP, another organization which is stirring up strife and leading demonstrations and creating violence in this country at this time.

Again, Governor, I want to congratulate you on a very enlightening statement which I wish every American citizen could read. It is a pleasure to have you here, and I commend you for your courage, for your ability in handling the problems of very great difficulty in your State, and for the service you are rendering to your State and Nation.

Governor BARNETT. Thank you, Senator.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from Alaska.

Senator BARTLETT. Governor Barnett. I shall say, too, that I consider you have made a powerful argument for the cause in which you so firmly believe.

Do you know, Governor, if Aubrey Williams is considered of Communist affiliation? He was one of the men pictured in the——

Governor BARNETT. May I look through this pamphlet just for a second?

Senator BARTLETT. Surely.

Governor BARNETT. Senator, I will be glad to make an investigation of that question you asked. I don't have any information that he is a Communist. The only thing I have in my file with reference to Mr. Williams is that he is with the—he works for the Youth Activities, a close friend of this group, whose picture I have filed here,

publisher of "Southern Farmer," a member of the Workers Alliance.

Senator BARTLETT. It will be altogether agreeable with me if you care to submit anything further on this in writing.

Governor BARNETT. I don't say that he is at all. I will be delighted to supply you with any information, and I would like to have that opportunity, that I may be able to find with reference to him.

Senator BARTLETT. Thank you.

(Information requested follows:)

[Excerpt from "A Report to the 1962 Regular Session, Mississippi State Legislature," by the General Legislative Investigation Committee]

AUBREY W. WILLIAMS, MONTGOMERY, ALA.

Aubrey W. Williams was identified as president of the Southern Conference Educational Fund, Inc., who had been a member of the board of the Southern Conference for Human Welfare. He also identified himself as editor and publisher of the Southern Farm and Home, a farm publication. Mr. Williams was identified by a witness as one who had been a member of the Communist Party. He was also identified by another witness as one who accepted the discipline of the Communist Party. Mr. Williams denied that he had ever been a member of the Communist Party or that he had ever accepted Communist Party discipline, but he admitted that he had been connected with a number of Communist-front organizations. He admitted also that on September 11, 1947, he made the following remarks in an address at Madison Square Garden, New York City, with reference to the Government's loyalty program:

"What they demand is that any man who admits to being a member of the Communist Party be fired immediately on the grounds that no man can be loyal to the United States and be a Communist. It is my belief that it is precisely at this point that we take our stand and defend the right of any Communist to maintain his position as an employee of the Government of the United States. To take any less position than this is to throw overboard such primary rights as the freedom to think and to hold whatever beliefs one chooses."

Senator BARTLETT. Governor, you informed the committee that it is your belief that much of what is occurring in the United States in respect to this racial situation is Communist inspired. Then you went on to say that many individuals and agencies, including the FBI, are concerned, in your words, about the real motivation of these so-called civil rights leaders.

I should like, sir, to ask you this question: Is this definite information known to you, that the FBI is concerned, or is this supposition?

Governor BARNETT. Well, from talking to two individuals, they think that the activities of these agitators, the activities of some of the leaders—I don't say all—of the NAACP, and demonstrators, are similar to the activities of the Communist Party. And a picture such as I handed the Senator, the chairman this morning, certainly convinces me that some of the leaders who have visited many States and organized Negro groups to march and to demonstrate are close friends of some of the Communist leaders.

Senator BARTLETT. When you say, Governor, individuals with whom you have talked, are we to infer that you mean individuals within the Federal Bureau of Investigation?

Governor BARNETT. Well, the State of Louisiana had an investigation some time ago, and as I recall the committee that made this investigation reached the conclusion that it stems from the activities of the Communist Party. I would like to furnish you with a report of the Louisiana investigating committee, if I may, Senator.

Senator BARTLETT. Thank you, I should be very pleased to see that.

But to return, if I may, more specifically to your statement about the concern of the FBI, do you have information that the Federal Bureau of Investigation believes that some of these so-called civil rights leaders are dominated by the Communists?

Governor BARNETT. I don't have anything before me, Senator, that is official.

Senator BARTLETT. It is your belief, however, that the FBI entertains this fear?

Governor BARNETT. It is my belief that the FBI believes the leaders—the leaders of the FBI believe that the activities of the Communist Party are very similar to the activities of these agitators.

Senator BARTLETT. Is it your opinion likewise that the Communist Party furnishes, again in your words, "the real motivation behind these so-called civil rights leaders?"

Governor BARNETT. I do, sir. I believe that, because one of the purposes of the Communist Party, Senator, is unmistakably to divide the people, and that is exactly what these agitators have been trying to do, is to stir up brother against brother, race against race, and to bring about turmoil and strife and discord, and to—I can't see any other conclusion that anyone could reach except to divide and conquer.

Senator BARTLETT. I infer that you would regard it as an act of appeasement on the part of the Congress if this bill were to be passed?

Governor BARNETT. Yes.

Senator BARTLETT. And you equate, according to your statement, the type of appeasement which would flow from such an action with which you describe as our policy of appeasement toward Cuba and Laos?

Governor BARNETT. Yes. I don't think, Senator, that when you appease a lot of those people, when you study their backgrounds, study their thoughts and their actions, the appeasement that they might temporarily receive wouldn't last long.

There was an article, I understand, in the U.S. News & World Report along that line recently. I don't remember which issue. I know of one Governor in the United States who told me—I'm not privileged to tell his name, that he had a lot of trouble with a minority group. He appointed several to his positions of honor and trust and responsibility in State government, and now it is worse than it ever was with him.

Senator BARTLETT. Governor, you expressed a belief to the committee that if this bill is passed, it will only result in pressure for, as you described it, more and more and more. What direction do you think further demands might take?

Governor BARNETT. Well, it is just a group of people, Senator, that I don't think you can satisfy. They are not going to be satisfied. When you study the background of a lot of these people, advocating—I mean, not the Congressmen or Senators, but the people who are demonstrating—when you start to try to appease them, and they know that you are trying to appease them, then they are going to demand more and more, and you just get into mighty deep water.

Senator BARTLETT. What do you think they might demand next, after this?

Governor BARNETT. Division of property, land grants. I think, Senator, frankly, that the ultimate aim of the NAACP, the Negro race, is to bring about complete amalgamation.

Senator BARTLETT. Of what nature?

Governor BARNETT. Integrate, intermarry, bring about complete amalgamation. That is my honest opinion as to what many of the agitators really want.

Senator BARTLETT. And you believe that the legislation here under consideration is sought by a minority of the people in the United States?

Governor BARNETT. Is what?

Senator BARTLETT. Is sought by a minority of the people of the United States, that it is agreeable to the minority only?

Governor BARNETT. I didn't quite hear the question.

Senator BARTLETT. Do you believe that legislation of this kind is sought and/or approved only by minority groups within the United States?

Governor BARNETT. Yes, sir; Senator, I certainly believe that, sincerely, that the majority of the American people don't want legislation like this.

I think if this were left up to the American people to vote, a secret ballot, I believe an overwhelming majority of the American people would vote not to pass this bill, to permit the individuals to control and direct their activities as they see fit.

Senator BARTLETT. Governor, did Mrs. Staley have to, in a legal sense, close her restaurant in Winona?

Governor BARNETT. Will you ask the question again?

Senator BARTLETT. Was she required to close her restaurant by any provision of law?

Governor BARNETT. Not by any court order. What happened, Mrs. Staley operated this restaurant in a town of about 4,000, I guess, people. It is a Continental Busline Terminal, Winona, Miss. She was told by the Continental Bus officials that they were being told by the Department of Justice that she was going to have to close the business or integrate. So she attempted to integrate, and it didn't work. And she told me that she was closing her business, her lawyer told me the same thing, and her attorney—I can furnish her lawyer's name in a day or two—said that she has closed it, and as a result of not being able to get along by integrating, the white people won't stand it at all; the Negroes didn't like it, They had a nice compartment; they were all getting along well.

The customers were happy. She was making a good living. Seven or eight employees were doing well. As a result, Senator, which I think is going to happen in many, many places throughout especially the South and other areas, she closed her business. Now it is vacant. She still has a lease on it, however. $20,000 worth of equipment is in there. Seven or eight people are out of work, and the customers, 99 percent of them, are unhappy.

Senator BARTLETT. Governor, what if Mrs. Staley had said, when advised about this by the Trailways people, that she didn't care to integrate?

Does the Department of Justice have any law under which they could have compelled her to do so?

Governor BARNETT. Yes, sir. She told them that, time and time again, Senator. She begged them not to require her to integrate.

Senator BARTLETT. A law by which she could have been required——

Governor BARNETT. The Interstate Commerce Commission, I understand, just takes over interstate travel like that. I think under their ruling she either has to comply or fold up. The property was owned by the Continental Bus Co.

Senator BARTLETT. I see.

Governor BARNETT. And, Senator, they were called on. The Justice Department, I understand, called on the Continental Bus Co. that the company would have to close.

Senator BARTLETT. It wasn't her property?

Governor BARNETT. It was the bus company's property, not her property, except the personal property. The chattels, the movable things were hers. It was a terminal cafe.

The CHAIRMAN. Governor, I want to get this in perspective. This was a matter that was decided in the *Boyington* case, in interstate commerce, and therefore, the ICC was carrying out the order of the court in terminals and things of this kind, all over the United States.

Governor BARNETT. Yes, sir.

The CHAIRMAN. If you look up the *Boyington* case that is where the court made the order. I think it came out of Virginia, *Boyington v. Virginia.*

Governor BARNETT. Yes, sir.

Senator BARTLETT. Governor, I don't correct one part of your testimony with any pride, but a correction must be made on a factual basis.

You said, "There is a Communist nation just 90 miles from our own shore." Actually there is a Communist nation much closer to our shores than that, because Russia, owning Big Diomede Island in the Bering Straits, is separated from Little Diomede Island, owned by the United States by 2½ miles.

Governor BARNETT. Thank you, Senator. You are correct.

Senator BARTLETT. Finally, one question further. You say, and I quote your words on page 6 of your statement, Governor Barnett:

> Perhaps this is all a part of a great conspiracy to divert our attention to this domestic issue so that we may neglect other and far more important matters.

What would you consider to be the source of this conspiracy?

Governor BARNETT. Well, perhaps I don't say it is, as a matter of fact, but I made that suggestion, that it probably or possibly could be part of the opposition to divert attention to this issue, so that you may neglect other matters. For instance, foreign policy matters.

Senator BARTLETT. Who would be bringing this about so that this diversion could take place?

Governor BARNETT. Sir?

Senator BARTLETT. Who would be bringing about this diversion so we would be forgetting other and more important problems?

Governor BARNETT. I wouldn't be in position exactly to say who would bring it about.

Senator BARTLETT. But you have a belief——

Governor BARNETT. I have an idea that it is a fact, though. That is just my own conclusion.

Senator BARTLETT. Thank you, Governor.

I have no further questions.

The CHAIRMAN. Governor, would you apply the same forces to the Congress in 1875 when they passed a similar law? Were the same forces at work?

Governor BARNETT. What forces, Senator?

The CHAIRMAN. You talked about this as a great conspiracy to pass this legislation, one that is Communist inspired?

Governor BARNETT. No.

Senator BARTLETT. I wonder if in 1875 the same thing happened with the Communist Party?

Governor BARNETT. No, I wouldn't say that.

The CHAIRMAN. There is one other thing I am sure you want to clear up. You called attention to certain people, in this particular case the demonstrators, who seemed to be acting like Communists—using communistic tactics, I believe you said.

Governor BARNETT. Yes, sir; that is right.

The CHAIRMAN. Of course, these types of tactics have been going on in history for many hundreds of years, have they not?

Governor BARNETT. Well, not in my day they haven't.

The CHAIRMAN. Not in my day, either, but you can attribute the same type of tactics to many organizations. They are not necessarily Communist. The Communists have borrowed some tactics that have been used in history. I don't like it; you don't like it.

Governor BARNETT. You are correct.

The CHAIRMAN. But they haven't any monopoly on those tactics?

Governor BARNETT. No.

The CHAIRMAN. The Senator from Vermont?

Senator PROUTY. Governor, I think you have contributed a great deal to the work of the committee this morning, by virtue of the fact that you have represented a point of view which I am sure is shared by a great many of the voters in your State. I would like to say that that same point of view has been very ably reflected by your two distinguished Senators—I see one of them here at the present time, Senator Stennis—and also, Congressman John Williams.

I had intended initially to pursue the questioning which Senator Cotton engaged in, namely, voting rights. But inasmuch as that was covered so thoroughly, I won't pursue it further.

I would like to ask you just one question, however. Do you think there is any merit in the suggestion that a sixth-grade education be a primary qualification for voting?

Governor BARNETT. I don't think, Senator, that we ought to just draw a line of demarcation. I don't believe we ought to say a sixth-grade education is sufficient. I know of people who have finished the eighth grade who wouldn't have sense enough to vote. I know of several.

Senator PROUTY. I suppose there are some college graduates who might be placed in that category, too.

Governor BARNETT. I know of a number in high school. I believe that we should take the commonsense view of the thing, not only what he has learned in his books, but what he knows about government, whether or not he has made a study of government, whether or not he is practical. Many, many qualities that he has or doesn't have—I don't believe we just ought to—the registrar ought to have discretion to question the man and let him, who is elected by majority of the people of his county, reach the conclusion, after studying the man, after hearing him talk, and after finding out his background, whether or not he is educated sufficiently to vote an intelligent ticket.

Senator PROUTY. Governor, do you think all voters in your State are throughly conversant with every facet of Government?

Governor BARNETT. No, sir, I don't think they are all conversant. I think the registrars are bound to make some mistakes. I am sure that they do at times. They are human beings, and we are all subject to error. And certainly they reach the wrong conclusions at times.

Senator PROUTY. You have made several references in your statement to the plight of the small businessman, assuming this legislation became law. Does that apply to big business?

Governor BARNETT. I think it applies to all businesses. I think—I just don't think that it is good for the small businessman or the man who operates a huge corporation.

Senator PROUTY. What about chainstores which operate in all States of the Union and where stock is owned by thousands of people who live in all sections of the country, who may disagree with the views in your State. Are their rights being transgressed?

Governor BARNETT. I think so. I think it is an invasion on their property rights. I just think that they have a right to control and direct their own activities in their business as they think proper. I believe they ought to be entitled to employ whoever they please. I believe that they ought to be able to operate their business as they think proper, and not be under control and direction of someone from Washington, or someone who doesn't understand his particular problem.

Senator PROUTY. If I own stock in some company which operates in Mississippi, I probably don't understand the problem there.

Governor BARNETT. That is right.

Senator PROUTY. But I may feel that my company, the company in which I own stock, should be allowed to integrate if it so desires.

Governor BARNETT. They are privileged to do that in our State if they want to.

Senator PROUTY. Does a State commit an unconstitutional act if it forbids Negroes to eat in restaurants patronized by whites?

Governor BARNETT. I didn't hear the last part of the question.

Senator PROUTY. Does a State commit an unconstitutional act if it forbids Negroes to eat in restaurants patronized by whites?

Governor BARNETT. Yes, sir; if it is a State action, according to recent Supreme Court decisions, it would be unconstitutional.

Senator PROUTY. Does a State permit an unconstitutional act if it forbids Negroes to enter public schools attended by whites?

Governor BARNETT. Senator, I think the 10th amendment would probably cover that question, which provides that the powers not granted by the Constitution to the Federal Government, and when not prohibited by the Constitution to the States, belongs to the States respectively or to the people.

Senator PROUTY. I think there is some question perhaps about that. I think I refer to *Hays Brown* v. *Board of Education of the Department of Education*, in which I think the 14th amendment was said to apply. Article 6, clause 2 of the Constitution provides in part, and I quote, "This Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land."

Does the Constitution include and incorporate interpretation of its language by the Supreme Court?

Governor BARNETT. Will you ask that again, please, the latter part?

Senator PROUTY. Does the Constitution include and incorporate interpretation of its language by the Supreme Court?

Governor BARNETT. I don't think so.

Senator PROUTY. In other words, the Supreme Court does not interpret the law?

Governor BARNETT. They interpret the law of the land as in *Brown v. Board of Education*, but their decision is not the law of the land.

To my way of thinking, it is not the law of the land. It is the law of that particular case. Nearly every case is different. They are all different. It is just the law of that particular case, and not the law of the land. The Constitution itself, I believe, says that—it is the law of the land, the Constitution itself.

Senator PROUTY. Would the same be true of the *Civil Rights Cases* in 1875?

Governor BARNETT. Section 2 here, under article 6, says:

> This Constitution and the law of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land. And the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

The Court can't change the Constitution. They cannot add to the Constitution, nor can they take any words from the Constitution.

Senator PROUTY. You said earlier that the 1875 decision was the law of the land, did you not?

Governor BARNETT. You mean the decision? Well, I don't mean it is the law of the land. It may have been accepted as the decision. When it is the only decision, of course, it is accepted as the law until it is reversed, remanded, or overruled.

Senator PROUTY. Governor, if the Constitution includes and incorporates the decision of the Supreme Court, does a State official who obstructs or interferes with any decision of the Supreme Court violate the supreme law of the land and act in an unconstitutional manner?

Governor BARNETT. Will you repeat the question?

Senator PROUTY. If the Constitution includes and incorporates the decision of the Supreme Court, does a State official who obstructs or interferes with any decision of the Supreme Court violate the supreme law of the land and act in an unconstitutional manner?

Governor BARNETT. Senator, of course; there is a case pending against the witness at this time, and I doubt the wisdom of my going into all of the details of that.

Senator PROUTY. I quite agree with you.

Governor BARNETT. Of course, when I acted, I acted in accordance with the laws of the sovereign State of Mississippi, the Constitution of the United States, the 10th amendment. But I doubt the wisdom of my going into the details about that.

Senator PROUTY. I quite agree with you. Governor, if as you suggest, Communists are active in the integration movement, isn't action to guarantee civil rights to Negroes the best way of minimizing or destroying Communist influence?

Governor BARNETT. Will you repeat the question?

The CHAIRMAN. Our guests in the audience will kindly refrain; we will have some decorum so we can all hear the witness.

Senator PROUTY. You have suggested that Communists are active in the integration movement, or at least insofar as the demonstrations are concerned. If that is true, isn't the best way to take care of this action and to minimize and destroy Communist influence by guaranteeing civil rights to Negroes?

Governor BARNETT. No, sir.

Senator PROUTY. Thank you, Mr. Chairman.

Governor BARNETT. No, sir.

The CHAIRMAN. The Senator from Michigan.

Senator HART. Mr. Chairman, I apologize for having left, on the assumption we were going to recess until 2, so some of the questions may be repetitious. I would appreciate being told so if that occurs, and I will be very brief. I know the time limitation the witness now is operating under. I want to get a couple of things straight on the record.

Governor, I understood that you were going to file with the committee a memorandum of law on the question asked very early in our meeting here this morning that bears on this Mississippi Statute 2046.5, and the statute of the Mississippi Code 4065.3. As I understand it, you explained that the Mississippi law authorizes operators to refuse service.

Governor BARNETT. Yes, sir; they may either refuse or they may accept anyone who poses as a guest. But I will, as you suggested, have the attorney general brief that and send you and other members of the committee a copy.

Senator HART. There is one point that we need, awaiting that memorandum, however. You added that under section 3, 4065—that is the way you cited the code—integration is prohibited in public places. You were emphasizing the right of the individual operating a private establishment that he selects, but you added, as I understood you, that in matters of public accommodation or facilities, the obligation to segregate is established by law. Is that right?

Governor BARNETT. That is correct, Senator. The individual owners have the right to serve whoever they please, or reject whoever they please.

The other part of your question is absolutely correct. We have always believed in separate and equal facilities.

Senator HART. Specifically, then, as the chief law enforcement officer of Mississippi, you are required by Mississippi law to prohibit the mixing of whites and Negroes in public schools, public parks, public waiting rooms, and public places of amusement or recreation; is that right?

Governor BARNETT. That is correct.

Senator HART. How has "public" been defined?

Governor BARNETT. Well, public schools, for instance, are a public place; a courthouse; swimming pool. I notice quite a number of the swimming pools are being closed. In Atlanta, Ga., they closed one the other day. They didn't have enough people after they integrated to make a go out of it. And I look for a lot of other swimming pools to close after they integrate.

Senator HART. Governor, what money did you use to build those schools and swimming pools and so on?

Governor BARNETT. Well, we used money—for instance, the State legislature makes the appropriation.

Senator HART. Where does that money come from?

Governor BARNETT. It comes from various taxes. For instance, sales taxes.

Senator HART. Who pays the taxes?

Governor BARNETT. I beg your pardon?

Senator HART. Who pays the taxes?

Governor BARNETT. Well——

Senator HART. The citizens of Mississippi?

Governor BARNETT. The white people pay 90 percent of it, and the Negroes pay 10 percent of it.

Senator HART. Would it be your logic that you should admit 10 percent of Negro applicants to the schools and pools?

Governor BARNETT. No, sir.

Senator HART. Is that the justification?

Governor BARNETT. They have schools that are equal to our schools in most instances.

Senator HART. My question, of course, is—and it bears on the subject that concerns all of us here in the Congress——

Governor BARNETT. Senator, frankly I don't they they ought to integrate in the schools. They start dancing together, playing together, now and then intermarriage between the Negroes and the whites, and it has never worked in any country. It has always ended up in a mongrel race, if it is practiced long enough and extensively enough.

Senator HART. Do you mean if a Negro is permitted to enjoy the fruits of that which his money provides, this is the ultimate culmination of it?

Governor BARNETT. He can enjoy it. He can enjoy it.

Senator HART. He can't get into these public facilities. You are under obligation to reject him.

Governor BARNETT. He has his own facilities. We provide his own facilities.

Senator HART. Governor, let me ask it this way: What explanation do you give to the Negro taxpayer of Mississippi for denying him access to these public facilities?

Governor BARNETT. Well, because—of course, they have their own facilities. You are talking about facilities of the State, or other facilities?

Of course they have their own facilities. In Jackson, Miss., 1 Negro told me yesterday they have nearly 200 restaurants and cafes in and near the city limits of Jackson, Miss. Jackson State College is one of the most modern and up-to-date colleges in the Nation.

Alcorn A. & M. is the first Negro college that was ever organized, a land-grant college, in America, located at Utica, Miss. It is an A–1 institution.

And if a Negro wants to take some course that is not offered in those schools, then we appropriate money and pay his tuition and other advantages that he would get in the State of Mississippi.

For instance, the last special session of our legislature, about 4, 5, or 6 months ago, appropriated $100,000 for that one purpose. Some ought to go to a dental college, and we don't have one in Mississippi, or some other school where we don't have that particular kind of school, but we send them and we pay what they would get if we had that school in Mississippi.

Senator HART. If I were a Mississippi Negro, would I be satisfied with that explanation to my question?

Governor BARNETT. You ought to have heard one a while ago. When I said, "Would you rather be a Negro or a white man," he said, "Governor, if you spend one Saturday night on Faro Street you would never want to be a white man again."

Senator HART. Governor, I think the reason the civil rights debate in the Congress has taken a shift in tone is because it is no longer possible to stand up and say that they like it, that they are happy, that they are content This is the reason the shift in emphasis now moves into the general conservative pattern of assertion of property rights. I just do not accept the statement, I cannot, based on the experience as I see it, the proposition as you put it when you describe Mrs. Staley's restaurant, "everyone was well pleased." I don't think so.

Governor, in your administration, and for decades before, Mississippi has been trying to attract new industry into your State. Your agricultural and industrial board scheduled a meeting last fall in Chicago. You were to speak to several hundred industrialists. You were going to interest them in establishing plants in Mississippi. And then came the rioting at the University of Mississippi. The meeting was called off.

One of the courts said that several manufacturers indicated they were no longer interested, and a State official was reported to have said it was feared he would get a cold reception.

Doesn't such a loss of potential industry hurt your State, Governor?

Governor BARNETT. Senator, frankly, Mississippi has made more industrial progress in the last 3 years than ever before in any 6 years.

Senator HART. Did the incident that I described occur?

Governor BARNETT. I don't know whether it did or not. The papers of Chicago are criticizing us, but they are wrong; they don't know the facts about the meeting.

Senator HART. Do you deny there was a meeting in Chicago of several hundred——

Governor BARNETT. We had one in Chicago, and one man in Chicago put a plant in Mississippi at Gulfport, doors and sashes, et cetera, $2 million, and he was a guest at the meeting we did have. It may have been postponed for a week or two; I don't know. The agricultural-industrial board arranges those meetings. We did have one, and we have gotten several industries from the group that was there.

May I say this, please: Mississippi in 1961, the capital investment in our State was three and a half times greater than any other one average year. Last year Mississippi secured more new industries, more new expansions, more new industrial jobs than ever before in the history of our State. Last week we announced four industries. They are coming to Mississippi from Chicago, other places.

One company pulled up everything, lock, stock, and barrel, from Chicago about 30 or 60 days ago, the Spartus Co., and located at Louisville, Miss. Four hundred new jobs.

One pulled up everything he had in Ohio and came to Mississippi. And the great W. W. Sly Manufacturing Co. made this statement, in dedicating a factory at Webster County, Miss., that they came for one reason, they came to Mississippi, is because the Mississippi people have the courage to try to live up to the Constitution as it is written and they are not interested in misconstruing the Constitution to

suit political expediency. That man is named Carl Sayer, and he told me you can quote me anywhere.

Senator, I will say our State is growing so fast, the population is increasing rapidly. We are getting more industry, I think, than any State in the South.

The Standard Oil Co. will complete a $125 million refinery at Pascagoula, Miss., in a short time. Its president said that Mississippi is one of the last of the old frontiers. He likes the attitude of the white and Negro races in Mississippi. I can send you a copy of his statement.

Senator HART. I shall be glad to have it.

Did you go to the meeting in Chicago?

Governor BARNETT. Yes. I have been to several there. We travel a lot. We have them in New York, Pennsylvania. I have a trip to make Monday.

Senator HART. Are the Census Bureau figures correct that in the last 20 years you have lost 220,000 white people?

Governor BARNETT. Yes, sir.

Senator HART. And 650,000 Negroes?

Governor BARNETT. I think that is correct. That was from 1940 to 1950, and 1950 to 1960, Mississippi lost a Congressman, you see, in each of the 10 years. But the last two and a half years our population is increasing.

The interim report of the Census Bureau will tell you that we have gained in the last year and a half about—2 years—73,000 new citizens. It is industrial people who are coming there. Of course, I know a lot of Negroes are leaving. They are going north and east on account of mechanization of agriculture.

Senator HART. On account of that?

Governor BARNETT. Well, agriculture went to machines, you know. They don't have the cottonpickers we used to have. We have the picking machines.

Senator HART. And apparently there are other factors and circumstances, all of which we have elicited here.

When industry does locate in Mississippi, isn't it your opinion that these local customs of segregation and the law, to the extent that the law is applicable, would have a very discouraging effect on potential employees, both white and Negro, who might otherwise go to Mississippi to work? I wonder if it is possible—

Governor BARNETT. Senator——

Senator HART. If I may conclude the question.

Is it possible to put ourselves in the shoes of a Negro in San Francisco or Detroit——

Governor BARNETT. Senator——

Senator HART. May I conclude?

Governor BARNETT. Surely. Excuse me.

Senator HART (continuing). Who is an engineer, or a physicist. What would he think of joining a work force in Mississippi?

Governor BARNETT. The industrialists, Senator, would be surprised, if you would just sit down——

Senator HART. I am talking about the Negro engineer.

Governor BARNETT. Well, I don't know how he would feel. Of course, you would have to ask him. I don't know. I just wouldn't know.

Senator HART. Do you have any suspicion about how he would feel?

Governor BARNETT. No, sir.

Senator HART. You have no opinion at all?

Governor BARNETT. No, sir.

Senator HART. Governor, I hope my figures are right. The median white family income in Mississippi is $4,200. Is is about $6,000 nationally. The median Negro family income is $1,400, opposed to $3,100 nationally. You have indicated that in the last 20 years your population has dropped three-quarters of a million people. Education, to the extent that it is gaged by selective service rejection lists, lags behind other States in this country. More than 66 percent of potential draftees from Mississippi were rejected last year, compared with a national average of 46 percent.

It seems to me that there is no question that Mississippi wants and needs this new industry we are talking about. I cannot see how racial discrimination does but discourage the location of such industry. I would think that the insistence on discrimination, as this public section of your law requires, in education, public accommodations, and public facilities, contributes to this loss and to this weakness, the weakness that affects all of us in the Nation.

Governor BARNETT. Senator, certainly I disagree with you on that. I wish you could talk with some of the presidents of the corporations that have located in our State in the last 2 or 3 years.

For instance, the president of Chrome Craft, the vice president of Sunbeam Corp., the president of the Standard Oil Co. of Kentucky, W. C. Smith, the president of Sly Manufacturing Co., the president of the Lyon Co., about how happy they are in Mississippi.

We have no trouble with labor, we have an abundance of labor. But the Negroes and the whites work together in harmony and peace.

Mississippi—did I understand you, Senator, to say that we had lost—that the population had gone down to three-quarters of a million?

Senator HART. The figures that the Census Bureau furnished me indicate that you lost in 20 years 600,000 Negroes and 220,000 whites. The reason I'm pushing that "truth in packaging" bill, if my arithmetic is bad——

Governor BARNETT. I misunderstood you. I thought we dropped down to three-quarters of a million.

Senator HART. You have lost, in the last 20 years 870,000 people.

Governor BARNETT. That is probably correct. I won't say that it isn't. But in the last 2 years I think we have gained more than 22 other States in the Southeast and Southwest.

One reason we are gaining is because we have a great, a bold, and a far-reaching and famous economic development program in our State. We put our State on a competitive basis with that of other States. And that is one of the reasons why Mississippi didn't get the industry from 1940 to 1950 that it should have gotten.

For instance, we reduced our income taxes in Mississippi. We put the right-to-work law in our State constitution. If I may I would like to send you some statements of some industrialists of how happy they are by locating plants in Mississippi. Most of the plants in our State are expanding rapidly.

Senator HART. Did you describe it as the "last frontier" or "new frontier"?

Governor BARNETT. No, sir.

W. C. Smith, president of Standard Oil Co. made a public statement that Mississippi is one of the last of the old frontiers. He said. "Look at the States that have bowed down to the New Deal, the Fair Deal, and other deals." He said, "States are broke, or nearly broke. But Mississippi is sound financially and stable, and the people have the courage to vote their convictions."

I will send you a copy of W. C. Smith's statement if I may.

Senator HART. And I would exchange a copy of Secretary Rusk's statement of yesterday and we will decide between us which of these images more persuades the rest of the people of the world that our leadership is sound.

The last question, Mr. Chairman—it is really not a question but a comment in order to straighten the reference earlier made to the *Howard Johnson Restaurant* case.

Governor BARNETT. May I say one other thing about Mississippi?

Senator HART. Surely.

Governor BARNETT. Last year, you will find that the Federal Reserve System of Atlanta made a public statement that Mississippi's gain was 25 percent greater than the national average in manufacturing of goods in 1962. I will send you that statement. And where we have gained in so many ways we are far ahead of the Nation's average in many, many respects now.

Senator HART. Have you concluded?

Governor BARNETT. Yes.

Senator HART. The reference earlier was made to the *Howard Johnson* case as indicating that under the commerce clause we lacked authority to give effect to the bill that we are considering. I think the record again should show that in that case the Court was not considering the power of Congress which had been exercised by an explicit statutory enactment, but rather was considering the commerce clause unaided by any congressional enactment.

The point I seek to make is that that case readily is distinguishable, in the event we enact this bill.

I have been thinking about your recital of the attractions which bring business to Mississippi and which reverse, apparently, the cycle of loss of population. I would hope that it is not because the majority of the people of this Nation feel that practices which we are discussing in relation to this bill are desirable practices for a society such as ours to encourage.

Indeed, I suspect that if it is developed the reason Mississippi is increasing its rate of industrial expansion is because of discriminatory treatment of some citizens; the rest of the Nation will not adopt the discriminatory practices as their means of responding to the competition, but will step up their insistence on the Congress that we do all we can to eliminate that kind of competition.

I had hoped at the luncheon recess to make inquiry about this piece of paper, whether in fact the Georgia Commission on Education is the authority charged with education in the State. I have not had opportunity to do so. I'm sure the chairman will insure that this document is given to the FBI, and we would, as has already been indicated, welcome any information that bears on this.

Governor BARNETT. Yes.

Senator HART. I would hate to think that the hearing this morning begins to re-create the kind of atmosphere that this country unhappily experienced within the lifetime of everybody in this room where, as the witness has said, he doesn't know whether Dr. King is a Communist or whether Aubrey Williams is a Communist, but because of what has been said in this Senate doubt is put into the minds of many people about the people you talk about.

It was a tragic period when it happened, and it is fresh enough in our memory not to want to repeat it. The Communists are for peace, and so am I. That doesn't make me a suspect, I hope. I'm for civil rights, and I would walk with Martin Luther King. And I hope that doesn't make me a suspect.

Let's not re-create the atmosphere where public officials have to defend their loyalty instead of defending the wisdom of their position. That is a rather great danger when we open this "kettle of fish." I would hope, as we close the hearing this morning, nothing like that has happened.

Thank you, Mr. Chairman.

The CHAIRMAN. Governor, I was about to ask a question along the line that the Senator from Michigan asked. Suppose a Member of Congress thought about these things for many years, such as the question of public accommodations or the question of civil rights, and came to some honest and conscientious conclusion on one side or the other. What would all this have to do with the pamphlets, the demonstrations, or the tactics used, or anything like that? What does that have to do with my decision or John Doe's decision, or the decision of someone who thought about this thing for many, many years? What has it got to do with this case?

Governor BARNETT. I think, Senator, that all these——

The CHAIRMAN. Let me finish. If a demonstration was inspired by somebody who is wrong, a Communist, or the Elks Club, or the John Birch Society, what has that go to do with my honest convictions on a problem?

Governor BARNETT. It shouldn't have anything in the world to do with it. It should not.

The CHAIRMAN. It doesn't, I am sure, in your honest conviction. I think——

Governor BARNETT. I think it has been contributed. I wouldn't say it is the sole cause of these bills being presented by the Attorney General, but I think it has contributed materially to the Department of Justice asking you to enact these laws.

The CHAIRMAN. I don't know whether or not that is true. There have been petitions and meetings by some great Americans in the church movement, and that wouldn't influence my honest, conscientious decision any more than other demonstrations. Suppose there was a demonstration for the same thing inspired by people I detest. That still doesn't mean that my honest convictions are changed. We have to look at this, as you suggest, in a cold, honest, conscientious way. These demonstrations don't have much to do with the legislation as far as we in Congress are concerned, whoever inspires them, whoever doesn't inspire them. I think it is a mistake when we start to equate good, serious legislation that the Congress has the responsibility to

examine and resolve, with the feelings expressed through demonstrations. Congress has been looking at it for a hundred years off and on. When we get off on tangents as to why some demonstration took place or who was behind it or who wasn't behind it, I think we fail to do our job as good Americans.

You can equate anything. Somebody started a demonstration, and it could be somebody who is just as anti-Communist as you and I, but to equate that to Communist inspiration and conclude that therefore that is going to influence somebody's decision on a piece of legislation that has been before the American people, and been a problem, I agree with you, long before anybody ever thought of communism or fascism is simply mistaken. I think we ought to close on that note.

You have been here a long time. You have made a great contribution to the legal questions involved here.

Governor BARNETT. Thank you.

The CHAIRMAN. I expected that of you. I know you by reputation to be a fine lawyer.

Governor BARNETT. I am grateful for the courtesy you and other members of the committee have shown me. I am deeply grateful for the spirit of hospitality that has existed here this morning.

Thank you very much.

The CHAIRMAN. Thank you.

We will resume in this room at 3:30.

(Whereupon, at 1:58 p.m., the committee was recessed, to reconvene at 3:30 p.m. the same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

The next witness we have, and we couldn't get to this morning, is Mr. James J. Kilpatrick, editor, Richmond News Leader.

We will be glad to hear from you, Mr. Kilpatrick. Do you have a statement or are you just going to talk from notes?

STATEMENT OF JAMES J. KILPATRICK, EDITOR, RICHMOND NEWS LEADER

Mr. KILPATRICK. No, sir; I don't have a statement. I will just freewheel.

Let me first express my thanks to you and Senator Monroney for taking time off on a Friday afternoon to be here.

The CHAIRMAN. We are glad to be here.

Mr. KILPATRICK. It is very much appreciated, and I will not detain you long.

I'm here this afternoon as vice chairman of the Virginia Commission on Constitutional Government, and it occurred to me that I might put in a sentence about what the Commission on Constitutional Government is and what it is not, so that you will know in what capacity I am here.

The Virginia Commission on Constitutional Government is an official agency of the Commonwealth of Virginia, though a very modest one, created by the general assembly in 1956. It is composed of 15 members, and our function is to propagate as best we can what seems to us a sound construction of the U.S. Constitution.

We have a very modest schedule of publications; we make a few speeches around and about the country, and we do what we can to try to maintain a solid and constructive relationship between the Federal Government and the States.

Our budget is $125,000 a year but we are so frugal in Mr. Byrd's Virginia that we only spend about half of that every year.

The chairman, Mr. David Mays, was not able to be here today representing the commission, though he hopes to be able to testify before you next week or at the committee's convenience. He and Mr. Fred Gray, the former attorney general, who is a member of our commission, are both attending the Virginia Bar Association convention this weekend. They sent me to represent them and the commission and comment upon this bill.

That is what the commission is.

The CHAIRMAN. We are trying to save a little time here. May I suggest if their comment is no different than yours, we might have the whole thing and they can put a statement in the record.

Mr. KILPATRICK. Well, sirs, theirs will be much more informed than mine.

The CHAIRMAN. They will elaborate more than you.

Mr. KILPATRICK. Yes. They are lawyers, where I am not. I think they will be longer than I will be.

The commission is having two papers prepared, one by Prof. Wilfred Ritz, of the Washington and Lee law faculty, dealing with the omnibus bill. We are having another paper prepared by Mr. Hugh White, of Hunton, Williams, Gay, Powell & Gibson in Richmond, a leading law firm there, dealing simply with title 2 of the omnibus bill or the particular bill, 1732, that is before this committee.

For the record we would like to include at this point an excerpt from the booklet entitled "Civil Rights and Legal Wrongs," published by the Virginia Commission on Constitutional Government (1963), as follows:

TITLE II. PUBLIC ACCOMMODATIONS

Perhaps the most obvious wrongness of title II may be summed up in a phrase: This section is conceived in hypocrisy, and cannot rise above its shabby origins.

Title II opens with a long recital of "findings." In these opening paragraphs, the Congress purportedly "finds" all sorts of burdens upon interstate commerce, all resulting from acts of racial discrimination. It is of passing interest to inquire how the Congress has found these things, for the administration's witnesses have provided no convincing evidence to point them out. Possibly we are to rely on faith alone. In any event, the Congress here "finds" that a substantial number of Negroes, traveling in interstate commerce, are denied convenient access to hotels, motels, and eating accommodations; that practices of audience discrimination in the entertainment industry create "serious and substantial" burdens upon interstate commerce; that fraternal, religious, and scientific conventions "frequently" are dissuaded from meeting in particular cities by reason of discriminatory practices; that business organizations "frequently" are hampered in setting up branch plants by reason of discrimination; and finally, that—

"(h) The discriminatory practices described above are in *all* cases encouraged, fostered, or tolerated in some degree by the governmental authorities of the States in which they occur, *which license or protect the businesses involved by means of laws and ordinances and the activities of their executive and judicial officers.*" [Emphasis supplied.]

This is the strange and ominous foundation on which title II is made to rest. Read it, we beg you. Ponder it. Reflect, if you please, upon this assertion of some Federal authority over any business that may be "licensed" by State authority. Reflect, if you please, upon the vagueness of these activities of a State's executive and judicial officers. Because the very next sentence of this "finding" ties it all together:

"Such discriminatory practices, particularly when their cumulative effect throughout the Nation is considered, *take on the character of action by the States and therefore* fall within the ambit of the equal protection clause of the 14th amendment to the Constitution of the United States."

The object of this smooth leaping and hurdling is apparent to the most casual student of the Constitution. Obviously, the 14th amendment does not prohibit acts of private discrimination in ordinary daily life. The Supreme Court of the United States repeatedly has said so. In an unbroken chain of opinions reaching back to 1883, the Court has ruled that the amendment prohibits only those acts of discrimination that may be charged to the States themselves in such areas as voting rights, jury service, and access to public institutions. The amendment says that "no State" shall deny equal protection. What individuals do is their own business. But suppose—as this bill proposes—that individual acts take on the character of State acts? In this event, the smallest retail establishment, the humblest soda fountain, takes on the character of the State itself. In effect, it becomes an agency of the State. Its acts are State acts. Its denials are State denials. And in this fateful moment, the ancient distinctions between private property and public agencies fly out the window. Under the precedent here proposed, private property, as such, in this regard will have ceased to exist.

This is the very crux of title II of the President's bill. These easy "findings" do not affect the South alone. They affect every State, every locality, every businessman. In this mad confusion of the Commerce Clause and the 14th amendment, nothing makes sense. The alleged acts of racial discrimination by private business establishments simultaneously are found to be burdens upon interstate commerce and denials of equal protection by the States themselves.

The final finding reflects this confusion:

"(1) The burdens on and obstructions to commerce which are described above can best be removed by invoking the powers of Congress under the 14th amendment and the Commerce Clause of the Constitution of the United States to prohibit discrimination based on race, color, religion, or national origin in certain public establishments."

We invite the thoughtful reader to go back and read that paragraph once again. Ostensibly, the bill is here concerned with "burdens on and obstructions to" commerce. The power of the Congress in this area derives from article I, section 8, vesting in Congress the power "to regulate commerce among the several States." But the object of this bill is not really to regulate commerce. The object of the bill, in its own revealing words, is to "to prohibit discrimination." The Commerce Clause is here being deceptively adapted not to commerce, but to social reform.

The substantive provisions of the President's bill then are set forth:

"SEC. 202. (a) All persons shall be entitled without discrimination or segregation on account of race, color, religion, or national origin, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of the following public establishments:".

And the bill sets them forth. We put them line by line, the better to emphasize the sweep of this bill. The law, by its own terms, is to apply to—

Every hotel;
Every motel;
Every other public place engaged in furnishing lodging to transient guests, including guests from other States or traveling in interstate commerce;
Every motion picture house;
Every theater;
Every sports arena;
Every stadium;
Every exhibition hall;

Every other public place of amusement or entertainment which customarily presents motion pictures, performing groups, athletic teams, exhibitions, or other sources of entertainment which move in interstate commerce;

Every retail shop;

Every department store;

Every market;

Every drugstore;

Every gasoline station;

Every other public place which keeps goods for sale;

Every restaurant;

Every lunchroom;

Every lunch counter;

Every soda fountain;

Every other public place engaged in selling food for consumption on the premises; and

Every other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for sale, use, rent, or hire * * *.

Then follows the superficial saving grace of "if." The provisions of section 202 are to apply to such establishments "if"—

(1) The goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers; or

(2) a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce * * *.

There are two other such provisions, but it is needless to quote them. The second proviso impales the smallest hotdog stand upon the transportation of its mustard. There is not a neighborhood soda fountain in America, not a dress shop, not a hatshop, not a beauty parlor, not a single place or establishment beyond the tiniest roadside stand of which it may be said that a substantial portion of its goods, held out for sale or use, has not moved in interstate commerce.

We would urge thoughtful Americans, wherever they may live, whatever their views may be on questions of race relations, to ponder the twisted construction here placed upon the Commerce Clause. When the Congress first began to regulate "commerce among the several States," the object was to regulate the carriers in which the goods were hauled. In time, a second area of regulation developed, as the nature of the goods themselves came into the congressional power. Then a third area developed, as Congress sought to regulate the conditions under which the goods themselves were manufactured.

In this bill, a fourth area is opened up. It is as wide as the world. Here the Congress proposes to impose a *requirement to serve.* Heretofore, such a requirement has been imposed solely in the area of public service corporations—the telephone companies, electric power companies, gas and water companies—the companies that operate as regulated public utilities. Now the restricted class of public service corporations is to be swept aside. Here Clancy's Grill and Mrs. Murphy's Hat Shoppe are equated with A.T. & T. The neighborhood drugstore is treated as the gas company: *It must serve.* Within the realm of section 202, the owner has no option, no right of choice. Yes, he may reject drunks, rowdies, deadbeats. But his right to discriminate by reason of race or religion—or any other related personal reason—is denied him under the pain of Federal injunction and the threat of prison sentence for contempt of court.

At this point in our argument the Virginia Commission would beg the closest attention: We do not propose to defend racial discrimination. We do defend, with all the power at our command, the citizen's right to discriminate. However shocking the proposition may sound at first impression, we submit that under one name or another, this is what the Constitution, in part at least, is all about. This right is vital to the American system. If this be destroyed, the whole basis of individual liberty is destroyed. The American system does not rest upon some "right to be right," as some legislative majority may define what is "right." It rests solidly upon the individual's right to be wrong—upon his right in his personal life to be capricious, arbitrary, prejudiced, biased, opinionated, unreasonable—upon his right to act as a freeman in a free society.

We plead your indulgence. Whether this right be called the right of free choice, or the right of free association, or the right to be let alone, or the right of a free marketplace, this right is essential. Its spirit permeates the Constitution. Its exercise colors our entire life. When a man buys union-made products, for that reason alone, as opposed to nonunion products, he discriminates. When a Virginian buys cigarettes made in Virginia, for that reason alone, as opposed to cigarettes made in Kentucky or North Carolina, he discriminates. When a housewife buys a nationally advertised lipstick, for that reason alone, as opposed to an unknown brand, she discriminates. When her husband buys an American automobile, for that reason alone, as opposed to a European automobile, he discriminates. *Every one of these acts of "discrimination" imposes some burden upon interstate commerce.*

The examples could be endlessly multiplied. Every reader of this discussion will think up his own examples from the oranges of Florida to the potatoes of Idaho. And the right to discriminate obviously does not end with questions of commerce. The man who blindly votes a straight Democratic ticket, or a straight Republican ticket, is engaged in discrimination. He is not concerned with the color of an opponent's skin; he is concerned with the color of his party. Merit has nothing to do with it. The man who habitually buys the Times instead of the Herald Tribune, or Life instead of Look, or listens to Mr. Bernstein instead of to Mr. Presley, is engaged in discrimination. Without pausing to chop logic, he is bringing to bear the accumulated experience—the prejudice, if you please—of a lifetime. Some nonunion goods may be better than some union goods; some Democrats may be better than some Republicans; some issues of Look may be better than some issues of Life. None of this matters. In a free society, these choices—these acts of prejudice, or discrimination, or arbitrary judgment—universally have been regarded as a man's right to make on his own.

The vice of Mr. Kennedy's title II is that it tends to destroy this concept by creating a pattern for Federal intervention. For the first time, outside the fully accepted area of public utilities, this bill undertakes to lay down a compulsion to sell.

We raise the point: If there can constitutionally be a compulsion to sell, why cannot there be, with equal justification, a compulsion to buy? In theory, the bill is concerned with "burdens on and obstructions to" commerce. In theory, the owner of the neighborhood restaurant imposes an intolerable burden upon interstate commerce if he refuses to serve a white or Negro customer, as the case may be. But let us suppose that by obeying some injunction to serve a Negro patron, the proprietor of Clancy's Grill thereby loses the trade of 10 white patrons. In the South, such a consequence is entirely likely; it has been demonstrated in the case of southern movie houses. Can it be said that the refusal of the 10 whites imposes no burden on interstate commerce? Plainly, these 10 intransigent customers, under the theory of this bill, have imposed 10 times as great a burden on commerce among the several States. Shall they, then, be compelled to return to Clancy's for their meals? Where does this line of reasoning lead us?

How would all this be enforced? Under title II, the Attorney General would be required to investigate complaints of denial of service. Persistent acts of discrimination would be prohibited by Federal injunctions, obtained in the name of the United States. Any person who attempted to interfere with Clancy's decision would be subject to individual injunction. And at the end every such proceeding lies the threat of fine or imprisonment for contempt of court. *There would be no jury trials.*

This has been a very abbreviated summary of the "public accommodations" features of the President's bill. A definitive analysis could be much extended. Not only is the Commerce Clause distorted beyond recognition, the provisions of the 14th amendment also are warped to cover individual action as opposed to State action. Our hypothetical Clancy could not call upon the police to eject an unwanted customer, trespassing upon his booths and tables. Reliance upon local police to enforce old laws of trespass, under this bill, would be regarded as an exercise of "State action." Clancy has become the State. Like Louis of old, he too may say, "L'état, c'est moi."

Both of those papers will be ready within another week or 10 days and we hope to have an opportunity to present them to you.

The CHAIRMAN. We will be glad to have them.

Mr. KILPATRICK. Meanwhile I'm here in their behalf.

I started to say, Senator, what our commission is not. This seems to me important, especially in the context of today's hearing. We are not concerned in any way with these racial issues as such. In the past 7 years of our operations we have dealt with constitutional questions of search and seizure, of the allocation of seats in the State legislatures, of the water rights of Arizona and California, of the appellate procedures of State courts, and one thing we have not dealt with, as a matter of fact, is this question of race relations. Our concern is for constitutional government solely.

On that point, though, I thought I might stick in a small personal comment on the bill that you have before you, since I'm up here.

Many of us on the commission would not regard this title II of the omnibus bill as the worst part of the bill. We think other sections of the bill are in some respects a good deal worse. There is no question in my own mind that many of us in the South could live with the consequences of this title II, at least for a time. If you pass the bill on a Monday, Tuesday would come up just the same, and for a period of time the social changes or consequences in the South, as best I can interpret them, where this bill would be of primary application, would be relatively few.

So I have no strong feelings myself, sir, about the consequences of this bill as such. I think that none of the members of the Virginia Commission on Constitutional Government is enthusiastic about integration, but some of us are less enthusiastic than others. We have differences of opinion.

My purpose here is simply to talk about the bill from a constitutional point of view, and to convey to you the strong feeling of our entire commission, which discussed this bill last week, that it is in many respects, sir, a palpably unconstitutional bill; that it trespasses upon fundamental rights; and that it does so in a way that we believe would be very bad for the country, and of no perceptible value to race relations.

Going to the first section of the bill under "Findings," we find the sentence:

> These citizens, particularly Negroes, are subjected in many places to discrimination and segregation, and they are frequently unable to obtain the goods and services available to other interstate travelers.

Demurring to that for a moment, we would inquire by whom are they subjected to this discrimination? The language is that "they are subjected in many places to discrimination and segregation." At the outset of the bill, sir, we would take the position that they are subjected to these acts not by the State governments, sir, and not by laws, not by regulations, not by official acts of the States, but by private individuals acting in their private capacity.

The second paragraph of the bill recites—

> Negroes and members of other minority groups who travel interstate are frequently unable to obtain adequate lodging accommodations during their travels, with the result that they may be compelled to stay at hotels or motels of poor and inferior quality, travel great distances from their normal routes to find adequate accommodations, or make detailed arrangements for lodging far in advance of scheduled interstate travel.

We raise the question, sir, whether there is some right to adequate lodging accommodations, especially a Federal right arising under the Constitution of the United States? Is there a right to adequate lodging accommodations during travels? And desirable as that might be, sir, as a matter of social or public policy, we gravely question whether this is a right arising under the Constitution of the United States.

We think that possibly there may be a right arising under the common law under the old innkeepers' statute, but we would contend, sir, that this is no business of the Congress of the United States.

The third paragraph in the bill, along the same line, recites that—

Negroes and members of other minority groups who travel interstate are frequently unable to obtain adequate food service at convenient places along their routes, with the result that many are dissuaded from traveling interstate, while others must travel considerable distances from their intended routes in order to obtain adequate food service.

It seems to us that there is at least a degree of conflict between the first finding of fact and the third in that the first suggests that they are traveling in large numbers; the third suggests that they are having all these difficulties.

We would really like, sir, many of us, to see some sort of evidence in support of these findings. How frequently does all this occur? How many "others" must travel what considerable distance? We suspect that this finding has been largely spun out of whole cloth and would be inclined to ask for strict proof thereof.

The fourth paragraph in the bill recites that—

Goods, services, and persons in the amusement and entertainment industries commonly move in interstate commerce, and the entire American people benefit from the increased cultural and recreational opportunities afforded thereby.

We would take the position on that point, sir, that that finding represents a rather attenuated Federal interest.

The next sentence recites that—

Practices of audience discrimination and segregation artifically restrict the number of persons to whom the interstate amusement and entertainment industries may offer their goods and services.

Again, sir, we would ask for strict proof thereof. In my own experience in Virginia, and in traveling rather widely about the South, I at least would tend to doubt the validity of the finding in paragraph (d).

The fifth paragraph of findings says this:

Retail establishments in all States of the Union purchase a wide variety and a large volume of goods from business concerns located in other States and in foreign nations. Discriminatory practices in such establishments, which in some instances have led to the withholding of patronage by those affected by such practices, inhibit and restrict the normal distribution of goods in the interstate market.

Again, sir, respectfully, we would ask for strict proof thereof. We would ask how many instances, because many of us who have lived our whole lives in the South would strongly doubt that in many instances, sir, that to any substantial or truly significant degree these practices really have resulted in the withholding of any significant amount of patronage.

Again, sir, we submit that that finding of fact contained in the bill has been spun out of the drafters' imagination.

The sixth paragraph deals with conventions. It recites that—

Fraternal, religious, scientific, and other organizations engaged in interstate operations are frequently dissuaded from holding conventions in cities which they would otherwise select because the public facilities in such cities are either not open to all members of racial or religious minority groups or are available only on a segregated basis.

On this point also, sir, we would ask for some sort of really strict proof. How frequently? I ask the committee, sir, how many fraternal, religious, scientific, and other organizations really have been dissuaded—over what period of years—from holding conventions by reason of these particular things? I suspect the number in terms of the total number of conventions held annually would be very, very small, so small, sir, in our judgment, as not really to impose any significant burden upon interstate commerce.

The next finding is along the same line, that—

Business organizations are frequently hampered in obtaining the services of skilled workers and persons in the professions—

Because of these practices, and that these acts of discrimination prevent the most effective allocation of national resources.

Many of us have not been altogether aware that the allocation of national resources in the context of this paragraph was altogether the function of the U.S. Congress. We would have imagined that the selection of sites for business was the obligation and the responsibility of private industry and scarcely the responsibility of Congress.

Finally I come to the paragraph in the bill, No. 8, to which we take strong dissent:

The discriminatory practices described above are in all cases * * *.

Now, Senator, we submit strongly, sir, that that word "all" is most emphatically not justified anywhere in the whole of the South, that—

The discriminatory practices described above are in all cases encouraged, fostered, or tolerated in some degree by the governmental authorities of the States in which they occur—

Sir, with all respect, we strongly dissent, and we object to that language in the bill. In my own Virginia, for example, the practices and policies and the position of the governmental authority of the State is absolutely neutral on these matters. You can go to Richmond this afternoon and on Fifth Street, a block from my office, you will find one restaurant that is desegregated, and the one next to it that is not, and the government is absolutely indifferent. It couldn't care less whether the restaurant accepts or does not accept.

And this is true in North Carolina; it is increasingly true, I believe, Senator Thurmond, in South Carolina. It is true in parts of Georgia. It certainly is true all over Florida. It is true in Louisiana. In a great many parts of the South the State authorities are completely indifferent.

So it simply is not true, we respectfully submit, to say that in all cases these discriminatory practices are (1) encouraged, (2) fostered, or (3) tolerated in some degree by the State authorities.

Continuing in that paragraph, I submit that a word appears to which I would invite your most earnest attention. This is the statement that these practices are the result of governmental activities

"which license"—"which license—" "— the businesses involved by means of laws and ordinances."

We on the Virginia Commission of Constitutional Government would submit that you gentlemen have a Pandora's box in that word "license" and you are about to open it. When you predicate this bill upon the licensing activity of the States, as of that moment you have entered every dentist's office, every doctor's office, every lawyer's office, every beauty parlor, every barber shop. You have entered, in our judgment, 90 to 95 percent of all businesses operating in the whole United States with that word "licensed."

And now you are inside their doors, sir, and you have predicated the bill upon the fact of their being licensed by the State. In just a moment you are going to say that that fact of their having been licensed by the State gives them, as you say in this bill, the character of State agencies.

You say here these businesses are licensed or protected by means of laws and ordinances and this vague word "activities"—the activities of the State's executive and judicial officers. I surmise that what you gentlemen mean by this word "activities" is the activity of police in making arrests, and of courts in enforcing trespass laws. "Activities" is a very, very broad word, and we would like to see it somewhat narrowed.

Then appears the key sentence of this bill:

Such discriminatory practices, particularly when their cumulative effect throughout the Nation is considered, take on the character of action by the States and therefore fall within the ambit of the equal protection clause of the 14th amendment to the Constitution of the United States.

Gentlemen, what a leaping and a hurdling is here as you surmount logic and reason by this absurd syllogism. It takes on "the character of action" by the States, and without pausing to contemplate the meaning of that phrase, therefore, you recite, "Therefore it falls within the ambit of the equal protection clause."

Mind you, you are confessing this is not action of the States. You agree to that. It is merely the character——

The CHAIRMAN. Mr. Kilpatrick, we are considering these matters.

Mr. KILPATRICK. I should have referred to the drafters of the bill, sir, not the committee. I apologize, sir.

The CHAIRMAN. We haven't considered it yet. We haven't had a meeting to consider it. We are listening to good testimony like you are giving us to help us make a decision.

Mr. KILPATRICK. I apologize to the committee, sir. I was carried away by my own sense of indignation. I should have addressed this to the drafters of the bill. They propose this illogic, whoever they were, these anonymous gentlemen.

Then in the final paragraph, before we get to the meat of the bill, a curious reversal occurs. It says here:

The burdens on and obstructions to commerce—

We have been dealing with the commerce clause right up to the preceding sentence—

The burdens on and obstructions to commerce which are described above can best be removed by invoking the powers of Congress—

And then it doesn't say immediately under the commerce clause. Amazingly it says "under the 14th amendment" and then it recites the commerce clause.

The drafter of that particular paragraph, I say to you, sir, was sick with indecision and scarcely knew which way to turn, to the commerce clause or to the 14th amendment. He is going to remove these burdens upon commerce by invoking first of all the 14th amendment.

Now, sir, turning to the merits of the bill itself, I'm instructed by our Commission to present to you very briefly some of our arguments on the matter of the commerce clause. In our view the regulation of commerce among the States under article I, section 8 by the Congress in the past has dealt primarily with three areas of commerce.

First of all was the regulation of the means by which the goods were to be transported, the steamboats, the railroads, later the airplanes.

Secondly was the regulation of the goods themselves, or the prohibition of the goods themselves, and this led us under the interstate commerce clause into the control of drugs and foods and contaminated wheat and the interstate transportation under the White Slavery Act and the interstate transportation of automobiles. You got into the goods themselves.

And thirdly, beginning around 1910 or 1915, into regulation of the conditions under which the goods were manufactured, and this led us in time to constructions of the commerce clause dealing with minimum wages and hours and working conditions and overtime pay and labor relations and that sort of thing.

We would earnestly submit to you, sir, that only in one area, however, has the Federal Government ever attempted to deal with a requirement to serve under the commerce clause, and this is in your legislation dealing with public service corporations. And here we are in complete accord when it would come to a requirement that a railroad carry all customers, that a power company serve all applicants, that a telephone company serve anyone who wants a telephone. Certainly, in these areas of monopoly regulation, in the field of public service corporations, of course a requirement to serve seems to us a completely valid obligation. But now your position——

Senator MONRONEY. Would you yield right there?

Mr. KILPATRICK. Yes, Senator.

Senator MONRONEY. They are required to serve under Federal law only so long as they operate lines or systems outside of one State, are they not?

Mr. KILPATRICK. Yes, sir. I was thinking——

Senator MONRONEY. Even though they are interconnected with outside lines, unless they themselves are operating across State lines they are not compelled, under the utility laws that I know of, to serve anyone. They are State laws. Interstate, the Federal Power Commission can require it?

Mr. KILPATRICK. Yes, sir. Most of the compulsion to serve would come with State laws. The Federal Power Commission has such extensive jurisdiction I am certain it would be able to invoke it in this area. Power moves across State lines in so many grids that the companies are in fact interstate as the telephone companies are also.

Radio stations would be another example of this area of the requirement to serve, the equal time provisions, that sort of thing.

I think in all of these areas where you are dealing with public service corporations in interstate commerce, that, of course, a requirement-to-serve provision makes sense. You have licensed them to perform in a particularly narrow field and we have no quarrel with that. What we say here, sir, is that the drafters of this bill, in our judgment, sir, are attempting to equate the least dress shop, the least soda fountain, with A.T. & T. You are getting into an area of public service corporation regulation here when you impose a requirement to serve in the name of interstate commerce upon these generally local enterprises.

We don't want to go into reductio ad absurdum arguments because they, by their nature, do become absurd. But we raise the question for your speculation and for your committee discussions, of where this door leads you. Once you have justified some sort of equation with public service corporations, once you have imposed this requirement to serve all customers, now do you then open the door for rate regulation? For Federal licensing?

What sort of doors are you opening under a requirement-to-serve provision which you never before have applied to any except these public service corporations? We submit this is a very bad door to open. We don't believe that the least little dress shop on Grace Street in Richmond is to be equated with the Virginia Electric & Power Co. in terms of its subjection to Federal law and a Federal requirement to serve.

I dwell for a moment on that word "license" in the preamble to this bill. I would like to come back to it, because in our judgment it seems that this is a great door you are opening, this word "license," that if this leads us to the ambit of the equal protection clause, this State licensing, our fear, gentlemen, is that in that moment you tend to obliterate altogether the distinction which has existed historically when the agencies of the State and private business, and we question gravely whether that is a distinction that really you want to obliterate, whether or not in the emotionalism of the hour this profound question of our economy and our Constitution has not been obscured.

We take the position, moving on from the commerce clause, that the bill in its present form gravely violates the 14th amendment. We don't believe that it ever was the intention of the framers or the ratifiers of the 14th amendment that that engrafting upon the Constitution was intended to apply to enterprises, places, and establishments of the sort that would be covered under this bill.

During this morning's testimony Governor Barnett rather stole some of my speech because he read in large part from the *Civil Rights Cases* of October 1883, which I had intended to enlighten you with myself, and he dealt with some of the subsequent citations of that case in *Williams* v. *Howard Johnson*. He did not touch on the *Wilmington Parking Authority* case in which only 2 years ago the language of the *Civil Rights Cases* was again affirmed at the highest level of our jurisprudence.

So, we don't believe this ever was intended and we believe that the judges who, in October 1883, voted 8 to 1 to throw out that Civil Rights Act, of 1875, we believe they were a great deal closer to the true meaning of that amendment than perhaps we are today. They

haven't suffered from distorting distance, as Mr. Justice Brandeis once called it.

They knew what the amendment meant. And those eight justices were northerners: Ohioans, New Englanders, two of them had fought in the Union Army; they had no southern bias of any sort. The eight wrote this solid opinion saying that the 14th amendment never was intended to do anything of this sort.

It is our surmise that this word, "activities" in the bill is intended to mean, as I said, the activities of the police; that you have here a restaurant; the proprietor refuses for his own reasons to serve a Negro customer who comes in; the Negro sits down, refuses to leave; the proprietor demands that he leave, and summons the police; the police make an arrest for trespass; the case is taken into public courts, and prosecution is made there.

Our presumption is that it is the view of the framers that that action of the police and the police justice, of the courts, constitutes State action within the ambit of the 14th amendment.

With that point of view, sirs, we respectfully disagree as strongly as we know how. It seems to us that there the activities of the State are directed not toward the enforcement of some public law or practice or custom, if you please, of segregation; they are directed toward enforcing the businessman's right of property. They are directed, sir, against the law of trespass, and not against the private custom or practice of racial discrimination.

Surely in this free country a man still has the right to call upon his police to enforce the laws of trespass.

I had certain questions and reservations about the particular language and sweep of the bill. Our other spokesman later on will touch upon them. When you get down to any "soda fountain," as the bill now recites, in the third paragraph, we believe that truly you have passed completely out of the area of interstate commerce; that it is not reasonable, gentlemen, to say, as the drafters of this bill said, that "Any restaurant, lunchroom, lunch counter, soda fountain" is somehow engaged in interstate commerce.

This is stretching the commerce clause in our judgment beyond the bounds of reason. We think that there is still a point in law at which goods have come to rest and we think perhaps the neighborhood soda fountain is one such point.

On that point we would like to say this: That there has been a good deal of discussion about the Mrs. Murphy's places in the past few weeks—some talk of a compromise on this bill so that it would not apply to Mrs. Murphy's lunchroom, Mrs. Murphy's hatshop.

We would submit to you gentlemen that the thrust of this bill inevitably will be just against Mrs. Murphy's place.

Now, your big stores, your Miller & Rhoads, and Thalhimers, in Richmond, your big interstate highway lunch rooms, the Howard Johnson places and others, they are not going to continue any practices of segregation law. Month by month these pass. The big targets are steadily being toppled. The biggest hotels in Virginia now readily admit Negro patrons. These old barriers are falling at the big levels.

So that this bill, if passed, is not going to affect the big stores, the big hotels. No, sir, it is going to go to Mrs. Murphy. It is going to go to your soda fountain in Lawrenceville, Va.; your little lunchroom

over here somewhere, in a small town. That is where it is going, because in every case it will be true that a substantial portion of any goods held out to the public by such places for sale, use, rent, or hire has moved in interstate commerce, and they are covered.

There is, in the view of our commission, not the slightest question that every bowling alley, every beauty shop, every barbershop, every tiny retail establishment in the whole of this country is covered by the sweeping language of the bill as the drafters have put it forth.

I have only a few more comments under the Constitution and I am done.

We submit that there may be some question of the constitutionality of this bill under the fourth amendment dealing with the right of people to be secure in their houses. It is true that it deals with business, but business houses are often called just that, business houses, and we have seen the Constitution stretched all over the place.

Perhaps the theory of the Constitution on which we are not supposed to turn the clock back now regards a man's house as his place of business, in which case it would no longer be secure under this bill.

More seriously, we feel that the bill violates the fifth amendment's guarantees of property, that a man's property is not to be taken from him for public use without just compensation.

We feel that the bill violates the ninth amendment, which reserves to the people those rights that have not been enumerated and says that such rights shall not be disparaged. We feel that it violates the sixth amendment because in effect you have created here, sir, you will have created, or the bill's drafters would create, an area of criminal prosecutions.

Under the whole of the omnibus bill, on which I understand I really have no business testifying, you deal with a good many threats, and questions of intimidation. In plain point of fact, I believe that there are provisions if this bill dealing with the threatening or the denial of these various things.

Yes, sir; that is right. Under section 203 in the bill that I have here you speak of:

> The offense of depriving or attempting to deprive of rights and privileges, interfering or attempting to interfere, intimidating, threatening or coercing persons, punishing or attempting to punish persons.

It would seem to us, sir, that these lead you into the acts that have "the character of" criminal acts, and if these acts have "the character of" criminal acts, they would seem to us to be brought within the ambit of the sixth amendment that says that in all criminal prosecutions a trial by jury shall be preserved.

This bill would provide no jury protection at all——

The CHAIRMAN. Where is that reference in this bill that you are talking about?

Mr. KILPATRICK. It is the subheading, "Prohibition Against Denial of or Interference With the Right to Nondiscrimination."

The CHAIRMAN. I don't see that.

Senator PROUTY. What page?

The CHAIRMAN. Do you mean page 7? Section 4?

Mr. KILPATRICK. It is the section beginning, "No person, whether acting under color of law or otherwise."

The CHAIRMAN. I see it.

Mr. KILPATRICK. I am glad you brought me back to that because I had underlined, "or otherwise."

The CHAIRMAN. There is no criminal penalty involved there.

Mr. KILPATRICK. No, sir. What I say is that this takes on "the character of" criminal actions, and this use of that phrase, "takes on the character of," has a certain fascination for me. "Such discriminatory practices take on the character of action by the States."

While things are taking on the character that otherwise they might not be thought to assume, we would take the position that these various acts of intimidation and coercion take on the character of criminal acts, and by extension of the same sort of logic employed by the drafters of the bill earlier in the "findings," this might be thought to come under the heading of a criminal prosecution to which under the Constitution the jury trial is reserved.

Gentlemen, those are the preliminary objections that we take to this bill. As I say, I am here merely substituting for Mr. Mays and for Mr. Gray who want very much to come and expound this as lawyers to you.

And I now have trespassed longer on the time of the committee than I had hoped to.

Those are all the remarks that I have to make on it.

The CHAIRMAN. Are there any questions of Mr. Kilpatrick?

I have only one question. I think, Mr. Kilpatrick, you could be a pretty good lawyer the way you rattle off the Constitution.

Mr. KILPATRICK. I try to read it all I can, sir.

The CHAIRMAN. I am sure you don't mean to imply in your statement that there was any requirement to serve all customers.

Mr. KILPATRICK. You mean if a drunk wandered in?

The CHAIRMAN. Yes.

Mr. KILPATRICK. No, sir.

The CHAIRMAN. No one suggested that.

Mr. KILPATRICK. No, sir. If I implied that I didn't intend to. I stand on the language of the bill, "All persons shall be entitled, without discrimination or segregation"——

The CHAIRMAN. Sometimes a client is the type a person doesn't want, and they don't have to——

Mr. KILPATRICK. No, sir.

The CHAIRMAN. We are just talking about race, color, and creed.

Mr. KILPATRICK. Yes, sir; that is what we are talking about. In our part of the country, certainly, these feelings still are strongly and deeply held, and there is segregation in these business establishments by reason of race. No one denies it.

The CHAIRMAN. You make that point, and I suppose this happens, and I suppose it will always happen.

A person of a minority group may not necessarily be colored. In my State it might be an Indian; in Senator Bartlett's State it may be an Aleut or Eskimo who might wander in.

A fellow could say they were obnoxious in some way in a restaurant and say, "I am not going to serve you; get out."

Mr. KILPATRICK. Yes, sir, but our responsibility——

The CHAIRMAN. They might consider that not because they were obnoxious in some sense, but because they were an Indian or an Eskimo or an oriental.

Mr. KILPATRICK. Of course, that will always happen, and the courts have to differentiate in those cases if the matter ever should get to court.

The CHAIRMAN. But when you speak of section 4, the right against denial of interference with the right to nondiscrimination, I am sure you people in the Commission realize that the only penalty involved there is, don't discriminate.

Mr. KILPATRICK. No, sir. We respectfully would take issue with you. We would think that the end of the chain described in the bill lies an order for contempt of court punishable by fine and imprisonment.

The CHAIRMAN. If you continue to discriminate, I suppose the court could hold you in contempt.

Mr. KILPATRICK. Yes, sir; that would be our view.

The CHAIRMAN. Or could you use such remedies as any court may have within their authority?

Mr. KILPATRICK. Yes, sir. That is an area I did not touch on and perhaps should have.

The CHAIRMAN. The court can do something about it only if you continue to discriminate.

Mr. KILPATRICK. We believe in the right to discriminate.

The CHAIRMAN. You believe in the right to discriminate?

Mr. KILPATRICK. Yes, sir. I certainly do. With my whole heart.

The CHAIRMAN. In public places?

Mr. KILPATRICK. Yes, sir; public places and restaurants. I think these are public places and establishments.

The CHAIRMAN. Suppose the place was clearly a public place. We may differ as to that.

Mr. KILPATRICK. In a bus station?

The CHAIRMAN. Buses would be public conveyances.

Mr. KILPATRICK. You are leading me into areas of interstate commerce. A soda fountain, the neighborhood soda fountain. Yes, I believe in the right of the owner of a neighborhood soda fountain to pick his customers.

The CHAIRMAN. I don't go to neighborhood drugstores. A department store is a public place.

Mr. KILPATRICK. Yes, sir. The bill relates to soda fountains as well as department stores.

The CHAIRMAN. I think maybe the language might have been put in there because they are thinking in terms of many of these large chainstores like Woolworth because there are variety stores, and other stores that have lunch counters and soda fountains in conjunction.

Mr. KILPATRICK. Perhaps so. The language of the bill, as we were required to consider it, is any restaurant, any lunchroom, any lunch counter, any soda fountain. This would seem to us to cover all the soda fountains in the country.

The CHAIRMAN. They would have to be in interstate commerce. There are some naturally different versions of what is in interstate commerce.

Mr. KILPATRICK. Yes, sir. As long as it can be shown that this soda fountain has a substantial portion of its goods that have moved in interstate commerce.

The CHAIRMAN. That is right. That may not be the one you described at all.

Mr. KILPATRICK. It may not be, sir, but at the same time it very well may be the neighborhood drugstore in Mississippi or Alabama.

The CHAIRMAN. In every case where the court has ruled on the question of interstate commerce it has been on a specific case. The facts may be different in each case. If there is some disagreement, the court rules on the case as it comes up. Sometimes they have held things not to be in interstate commerce. There is always a question of difference of opinion about that.

Mr. KILPATRICK. I, sir, am no authority. I don't recall many things they haven't been held to be in interstate commerce, and when they held the window washers were in interstate commerce I rather gave up. So I have myself no optimistic feelings that they would hold my soda fountain not in interstate commerce in a particular case.

The CHAIRMAN. The courts have gone quite a long way in putting things in interstate commerce.

Mr. KILPATRICK. Indeed, they have.

The CHAIRMAN. By the same token, if the country has grown, there is more interstate commerce. What limits a committee of Congress might want to define for legislation would be a matter of public policy. We can define interstate commerce in a bill like this for these particular purposes, and limit it permanently, if that is what we decided to do.

The point I am trying to make is that there are varied opinions on the definition of interstate commerce.

Mr. KILPATRICK. Yes, sir, but in this the judgment, or the extent of the discretion that is vested in the Attorney General under this bill to make some of these determinations, seems to us very large, and not sufficiently circumscribed. The language is "in his judgment." It says that a couple of times in this bill. They are talking about the Attorney General's powers of prosecution. If he is to make these various decisions on the substantive nature of the defense——

The CHAIRMAN. In his judgment when the matter comes before him, it is whether he would institute the proceedings.

Mr. KILPATRICK. Yes, sir, and in an area so fraught with political considerations as this, we don't——

The CHAIRMAN. It has to be within the discretion of every Attorney General or prosecutor or law adviser to government?

Mr. KILPATRICK. Yes, sir.

The CHAIRMAN. You can't lay it down in so many words when to prosecute and when not to prosecute.

Mr. KILPATRICK. We don't believe there ought to be any prosecution.

The CHAIRMAN. Let's get down to that. You don't think there ought to be any bill at all?

Mr. KILPATRICK. No, sir; we don't think there ought to be any bill at all. If you are going to pass a bill we would like to have the least bad bill that is to be put together. We would prefer vastly not to see a bill.

The CHAIRMAN. You don't have a public accommodation bill in Virginia, as I remember it.

Mr. KILPATRICK. No, sir. We had a law on public assembly that was just thrown out.

It had not been enforced.

The CHAIRMAN. It has been introduced as I understand it and never got through the legislature.

Mr. KILPATRICK. A public accommodations bill?

The CHAIRMAN. It has been introduced on some occasions?

Mr. KILPATRICK. I do not recall it. I could be in error on that. If it was introduced it never got out of committee.

The CHAIRMAN. Senator Byrd told me some had been introduced.

Mr. KILPATRICK. I am sure it never got out of committee.

The CHAIRMAN. You are one of the 18 States that do not have public accommodations.

Mr. KILPATRICK. That is right, yes, which we believe of course is our right not to have it.

The CHAIRMAN. I understand that.

Senator Monroney?

Senator MONRONEY. You mentioned that you had little fear of the consequences of the bill before this particular committee. But then you proceed to show a degree of fear as to its effect on many rights of businesses that had always been regulated and policed by States rather than by the Federal Government, if the business was truly intrastate in nature?

Mr. KILPATRICK. Yes, sir.

Senator MONRONEY. You can remember back several years ago when the great Senator O'Mahoney proposed Federal corporation charters for truly interstate corporations, what a terrible hue and cry went up about even licensing the giants of our industry who operate oftentimes in all of the 50 States. My fear of the consequences of this bill rests on the stretching of the interstate commerce clause to the degree of licensing all forms of business, no matter how inconsequential or how intrastate they were in their complete operation. The pattern would be set that could not be reversed in our constitutional history of leaving these local businesses to local licensing, local regulations of all kinds.

Mr. KILPATRICK. Yes, sir.

Senator MONRONEY. If this amended any other section of the Constitution other than the commerce clause I wouldn't be so concerned. If you could use the 14th amendment I wouldn't be so concerned because that deals with bias and you can't spread that very well into the field of the size of a package or the rights of the business to operate pretty much on its own. But we have seen the stretching of the Constitution to a great many things that were way beyond or way below the interstate commerce activities.

Mr. KILPATRICK. Yes, sir.

Senator MONRONEY. I wonder if you would elaborate on whether you do feel that there is a real danger of this opening this wide door——

Mr. KILPATRICK. I do emphatically, sir.

Senator MONRONEY (continuing). Bringing almost everything under Federal jurisdiction.

Mr. KILPATRICK. Most emphatically that is our feeling. We are trying to shrink the Constitution back, may it please. We think it has been stretched way beyond the bounds of the original Federal plan, and our whole hope and prayer is to see it shrunk back a little bit toward its original dimension. Yes, sir; as I attempted to outline,

our feelings under the commerce clause are very strong, and we have the gravest apprehensions of the mischief that will be let loose if this bill were to be passed as an extension of the commerce clause. I would be inclined to agree with you to that extent, sir. However, under the 14th amendment we would not say that the bill is constitutional. The 5th section of the 14th amendment gives Congress the power to enforce this article by "appropriate" legislation, and that is all. The article relates to these actions of the States that are prohibited, whereas this bill, may it please you, sir, does not relate to actions of the States at all. It relates to actions of individuals, and therefore it would not seem to us "appropriate" legislation for the Congress to pass to enforce the 14th amendment. We have very strong feelings, just as strong on the 14th amendment, as we do on the other.

On the first question you asked, sir, about my comment on the consequences, I think there would be very severe consequences from this law in lots of ways. For example, under law enforcement: This is a prohibitory kind of bill that you have here. It is bound in the nature of things to be widely violated and every one of you gentlemen knows it. All of us know it. This bill is practically unenforceable without an army of Federal agents in and out, and an army of lawyers operating through the Civil Rights Division receiving complaints, investigating them, making these decisions, opening the mail, going hither, coming yon, dealing with the proposed Conciliation Service that would be set up. In the long haul I think the thing would be so circumvented and so violated and so many phony private clubs set up, and all of this, that we would be right back in the era of my childhood and the prohibition I knew as a boy out in Oklahoma. Sir, I can remember calling the bootlegger. There was gross contempt for law in the period of prohibition; and there would be wholesale contempt for this law. I believe that the most serious immediate consequence of it, would be the widespread contempt for the law that would be generated by this.

In terms of race relations, I stand on what I said. No, sir; I think we could live with this thing. You pass this bill on Monday and on Tuesday you are not going to have swarms of Negro customers at the flossiest restaurants of New Orleans and Birmingham and Atlanta and Richmond.

Of course, you are not. In the 2 years since we have had desegregation of restaurants in Richmond there has been practically no Negro patronage of them. We have lived with this situation and we can live with the immediate social consequences of this title II of the omnibus bill much better than we could live with some of the other provisions.

But I think your other consequences, Senator Monroney, would be very bad.

Senator MONRONEY. Which is the overexpansion of the commerce Clause and the paths it would be taking.

Mr. KILPATRICK. Yes, sir.

Senator MONRONEY. I quite agree. Would it be preferable if legislation must be enacted—I am sure you are not for any legislation—to do this on a constitutional basis by amending the Constitution and specifying that the action is taken to prevent bias being shown

to any citizen of the United States, and, therefore, it could apply only in cases of bias and would not set a precedent for continuous advancing under the——

Mr. KILPATRICK. Of course, it would be. If you want to get up a resolution to amend the Constitution that says no State shall do A, B, C, D, E, or F, fine.

If you can get it through two-thirds of each House and three-fourths of the States ratify it, we in the South will obey it. Our point is that it is wrong to stretch the Constitution and make it mean things it palpably doesn't mean.

Senator MONRONEY. This would be the strictly straightforward means of doing it.

Mr. KILPATRICK. Of course.

Senator MONRONEY. You are talking about discrimination against an American citizen which the country has the right to say shall be unlawful.

Mr. KILPATRICK. Yes, sir.

Senator MONRONEY. All American citizens shall be treated alike.

Mr. KILPATRICK. You gentlemen made yourself honest on this poll-tax amendment, and I was strongly in favor of it.

Senator MONRONEY. It came within one or two votes of having passed in the first session it was before the legislature.

Mr. KILPATRICK. Yes, sir.

Senator MONRONEY. This is almost a record for speed in adoption.

Mr. KILPATRICK. Yes, sir.

Senator MONRONEY. If there is——

The CHAIRMAN. Have you in Virginia ratified it?

Mr. KILPATRICK. No, sir. Our legislature is not in session and I frankly have no idea we will ratify it. We have a poll tax in Virginia. I think we will reject the proposed amendment. But this, in my opinion, is the right way to go about these constitutional questions.

Senator MONRONEY. The issue affects only six States and will undoubtedly pass in the next legislative session. Doing it this way allows the people of the States to be a party to the elimination of discrimination.

Mr. KILPATRICK. Yes, sir.

Senator MONRONEY. In other words, Congress is not imposing it on them, but at least two-thirds of the States will be voting it on themselves and on the other remaining third.

Mr. KILPATRICK. Three-fourths, yes, sir. But I venture this further comment: I believe that the Congress of the United States, if it were considering a constitutional amendment, would take these provisions with far greater seriousness than I am afraid the provisions of this bill are likely to be taken. When you start writing the supreme law of the land, and you are going to put this in the Constitution, I think these questions of property rights would all have a sudden tower over this Hill in a way that they don't tower now.

Senator MONRONEY. There would be a question of human rights——

Mr. KILPATRICK. Yes, sir.

Senator MONRONEY (continuing). Involved here, which I think is at the heart of the thrust on this bill, and on the thrust, perhaps, if there is one, for a constitutional amendment.

Mr. KILPATRICK. If three-fourths of the States want it, all right.

Senator MONRONEY. You have to equate this. I think there is a human rights element involved in this. You can discriminate, I think, very easily if you say this motel wants no children, white or colored, because they don't want the noise or the running through the halls.

There is no actual discrimination there except that this is one of the rules of the establishment as to whom they are accepting. But when you say all people are desirable who have white skin and all people are undesirable who have dark skin, then I think we are coming into a very dangerous basis of prejudice, which 30 States and countless municipalities have already moved against.

Mr. KILPATRICK. It may be unwise, sir; it may be unfair; it may be just as wrong as wrong can be, but I don't believe it is the kind of wrong that it is the duty of the Congress of the United States to try to correct.

Senator MONRONEY. If it is impossible to correct it otherwise, then I think the Congress must, if we think it is wrong——

Mr. KILPATRICK. No, sir; it is not impossible to correct otherwise.

Senator MONRONEY. We should find a constitutional way.

Mr. KILPATRICK. It is not impossible to correct it otherwise; 32 States have already attempted through their State processes to correct it. In other of the States without the State laws, the problem, whatever it is, is in the process of being gradually corrected. It can be corrected otherwise.

Senator MONRONEY. Slowly, but perhaps it can, because there are countless municipalities that are not counted in the 32 States. Richmond has desegregated eating places; Oklahoma has done rather well in that regard, and so on.

I feel if we are going to correct this, it ought to be done so there is no question as to its constitutionality.

Mr. KILPATRICK. Yes, sir; but are you going to correct it within the framework of a voluntary society or by compulsion?

Senator MONRONEY. An inn takes on a certain aspect of being a public place. It accepts one person who walks through the door and rejects another.

Mr. KILPATRICK. Yes, sir; but you know where the problem is going to arise. It is in the Mrs. Murphy establishment, the neighborhood pub, the small towns. That is what we are talking about in this bill. These, in effect, take on the character of clubs, may it please the committee.

The little neighborhood pub at the end of the alley in my block on Hanover Avenue in Richmond to all intents and purposes is a little club. And the poor thing that it is, Nick's Restaurant, it is our pub. We believe that it is an essentially private establishment, that it is not essentially a public place, and we believe Mr. Nick Baronian, the proprietor thereof, has the right to pick and choose his customers on any basis that seems to him reasonable.

Senator MONRONEY. It might be that that would be a proper reservation. Certainly if we are going to pass this law and use the constitutional provisions for regulation of interstate commerce, then I think you should give consideration to those establishments that are interstate in their nature.

I mean your eating places that are owned by corporations that operate in more than one State. There are people who operate hotels in more than one State, people who are especially dealing in interstate commerce along the interstate highways, where the trade would be preponderantly in the field of interstate commerce, rather than those who are so local and personal in their nature that it has no effect whatever on the true meaning of the interstate commerce provision.

Mr. KILPATRICK. Yes; I agree entirely. But the language of this bill is based upon the theory that when my restaurant operator turns away this Negro customer, he has imposed this burden upon interstate commerce. I submit to your thought the interesting proposition that the whole thing can be reversed and turned around and the thrust sent backward.

Do you now lay the groundwork for a bill that compels me to patronize a particular place? If I withhold my patronage from Nick's Restaurant or Miller & Rhoads, or from a particular store, do I thereby impose a burden upon interstate commerce by not patronizing?

And if so, may you by Federal law reach out and compel me to trade? Is not the burden on interstate commerce the same in either case? It is an interesting question.

Senator MONRONEY. I would hardly think so. That is all that I have, Mr. Chairman.

The CHAIRMAN. Mr. Kilpatrick, of course despite what the courts have said is interstate commerce, Congress can define what they want to be considered as in interstate commerce for a particular purpose in a particular bill.

Mr. KILPATRICK. It would be a great day, sir, for this republic if Congress would stand up more directly and tell the court what it understands it to mean.

The CHAIRMAN. The Congress has that power, no matter what the courts have decided on this. And in this particular case surely Congress has the authority to consider how far down the line it will go, or how far up the line, in defining what is in interstate commerce.

Mr. KILPATRICK. Yes, sir; Mr. Marshall said your powers in that direction were practically without limit.

The CHAIRMAN. Senator Morton, do you have any questions?

Senator MORTON. I was interested in your last point, to turn this meaning around, backward, was your expression.

If you withheld your business, would there be a burden on commerce? We hear a lot today that we have to get taxes lower, we have to get the economy moving forward with more vigor, and we have got to do this, that and the other.

Wouldn't it be a burden on interstate commerce if somebody saved 10 percent of his money instead of being required to spend it all?

Mr. KILPATRICK. I think if a theory could be developed along this line, where he——

Senator MORTON. This could go on indefinitely.

Mr. KILPATRICK. Yes. I believe seriously, sir, that under the language put in this bill by the drafters thereof, such enormous questions of commerce have been created that the courts would be forever determining what they meant. I see no limit to it.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman. Mr. Kilpatrick, I want to take this opportunity to congratulate you upon your very fine analysis. You state you are not a lawyer, but I think you made a better analysis here today than almost any lawyer I have heard here in a long time.

You brought out that under the interstate commerce clause, the Congress has gone into the means of transportation, whether by train, barge or so forth, is going into the matter of goods transported from one State to the other, it is even going into the conditions under which those goods are manufactured, such as wages and hours, and now, if this bill should pass, it would go into a new phase, would it not; namely, the conditions under which the goods are sold?

Mr. KILPATRICK. Yes, sir, and the destination of the goods, to whom they are sold. Yes, sir, the final repository of the goods themselves. This is an enormous new area as we see it.

Senator THURMOND. So this is a new facet of stretching the Constitution, so to speak, if this bill passes.

Mr. KILPATRICK. It seems to us a fourth mile that would be traveled under the construction of the commerce clause.

Senator THURMOND. If this bill should pass, wouldn't the matter of the enforcement, for instance, at the corner drugstore, enter into the police power of the State? Right now police power is reserved to the States of the Nation. That has not been delegated to the National Government.

People frequently confuse the Federal Bureau of Investigation with being national police, the enforcer. They only investigate. They have no police duties. Those are reserved to the States.

Wouldn't this be a step in the direction of encroaching upon the police powers of State?

Mr. KILPATRICK. I am not certain on that point, Senator. I would like to hear the question argued. I would not have thought myself, with my limited knowledge of it, that questions of police power as I would ordinarily regard the States' reserved police powers, would be quite so intimately involved in this.

This is not a question to my mind of State regulation for the States are not policing restaurants in the name of keeping domestic tranquillity or health or welfare or anything else.

In my own view, ideally the States have nothing to do with this guy's restaurant in terms of whom he serves. The State's police power simply is to keep the peace. If someone is in his place of business and won't leave, I believe that the State's police power properly could be invoked to get him out of there.

Beyond that, simply enforcing trespass laws and the States' rights to enforce property laws, I would not see the police power involved.

Senator THURMOND. That is correct. In this bill, however, if it should pass, wouldn't you have Federal agents inspecting these places to see what is going on?

Mr. KILPATRICK. After a complaint were made; yes, sir.

Senator THURMOND. And taking action then against those people who violate the law?

Mr. KILPATRICK. Yes, sir. The bill requires them to go through these processes of conciliation first by this Community Relations Service, but then there are some hurry-up provisions in which the 30-day cooling-off period could be waived by the Attorney General.

In my judgment there would have to be some investigation by the Civil Rights Division of the Department of Justice once this written complaint were received.

In the nature of things, is it a frivolous complaint? Does it come from a crank? Is there some substance to it? I think you would have to send a Federal agent in to investigate.

Senator THURMOND. I can't get away from the fact that a private business—you may call them public places, if you want to; it is a matter of verbiage—is a business that is controlled and operated by a man who wants to sell and serve to the people whom he desires to serve and sell.

It is very difficult for me to get away from the fact that under the 5th and 14th amendments to the Constitution, a man cannot be deprived of life, liberty, and property without due process of law. It seems certain we are depriving him of his property without due process of law if you control who he sells to or who he serves to.

Mr. KILPATRICK. Yes, sir, this would be our view. And in the case such as that described this morning by Governor Barnett, of the woman with the $20,000 investment who found, by reason of the prejudice in the community, she was unable to operate on an integrated basis, and lost her $20,000 worth of capital in the restaurant, yes, sir, we would take the view that this was a taking of her property for public use without just compensation and thus a denial of the fifth amendment.

Senator THURMOND. That was just as much a taking of her property as if the Government had condemned that property. The practical effect was the same.

Mr. KILPATRICK. That would be our view because the Government we believe, sir, is powerless to correct the discrimination, if you please, the prejudice that operated to cost her her business.

Senator THURMOND. And, of course, she received no compensation for that loss that she suffered when she lost her business and the $20,000 invested?

Mr. KILPATRICK. No, sir.

Senator THURMOND. Frequently, people desire goals and frequently worthy goals. But under our system of government which is the most unique in the world, only certain fields of jurisdiction are supposed to be entered by the Federal Government.

Mr. KILPATRICK. Yes, sir.

Senator THURMOND. And all others are reserved to the States. And on the question of property, our Constitution refers several times that you cannot take people's property without due compensation; you cannot take their property without due process of law. In cases of this kind, it would be taking their property without due process of law and without compensation, would it not?

Mr. KILPATRICK. We think that is one of the constitutional objections to the bill, yes, sir.

The CHAIRMAN. Would the Senator yield?

Senator THURMOND. I will be pleased to yield, Mr. Chairman.

The CHAIRMAN. Why wouldn't someone in the 32 States, then, appeal all these laws to the courts?

Mr. KILPATRICK. I beg your pardon?

The CHAIRMAN. The 32 States laws are much more stringent than this law.

Mr. KILPATRICK. Yes, sir, but we believe in States rights all the way. The power has been reserved to the States to do this, sir. The States can do whatever they want to do. And in these cases, we would take the view that the fifth amendment guaranteeing a man's property from public seizure without paying just compensation, is an inhibition upon the Congress.

I never myself have accepted this swallow-up process by which the 14th amendment in some fashion blotted up all of the first eight amendments of the Constitution. I don't intend to evade the point.

What I am trying to say is that I believe these 32 States have the right, they have the power to adopt these laws. I don't think the Congress of the United States does.

The CHAIRMAN. I am confessing, I am a lawyer; I have a law degree, but I haven't practiced it that long except around here where we get a lot of law.

Let's take my State constitution. It has exactly the same wording as the Federal Constitution on due process of law. And yet, we have had for years this law in my State, and if it was taken to the State supreme court, they would have to decide that it was taking the property under the same basis as if someone took it to the Federal Supreme Court.

Mr. KILPATRICK. The construction that would be placed upon Oregon's constitution by the Oregon supreme court would seem to me to be Oregon's business.

The CHAIRMAN. I know, it is Washington's or Oregon's business, but where they have a constitutional provision, you and I are talking about exactly the same thing. You say this law would violate the Federal Constitution?

Mr. KILPATRICK. Yes, sir.

The CHAIRMAN. And our State law which is exactly the same, refers to a section in the State constitution exactly as the Federal. Now, if this sort of bill violates the Federal Constitution why wouldn't it violate the State constitution?

Mr. KILPATRICK. I can only leave that to your courts to construe.

The CHAIRMAN. There are no decisions on it.

Mr. KILPATRICK. We have a provision in the constitution of Virginia that was first written by George Mason in May 1776, that guarantees a man's right of acquiring and possessing property.

The CHAIRMAN. I know. I am saying that the State of Washington works under the same constitutional prerogatives in this field as the United States Constitution; our State law would involve the same questions in my State as this law would involve the same questions before the Supreme Court of the United States.

Mr. KILPATRICK. Yes, sir.

The CHAIRMAN. I haven't checked this, and I will, but I think all 32 States work on almost the same wording; they copied the Federal Constitution in many cases——

Mr. KILPATRICK. Yes, sir.

The CHAIRMAN. In those 30 States—the last 2 were just lately—in those 30 States, when there have been appeals, they say it comes well within the same wording as the Federal Constitution.

Mr. KILPATRICK. Senator, if 32 States had said this was not a taking of property, I would still think I was right.

The CHAIRMAN. But they are interpreting that conclusion upon the same language you are talking about in the Federal Constitution.

Mr. KILPATRICK. Yes, sir. I think our Virginia Supreme Court of Appeals would take a somewhat different view on this question of property.

The CHAIRMAN. That may be true in Virginia courts. If you will check when you get back to your Commission, you will find that the Michigan statute, which is even stronger than this, has been appealed to the U.S. Supreme Court.

Mr. KILPATRICK. On the Federal question?

The CHAIRMAN. Yes. You look it up.

Mr. KILPATRICK. I don't think I want to.

[Laughter.]

The CHAIRMAN. The point I am making is it is the same rules, the same wording. The same ruling, and the same kind of law would have to be judged under the same circumstances because our State constitution is just the same as the Federal Constitution in this respect.

Maybe our State supreme court might be a little different than that in Virginia. I grant you that.

Mr. KILPATRICK. I have to plead at this point absence of counsel in my behalf. I am struggling to do the best I can with whatever that is over my head.

The CHAIRMAN. Excuse me. The Senator yielded to me. Senator Thurmond?

Senator THURMOND. I want to say that there is a lot of merit in what the chairman said. I think I agree with you, Mr. Kilpatrick, on everything you said in the last few minutes when you said that States can do these things. I don't see how the State can pass a law, I don't see how the city can pass a law, I don't see how the National Government can pass a law to force a man to use his private property in any way.

Even though 30 States may have done it—32, 40, or 50 may have done it—I still don't think that you can violate the Constitution of the United States to make a man use his property the way he doesn't want to.

Mr. KILPATRICK. No, sir.

Senator THURMOND. These State laws have not been tested. They have not been tested certainly up to the Supreme Court.

The CHAIRMAN. The Michigan law went to the Supreme Court.

Senator THURMOND. I wouldn't be surprised at anything that Michigan sent to the Supreme Court.

What I am driving at is that I don't think that it is right, I don't think it is constitutional, to force a man to use his private property in any way.

Mr. KILPATRICK. I agree with you absolutely.

Senator THURMOND. I think it has got to be done on a voluntary basis much like you said, in Richmond you have one restaurant segregated; right next to it you have a restaurant that is integrated. That was the choice of the——

The CHAIRMAN. Which has the best food?

Mr. KILPATRICK. The segregated one has the best food.

Senator THURMOND. That was the free choice of the individuals. They made that decision?

Mr. KILPATRICK. Yes, sir.

Senator THURMOND. That decision is reserved to them, in my judgment. It resides in them. It wasn't reserved to the States. That is a fundamental right of the citizen under the Constitution, who owns private property.

Mr. KILPATRICK. Yes, sir.

Senator THURMOND. Of course, the Constitution provides that all fields are not delegated to the National Government, that some are reserved to the States. Under this theory you made the statement that possibly States could do this because it has never been delegated to the National Government. That is one theory you might take.

I am going to the fundamentals of the Constitution, in the use of property, whether there is legislation by city, by State, or the National Government. I just don't think under the Constitution, if properly construed, you can force a man in his own private business to use his property in any way that he doesn't want to use it.

Mr. KILPATRICK. Under the 14th amendment—I agree with you, sir. I felt that way very strongly at the time of this renewal case here in Washington. I thought Douglas' opinion was dead wrong in that, when the Court held that they could take this man's property away from him under this urban renewal doctrine.

I thought that was just as wrong as it could be, and I agree with you on this 14th amendment point. It says a State shall not deny any citizen his property, equal protection of his property.

Senator THURMOND. I think any statute of a State or ordinance of a State, or even constitution of a State, that comes in conflict with the U.S. Constitution, or the 5th or 14th amendments, on the use of a man's property, the control of it, or the use of it, would have to fall if the property restrictions are placed upon it.

Mr. KILPATRICK. Of course, it would have to fall. What I intended to say, and obviously said very poorly, is that I believe the States have powers reserved to themselves which are very wide, very extensive, and can try all sorts of social, political, or economic legislation that the U.S. Congress would not be able to pass.

Senator THURMOND. That is correct. Where there is not a provision in the Constitution that reserves or preserves to an individual a specific right, then the States can do anything——

Mr. KILPATRICK. Right.

Senator THURMOND (continuing). That is not prohibited by the Constitution of the United States.

Mr. KILPATRICK. Yes, sir.

Senator THURMOND. But the National Government can do only those things where they have specific authority to do so as granted them in the Constitution and the 22 amendments that have been adopted since we adopted the construction.

Mr. KILPATRICK. That is the way we strict constructionists see it.

Senator THURMOND. That was the construction of Thomas Jefferson, wasn't it?

Mr. KILPATRICK. Yes, sir; until he got to Louisiana it was, anyway.

Senator THURMOND. Mr. Kilpatrick, don't you feel it isn't a matter of race prejudice in this proposal before us; it is simply a question of

whether we are going to change the American system, or whether we are going to try to rewrite the Constitution here to make it mean something the forefathers didn't intend for it to mean?

Mr. KILPATRICK. Yes, sir.

Senator THURMOND. I agree with Senator Monroney when he said that we could amend the Constitution of the United States in one of the two ways provided in the Constitution for amending it. We could amend it to do the very thing here, to require private property to be opened up to the public in general.

But until we do amend the Constitution in that way, then there is no way under the earth that I know of that you can force a man, if the Constitution is construed correctly, to do so.

Mr. KILPATRICK. Not constitutionally, as far as we can see it, sir.

Senator THURMOND. Don't you feel that voluntary action is the only proper way to go about opening up places of business, that is private business as distinguished from public utilities like power companies of gaslines or other things in public utilities where they have to serve everybody, or where there is some State connection, for instance, where a State or school district operates schools, or where there is some other specific State action, so to speak. Unless you have public utilities or State action there is no other way you can do it under the Constitution?

Mr. KILPATRICK. No, sir.

Senator THURMOND. Then isn't the proper way, and shouldn't the people of America understand that the only proper way it can be done is through public opinion, through a voluntary opening up of these places if it is desired that they be opened up?

Mr. KILPATRICK. Yes, sir. That, and economic pressure. I think when the time comes that it is profitable to run an integrated restaurant in Richmond, Charleston, or Columbia, S.C., if somebody can make an honest dollar, somebody is going to open up such a restaurant.

Senator THURMOND. If any man in Richmond today wants to run an integrated place, there is nothing to prohibit him from doing it?

Mr. KILPATRICK. No, sir; many of them are.

Senator THURMOND. If any other section of the South wants to run an integrated restaurant, he is allowed to do it, isn't he?

Mr. KILPATRICK. Certainly, so far as State law is concerned. All the State laws that used to prohibit that now have been declared void and I think rightly declared void.

I don't think those laws ever had any constitutional standing.

Senator THURMOND. Because that is a decision, that is a choice.

Mr. KILPATRICK. Yes, sir.

Senator THURMOND. Only the individual operator of that business can make it.

Mr. KILPATRICK. I think the laws, the Jim Crow laws in the South, I think inhibited personal choice. It has taken a long time for us to see and understand that. Those laws never were constitutional. They never should have been passed. They should have been repealed a long time ago.

Senator THURMOND. The constitutionality of a lot of laws put on the books has never been tested.

Mr. KILPATRICK. When the law says that you cannot serve customers of both races, I think that law is just as bad as the law we are talking about here that says you must serve customers of both races.

Senator THURMOND. I think you made a very fine statement. You have been most helpful to the committee. I wish to express my gratitude to you for your appearance here today.

Mr. KILPATRICK. Thank you, sir.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Cannon?

Senator CANNON. Thank you, Mr. Chairman.

Mr. Kilpatrick, you make a very persuasive case against an attempt to expand the concept of the extent of the 14th amendment and the commerce clause and I share the concern of Senator Monroney about the attempt to make that expansion in this manner rather than through an amendment to the Constitution, which I personally would be inclined to support.

But we still have the basic problem, which is a moral one, and certainly needs to be resolved, other than in the fashion that is proposed here.

Mr. KILPATRICK. No, sir. I am not beyond saying that moral problems as such simply are not the responsibility of the Congress of the United States, and you ought not to try to solve moral problems. One of the difficulties that we are in, in this Republic, is that the Supreme Court of the United States, and this Congress from time to time has looked at a given situation and said, "This is morally wrong, therefore it is unconstitutional."

These two things just don't follow. It is one of the worst non sequiturs that ever got inflicted upon us.

I don't know how you as a Congress go about correcting a moral evil. I don't know of any law that you can write. You asked me how to go about it. I would say you go about it through the churches; you go about it through persuasion, through the ordinary arts of human relations, and that this is how things are corrected, with an occasional nudge here and there from economic pressure.

You correct it by a sense of shame.

What was it Justice Frankfurter said in that reapportionment case? You have to get this voice crying out, that this is a shameful situation. And until the public conscience cries out, I don't think you of the Congress of the United States can do anything about a moral problem, sir.

Senator CANNON. We have one area of concern, Mr. Kilpatrick, that concerns me very greatly, independent of the constitutional question, and that is this: the Federal Government is giving assistance, with taxpayers' money, in many areas—Small Business Administration, FHA, guarantees, programs of this sort. It is very difficult for me to see why the Federal Government should not have some control over where they are lending funds, or insuring funds, or helping a man make a success of his business, and why they could not give that assistance only under certain conditions.

What is your reaction?

Mr. KILPATRICK. That is not actually in the bill I came up to talk about. I think the Federal interest is very attenuated and we will take a position on that in the omnibus bill. We object to the language

in the omnibus bill that would make this thing discretionary, that would permit political considerations to enter into the withholding of this grant, the granting of this contract, the taking away of his contract, the suspending of funds and so on.

In the language of the bill that we have under consideration, S. 1731, the omnibus bill, that power to grant and withhold is so discretionary we think it is very bad.

To try to answer as responsibly as I can to it: All over this country, sir, there are all kinds of people, not just whites and Negroes, as if this were the great dichotomy; among the white people of the South you have integrationists and segrationists and moderate people. You have lots of white taxpayers in the South who are very liberal in their persuasions. They have paid their taxes, too.

Under the denial plan of Mr. Kennedy, these white taxpayers would lose the benefit of their taxes that they have paid. In this area, if you want to call it such, a segregationists majority may have compelled certain practices in certain public institutions, or in certain subdivisions, if you please. This is not necessarily the business of this guy who lives 50 miles away. He had nothing to do with the making of this decision.

Tomorrow there will be a new subdivision built right outside of Richmond, $15,000 houses. They will all be for white purchasers. The project will be insured under FHA. The Executive order of the President now says this is unlawful. You are going to take this right of insurance away. I use the word "right" wrongly. You are going to take away the privilege of insurance from the contractor who is building the subdivision. I think it is such an attenuated reach of the Federal power as to be beyond the proper scope of the Constitution.

This insurance fund, this power of the Congress to insure these various loans, is a power created by the people all over the country. The loan funds are insured in part at least by this taxpayer way over here. He has no control over this decision in this subdivision.

And then I come back again to the fifth amendment question. In the Richmond, Va., of 1963, unless this subdivision were sold entirely to white persons, the subdivision is not going to be sold. This is a fact of life that we live with. He has his property rights, the subdivider involved in this. This insurance program is nationwide. He has paid taxes to support it, just as everybody else has. And I don't believe he ought to be denied the benefits of this national program by reason of the existence of a community feeling that he himself is powerless to change, just as powerless as you are powerless to change it.

Senator CANNON. Let's go beyond this point and take it into the area of small business. For example, suppose the Congress elected to pass a provision that a man could not get a small business loan from the Federal Government unless he certified that he did not discriminate but made his business available for the service of everyone. He is applying for direct financial assistance from the Government that comes out of tax money.

Mr. KILPATRICK. Yes, but what is the purpose of the grant in the first place under the Small Business Administration? Its purpose I would imagine is to stimulate the economy, to contribute to employment, to create revenues for the Government in the form of profits.

If those are your purposes, sir, then this has nothing to do with it. If your purpose is social reform, all right. OK. I just don't think that is your purpose under the Small Business Administration bill.

Senator CANNON. Thank you, Mr. Chairman. That is all that I have.

The CHAIRMAN. The Senator from Vermont.

Senator PROUTY. Mr. Kilpatrick, are the department stores in Richmond segregated?

Mr. KILPATRICK. No, sir.

Senator PROUTY. Do they have lunch counters?

Mr. KILPATRICK. Yes.

Senator PROUTY. Are they segregated?

Mr. KILPATRICK. No, sir.

Senator PROUTY. Is that true throughout the State generally?

Mr. KILPATRICK. Yes.

Senator PROUTY. I didn't know if that was the case.

Mr. KILPATRICK. Yes.

Mr. PROUTY. Thank you.

The CHAIRMAN. One thing: The hour is getting late. You and I are two great students of the Constitution.

Mr. KILPATRICK. Love it, sir.

The hour has gotten so late I have missed my train.

The CHAIRMAN. We have heard the term around here for the last 2 weeks about "stretching the Constitution."

Mr. KILPATRICK. Yes.

The CHAIRMAN. Actually we can't stretch the Constitution and we can't condense it. The Constitution is there. The Court interprets it. We can't stretch it. There is nothing we can do to change the Constitution except through an amendment.

We can pass a bill that might look like it. Somebody might interpret that we are stretching it a little too much or we are condensing it too much. But there isn't a thing we can do about the Constitution. It is there. It is as solid as that granite. It depends on how the Court interprets it.

So when you say we can stretch it or we can condense it, that is not true. We have no authority to do one or the other.

Mr. KILPATRICK. Yes; your authority is to pass laws pursuant to the Constitution, and the Constitution is what our nine friends say it is.

The CHAIRMAN. We can't stretch it or condense it. We have no such authority. We have the responsibility to pass laws that we think determine public policy and are in the public interest.

Mr. KILPATRICK. Yes; that is the theory of it.

The CHAIRMAN. If the Court says that is stretching it too much or condensing it too much, we have no control over that at all. We can't change the working of the Constitution.

Mr. KILPATRICK. No, sir; but you can exercise your own good judgment on whether the bill before you is or is not in accordance with it.

The CHAIRMAN. Oh, yes. There are some things that I think are not within the Constitution that you would say were within the Constitution. This is what makes lawyers.

Mr. KILPATRICK. Yes.

The CHAIRMAN. Sitting downtown this afternoon is a 17-man committee of the American Bar Association. They started at 9 this

morning. They were called in by the President to discuss the legal aspects of the civil rights problem. Right now, beginning this morning there will be 17 different opinions.

Mr. KILPATRICK. Yes.

The CHAIRMAN. That is the way lawyers are.

But the point I'm trying to make——

Mr. KILPATRICK. I would hate to think there is only one right now.

The CHAIRMAN. I may think some legislation stretches the Constitution or takes it too far, but I can't do anything about what the Court interprets. That is it.

Mr. KILPATRICK. You can in a way; yes. You can pass laws that in some way correct what they do.

The CHAIRMAN. We don't agree with the Supreme Court all the time. I said the other day we many times in Congress repeal decisions of the Supreme Court.

Mr. KILPATRICK. Yes; and I have supported it every time I can remember that you have done that.

[Laughter.]

The CHAIRMAN. I said the other day, this is a kind of a funny thing. One day I had a bill on the Senate floor that repealed the Supreme Court decision by unanimous consent. There wasn't any one——

Mr. KILPATRICK. That is a real bill.

Senator MORTON. There wasn't anybody on the floor.

The CHAIRMAN. Yes, sir; there were quite a few. Everybody knew what the bill was about. But I say the Constitution is written; there it is.

Our job is to legislate the best we know how. There are many different opinions.

Mr. KILPATRICK. There certainly are.

The CHAIRMAN. When we are through here, there will be eminent lawyers, of great standing, constitutional experts, so-called, who will have entirely different viewpoints on it. It never can be determined until somebody puts in the final decision. Sometimes Congress takes and weighs the two. Sometimes more of one outweighs the other. You take your pick, as you do anywhere else. We have all kinds of bills in this committee under the interstate commerce clause. We have a bill in this committee that would fix the retail price of whatever a man sells.

Mr. KILPATRICK. Yes, sir; and I am opposing that bill.

The CHAIRMAN. There are a lot of people for it. It is called the "fair trade" or "economic stabilization bill."

Mr. KILPATRICK. It is a very bad bill for a lot of the reasons I have advanced.

The CHAIRMAN. It is to protect the big businessman, where the big house is selling too low on a standard item. This would be to fix the price.

Senator MORTON. I think the rule is germane. Why not kill the bill right here?

The CHAIRMAN. I think the rule is well taken. There again, what is in interstate commerce? As a matter of public policy, we may all come to the conclusion you wouldn't want to put this under that authority. But there is no use of us here belaboring the point of what the interstate commerce clause includes, how far it may or may not extend, because it is written.

Mr. KILPATRICK. If I can be serious for just a minute, sir, this is your primary obligation before it ever hits that court, to make that judgment, to bring to bear on it all the thought, power, energy, and intellect that you can to make the primary decision as to whether it is or is not constitutional.

The CHAIRMAN. We do. And that is why we hear all these lawyers and that is why we try to weigh all these things and make our final decision. But the final decision is the Constitution's own written words.

Mr. KILPATRICK. Yes, sir; someone has to finally construe it, whether the Supreme Court or in the end, the people in the States themselves.

The CHAIRMAN. As Senator Thurmond pointed out, many cases in this field have never been passed on in different places. Some have. I have listened to at least 17 different versions of that *Howard Johnson* case before this committee.

Mr. KILPATRICK. That was a good opinion.

The CHAIRMAN. And you read it and you can read a lot into it or out of it, whatever your feeling is.

Mr. KILPATRICK. I felt pretty good about it.

The CHAIRMAN. If you are a segregationist you can read whatever you want into it. If you are an integrationist you can read other things into it.

Mr. KILPATRICK. Yes, sir.

The CHAIRMAN. We gave him a fine lecture on constitutional law.

Mr. KILPATRICK. We tried to. You did very well.

Senator MORTON. Would the Senator yield?

The CHAIRMAN. I yield.

Senator MORTON. I think my colleague from Oklahoma and I are the only nonlawyers represented here on the committee now. I want to observe that I think the two most articulate statements we have had have been by the two men not being lawyers—the present witness and the Secretary of State. I commend them both.

The CHAIRMAN. We will be in recess until Monday morning at 9 o'clock, in this room, and we are going to have the Governor of Alabama, Mr. Wallace.

(Whereupon, at 5:08 p.m., the hearing in the above matter was adjourned, to reconvene the following Monday at 9 o'clock on July 15, 1963.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

MONDAY, JULY 15, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 9 a.m. in the caucus room, Old Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order.

There are several Senators who are on their way. They will be here in a very few minutes.

We have two important witnesses this morning and we want to have ample opportunity for them to be fully heard. Members of the committee may have several questions to direct to them.

We are privileged this morning to have with us our colleague from Alabama, John Sparkman. I'm sure he would like to present the Governor to the committee.

Senator SPARKMAN. Thank you, Mr. Chairman.

I would like to present to you the witness of this morning. Let me say in the beginning that I have a committee meeting of my own. I have already explained to Governor Wallace that I would not be able to stay the full time, but I'm going to stay as long as I can before going to my own committee.

I call attention to the fact that Congressman Jones from Alabama is here also.

The CHAIRMAN. Yes; we are happy to have you with us, Congressman.

Senator SPARKMAN. I would be very happy to yield to him if he would like to say a word at this time.

Mr. JONES. You proceed, Senator.

Senator SPARKMAN. Mr. Chairman, I'm glad to present to the committee the Governor from Alabama, the Honorable George C. Wallace.

I have known George Wallace for a long time. I have known him as a man of strong convictions and courageous beliefs. He was reared in Alabama, served as a circuit judge. He served in both houses of the State legislature. He served in the Air Force during World War II. He has had a distinguished career while still a young man, and I'm very glad to present him to the committee this morning.

The CHAIRMAN. We are very glad to have the Governor here this morning to testify on this very important piece of legislation before the committee and to hear his views.

Governor, we welcome you. You have a prepared statement. We would be glad to have you give it to us.

Does the Congressman have anything to add to this? We would be glad to hear from you.

Mr. JONES. Senator, thank you.

It is a pleasure for me to join with Governor Wallace in the presentation of the views. I can assure the committee that he speaks for the voice of Alabama. We are pleased to have the opportunity to accompany him in his testimony before the committee on such a vital and important issue in our forum throughout the country.

The CHAIRMAN. Thank you.

Governor, we would be glad to hear from you.

The Chair will have to ask our guests here this morning, who I know are also deeply interested in this matter, because of the number of people that this hearing has attracted, to be as orderly as possible so that we can hear the witness and you can hear him, too. I'm sure you will.

We are glad to have you here. We only wish we had a much bigger hearing hall, but we don't have such a thing in the Senate Office Buildings.

We are very glad to have you here and I hope you cooperate with us.

Now, Governor, thank you very much.

STATEMENT OF HON. GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA

Governor WALLACE. Thank you, Mr. Chairman, and members of the Senate Committee on Commerce. I appreciate the opportunity to appear before you today and give here my views on the important matters now before this committee, I dare say the whole majority views of the people of Alabama.

The leaders of the Federal Government have so misused the Negroes for selfish political reasons that our entire concept of liberty and freedom is now in peril.

We daily see our Government go to ridiculous extremes and take unheard-of actions to appease the minority bloc vote leaders of this country.

I was appalled and amazed to read of recent statements by Pentagon officials relative to proposed civil rights investigations on our military installations. There was a time when military installations were established in accordance with the requirements of the national defense posture.

Today these officials use the threat of withdrawal of military bases to accomplish political purposes. Any officer or official issuing such orders should have his background investigated.

Although he may not be affiliated with our enemies, his actions play into their hands by jeopardizing the security of this Nation.

The Air Force is encouraging its personnel—I would say certain folks in the Air Force—to engage in street demonstrations with rioting mobs and is even offering training credits as an inducement. Perhaps we will now see Purple Hearts awarded for street brawling—heretofore they were awarded on the field of combat.

I note that by way of further intimidation, one of the President's committees has recommended that any business be placed off limits

to military personnel unless they surrender to current Federal ideologies.

Is the real purpose of this integration movement in this respect to disarm this country as the Communists have planned?

For a century certain politicians have talked about southern mobs, which were actually nonexistent. But now we have Negro mobsters and mobs running in the streets of our cities, these politicians and the press now refer to them as demonstrators.

These so-called demonstrators break laws, destroy property, injure innocent people, and create civil strife and disorder of major proportions.

Yet they receive sympathy and approval of the leaders of our Federal Government.

I personally resent the actions of the Federal Government which has created these conditions. As a loyal American and as a loyal southern Governor, who has never belonged to or associated with any subversive element, I resent the fawning and pawing over such people as Martin Luther King and his pro-Communist friends and associates.

When this bunch of incendiaries comes to Washington they are given red-carpet treatment, and I daresay if they came into this room here today, some of the members of this committee would feel compelled to greet them in such a manner as to publicly demonstrate their concern for so-called civil rights.

Last Friday Governor Barnett showed this committee a picture of Martin Luther King and a group of Communist and pro-Communist leaders attending a meeting together. As widely reported in the press in the last 2 months, King's top lieutenant in Alabama, Fred L. Shuttlesworth, a self-styled "reverend," was elected president of the "Southern Conference Educational Fund" which is headquartered in New Orleans and active in 17 Southern States. This organization has been described by both the Senate Internal Security Subcommittee and the House Un-American Activities Committee as an organization "set up to promote communism" throughout the South. The Cincinnati Enquirer, in its issue of Sunday, June 9, 1963, quotes the following statement of Shuttlesworth as to his leadership in this Communist organization. This is what Shuttlesworth said:

> Generally, the House committees are governed by southerners who will label any organization subversive or communistic that seeks to further the American aims of integration, justice, and fairplay.
>
> To a segregationist, integration means communism. I can think of nothing more un-American than the House Committee on Un-American Activities.

Recently Martin Luther King publicly professed to have fired a known Communist, Jack O'Dell, who had been on his payroll. But as discovered by a Member of the U.S. Congress, the public profession was a lie and O'Dell had remained on King's payroll.

On a recent visit to this country, why was it that Ben Bella, a Communist, in my opinion, had his first conference in this country with Martin Luther King? And then Ben Bella flew to Cuba and embraced the Communist Castro and said that he is one of the world's greatest. Is there any connection?

I come here today as an American, as a Governor of a sovereign State and as an individual with full respect for constitutional govern-

ment. I appear to respectfully call upon the Congress of the United States to defeat in its entirety the proposed Civil Rights Act of 1963.

The President of the United States stated in his message accompanying Senate bill 1732 that—

> Enactment of the Civil Rights Act of 1963 at this session of Congress—however long it may take, and however troublesome it may be, is imperative.

The President might well have further stated: "And however many people it hurts or business it destroys, and regardless of the rights of the vast majority of our people.

In my judgment, the President of the United States and the Attorney General of the United States, by design and political motivation, are sponsoring and fostering a complete and all-inclusive change in our whole concept of government and society—a revolution of government against the people.

Senate bill 1732, the so-called public accommodations bill, would, together with the President's full civil-rights package, bring about government of the Government, by the Government and for the Government.

The free and uncontrolled use of private property is the basic and historic concept of Ango-Saxon jurisprudence. One of the primary reasons our forefathers came from Europe to carve this Nation out of a raw and savage wilderness was for the purpose of using, controlling, and enjoying their private property and to pursue their chosen professions without fear of interference from kings, tyrants, despots, and I might add, Presidents.

I don't think it's necessary today to talk to you at length about the constitutional basis for legislation such as this. You know that similar legislation has been declared unconstitutional.

You know that in the 1883 *Civil Right Cases* the Supreme Court of the United States ruled out the commerce clause as the basis for legislation nearly identical in effect to that contained in Senate bill 1732.

You know the 14th amendment, which amendment is of doubtful origin and questionable validity, was held by the 1883 Court to merely allow legislation predicated upon the correction of the operation of State laws only—and in no sense gave the legislative branch of the Federal Government the right to enact statutes providing a code for the regulation of private rights.

No part of the bill before you qualifies as to constitutionally even assuming that you operate on the premise that the 14th amendment was validly ratified in accordance with the requirements of the Constitution—and I say it was not.

I will tell you what this Senate bill 1732 does: It places upon all businessmen and professional people the yoke of involuntary servitude. It should be designated as the "Involuntary Servitude Act of 1963."

Under the provisions of Senate bill 1732, if you are engaged in any profession where you offer your personal services, you cannot refuse to serve anyone without fear of violating this act. I don't know of any business or profession that does not have some abstract connection with interstate travel or interstate movement of goods. Under the provisions of this act, the lawyer, doctor, hairdresser, or barber, plumber, public secretary-stenographer, et cetera, would no longer be free to choose their clientele.

Nobody who offers services to the public or attempts to engage in his chosen profession will be free to operate without fear that the police state which is now vigorously rearing its head will dictate his every move and tell him exactly how he can run his business. In fact, if the provisions of the act are passed and enforced many individuals will no longer have any business.

Section 3(b) of the act provides:

> The provision of this Act shall not apply to a bonafide private club or other establishment not open to the public, except to the extent that the facilities of such establishments are made available to the customers or patrons of an establishment within the scope of subsection (a).

I submit to you that I am at a loss to understand the true meaning and full import of this exception. I am wondering if it constitutes a "sleeper" in this act designed to destroy the privacy of private clubs and "other establishments." In fact, what is the definition of the term "other establishments"? Does it include fraternal and social organizations, churches, religious organizations, the Masonic lodge, the Order of the Eastern Star, the Knights of Columbus.

Would this "exception clause" cover the following situation?

A certain exclusive private club having a membership composed entirely of Italian-Americans has a rule allowing members to bring guests, many of whom travel in interstate commerce. The club also has another strict rule that guests must be limited solely to Italian-Americans. Just suppose this is the case. Under the provisions of this act may a member bring in a non-Italian-American traveling in interstate commerce despite the club rule forbidding it? Another example that arises would be the fact that my Masonic lodge has strict rules against bringing in non-Masons and/or Masons not of the same type organization as mine. I have taken many interstate traveling Masons to my lodge. Can a member bring a non-Mason or Mason of another type organization into my lodge if he is a guest traveling in interstate commerce?

Section 5 of the act provides for civil actions for preventive relief including injunction, restraining order or other order. I wonder, of course, and I am sure other people do, what this "or other order" implies. Does it not mean being heavily fined or placed in Federal prison for contempt of court if you refuse to obey? This same section provides that this relief may be obtained by the person aggrieved or by the Attorney General of the United States and it provides further that the relief may be obtained where a person has not actually violated any section of the act, but there are grounds to believe that any person is about to engage in any of the many prohibited acts. This is the beginning of thought-control legislation. In other words, they can take you to court and try you for what you are thinking or possibly thinking about doing—whether you every carry your thoughts into effect or not.

It is interesting to note that in section 2(g) of the act, which in effect constitutes the preamble of the act, it is stated as fact that discrimination reduces the mobility of the national labor force and prevents the most effective allocation of national resources, including the interstate movement of industries, particularly in some of the areas of the Nation most in need of industrial and commercial expansion and development.

This is a thinly veiled reference to the South which, contrary to the statement contained in the preamble of this bill, is now and will continue to enjoy the greatest industrial growth of any section of the United States. I might point out that we have $130 million worth of new industry and expanded industry that has announced it will come to Alabama in the last 4½ months, the largest amount that has ever come to that State in any comparable period in our history.

And we are fixing to announce in the near future several more multi-million-dollar industrial establishments, and I might say also that many people that I have discussed these matters with say they agree with us. In fact, one man, the other day, the president of a corporation, said they were going to build his next plant in the South because he believed that the future salvation of this country rested upon the thinking and attitude of the people of Alabama and the South.

I cannot help but wonder if some of these same people who are now so worried about our industrial growth are not some of the same people who fought the removal of the "Pittsburgh plus" discriminatory freight rates which for so long kept the South from realizing its true potential in industrial growth.

I might also point out that the South in my judgment has further progressed than any other part of the Nation. When you take into consideration all the factors involved, "Pittsburgh plus" discriminatory freight rates, which were removed and modified only about 10 years ago, and when you consider the fact that in the days of the Reconstruction era we didn't have any Marshall aid or lend-lease, we didn't have any Federal aid, in fact we were set upon by a vengeful Government, and yet we have progressed as far as we have progressed in spite of all these things. I think we are further progressed than any other part of the United States, with all factors considered.

I cannot also help but wonder if one of the true motives in back of this act is, in part, a desire on the part of some to return the South to its position of disadvantage which disappeared with the removal of discriminatory freight rates.

The CHAIRMAN. Governor, I don't like to interrupt there, but you and I have at least one thing in common——

Governor WALLACE. The West.

The CHAIRMAN. The West was in the same position in this thing, and over the years, we pretty well joined together on this rate proposition, and we made substantial progress.

Governor WALLACE. Yes, sir, you made substantial progress in the West.

Senator COTTON. I might add you did a pretty good job on New England.

Governor WALLACE. One reason you have progressed is because of the equalization of the freight structure, the greatest ever imposed on the shoulders of people. Usually people who know about segregation know about it because they practice it, and they don't practice it on any one particular group of people, but they practice it on a section. Equalization of the national freight rate structure was brought about through the efforts of southern Governors, in the main, southern Congressmen, and southern civic and labor-management groups.

It has brought 25,000 new industries into Alabama and the South in the last 10 years, employing hundreds and thousands of people.

We were opposed in this effort, at the Northern Governors' Conference and other groups in certain sections of the country to talk so much about discrimination, and had this equalization not come about, there would be thousands upon thousands of Negro citizens in Alabama and the South who today wouldn't have an industrial job as they have today.

Southern Governors have enhanced the standard of living of southern Negroes and southern politicians more than any other group of people in this country, more so than the Members of the Congress who talk so loudly about this because in many instances we find some Members of the Congress who talk loudly about it and do more to sponsor legislation to kill, for instance, the effectiveness of our industrial bond agents that we have passed and used in Alabama, Mississippi, and other States.

I will go on and say that the President, the Attorney General, and I say respectfully, every Member of this Congress who has sponsored this legislation stand indicted before the American people.

This group has invited the Negro to come North to a land of milk and honey. They accepted the proposition, and instead of finding this utopia, they have found unemployment. They have been stacked in ghettos on top of one another, to become a part of every city's Harlem. Thereby social and economic problems have been compounded.

The end result is that this gross hypocrisy has brought guerrilla warfare and insurrection to every large city of the United States endangering the lives of millions of our citizens. Because of this hypocritical spectacle, he no longer wants mere equal treatment, he expects and apparently intends to bludgeon the majority of this country's citizens into giving him preferential treatment.

And, if you heard the statement over television last night by the head of CORE, in which he indicated, as I recall, that we need to change our economic order—I believe that was the substance of his statement—and also that Negroes are entitled to compensation and preferential rates, he shows his sense of responsibility by flaunting law and order throughout this country. I am talking about the leaders and I am talking about the mob.

I am not talking about all the Negro citizens of Alabama and of the Nation, but I am talking about a minority group of them—even threatening to intimidate the Congress of the United States. And all of this is done with the tacit approval of the sponsors of Senate bill 1732.

The CHAIRMAN. Governor, I think we ought to stop right there and start to get this in perspective. This committee is sitting here to consider seriously, soberly, and with integrity, a piece of legislation, and we are not going to be intimidated by anyone, whether they be on one end or the other. I think we ought to start from that premise.

Governor WALLACE. Mr. Chairman, of course, this Governor doesn't try to intimidate anybody. I have been invited to testify before this committee.

The CHAIRMAN. Yes, you have, and we respect your being here, and we respect your views.

Governor WALLACE. And I respect your views, but at the same time, my opinion and attitude is that all this does have the tacit approval of people in the American Congress, certain Members of the American

Congress, and I cannot otherwise state it because I believe it. I am convinced of that even if I am wrong. That is too bad, but I really believe it.

The CHAIRMAN. As Dr. Johnson once said, you could be right. We don't know. We are here to soberly, seriously, and with our own conscience consider a piece of legislation. And no one, whether they are in any organization or any place on this committee will coerce a decision—I am sure I know the members of this committee well enough to know that they are pretty hard to intimidate.

Governor WALLACE. As I say, I was invited to speak before this committee; I feel what I have said, and if——

The CHAIRMAN. We respect your views.

Governor WALLACE. The physical danger I outline is no problem in the South. You and your family can travel to any place in the South, walk the streets of every section of cities and towns alone, without fear of bodily harm. But I know, as you know, that you and your family cannot walk the streets of our Nation's Capital without fear of mugging, raping, killing or other physical assault.

And, gentlemen, your constituents know this, too, and they are fed up with it. And if you will come to my offices, I will show you countless thousands of letters from every part of the United States protesting the continued usurpation of power by the Federal Government and the failure to adhere to the Constitution of the United States.

People who write me want their elected representatives to start representing them and not the minority bloc voting mobsters.

To impress upon you, I am not saying for one instant that every member of the Negro race is a mobster, I am saying the leaders and those who have participated in these demonstrations are.

A President who sponsors legislation such as the Civil Rights Act of 1963 should be retired from public life. And this goes for any Governor or other public official who has joined in this mad scramble for the minority bloc vote.

Does not the present situation in Washington, D.C., give you some idea of the result you would obtain with this legislation? The Nation's Capital is supposed to be the supreme example of what civil rights legislation can accomplish. It's an example all right, an example of a city practically deserted by white people. If you in the Congress are really sincere about this civil rights business, why don't you give home rule to the people of Washington? Let's see how the local residents can run this city.

I believe in local self-government. I challenge you to vote for home rule in Washington, D.C. I suspect that if you attempted to do this, the Secretary of State would have to testify behind closed doors that this would result in damage to our image before the rest of the world.

A few days ago, I noted a report released by Washington, D.C., police officials which stated that during the last 12 months major criminal offenses in this Nation's Capital reached the second highest peak in history.

I suggest that if the Congress spent its time trying to stop these assaults, rapes, robbery, and housebreaking, rather than in efforts which will destroy all rights of property, then you might accomplish something worthwhile.

When I came here to testify against the 1957 Civil Rights bill, it was said that our image would be affected in Africa and Asia if the bill failed to pass. Well, the 1957 bill was passed, and it appears that we are still supposed to worry about our image.

I have stated before and wish to state again here today—I will worry about our image in the rest of the world when these foreign countries that are griping begin to return 25 percent of the foreign aid we are sending them because it comes from the South, the Confederate States.

In my judgment, the rest of the world should be more concerned with what we think of them since we feel bound and determined to provide their support. And while we are speaking of an image, the Federal Government should worry about the image it is creating in the South and to freedom-loving people everywhere.

I think you gentlemen are well aware of the reason you are having to consider Senate bill 1732. I believe this. The President of the United States and the Attorney General of the United States have used the powers of the executive branch in such a manner as to create a tense and explosive situation which they can no longer control.

The President so much as admitted this in his nationwide telecast which prefaced the introduction of this civil rights legislation. He wooed and won the minority bloc vote. Since then he has committed a series of blunders in trying to appease the mob leaders.

These leaders have now pressured the President into the ridiculous position of placing his stamp of approval on mob violence and rioting in the streets of this country.

The entire handling of this racial situation by the present administration has shown an ineptness and total lack of understanding in handling the problems which have been created by the political efforts to capture these votes.

The promised New Frontier is a nation torn by strife and turmoil on the brink of civil warfare.

The only method it has been able to come up with is the use of Federal troops which, strangely, it seems, have been used only in the South although the most serious disturbances have been in places like New York, New Jersey, Philadelphia, Chicago, Washington, Los Angeles, and Cambridge, Md.

It is not politically popular to send troops into these cities—and they are going to find next November it is not politically popular to send them to Alabama and Mississippi.

The Kennedy administration is in political jeopardy, and in a calculated attempt to recover from losses of political prestige, it has shifted the burden of its gross mistakes in judgment to the Congress of the United States—all the while catering to a lawless minority which shows utter disregard and contempt for law and order.

This bill will not remedy the situation. This bill will inflame the majority of the citizens of this country. When you determine that you will control and destroy private property rights, you invite chaos.

I charge that Senate bill 1732 constitutes the first step toward land reform—and I think that was indicated last night in the statements I heard over television—a long step in a socialistic scheme of government which will bring the total destruction of private property rights.

Property is power, and when we lose our rights to property we will have lost our power to govern ourselves.

If you intend to pass this bill, you should make preparations to withdraw all our troops from Berlin, Vietnam and the rest of the world because they are going to be needed, and they will be needed to police America. You are going to make the American people law violators because they are not going to comply with this type of legislation.

It is suspected, and I suggest, that Senate bill 1732 is such a ridiculous piece of legislation that it probably is a mere smokescreen which is calculated to draw the attention of the people to it, thereby blinding them to other parts parts of the civil rights package which are equally abominable.

No part of the Civil Rights Act of 1963 is acceptable and we people in the State of Alabama and the South will take the lead for all freedom-loving people of this country—black or white—in an all-out effort to defeat any man who supports any feature of the civil rights package.

The executive branch of this Government has ignored the Constitution of the United States and fostered the march toward centralization and the ultimate destruction of our system.

The judicial branch has perverted the Constitution of the United States in a manner which shocks the conscience of the American people.

The Congress of the United States is the last remaining bulwark against the destruction of our system of government.

I ask you to ignore political pressures which will destroy our entire free enterprise system—that you determine that this country will not have government by intimidation—that is all that is, a matter of taking a mob in the streets after they have broken windows and stuck knives in policemen and burned buildings down and shooting people, and then say we will sit down and discuss that which you want.

I think when you do that, that you have succumbed to mob pressure. If these were white people, I suspect the Government would not only be there with troops, but they would already call the United Nations on us—that you not see fit to destroy established businesses and personal service professions—that you not place the vast majority of American citizens in involuntary servitude—that you stand up for America.

I challenge the President and the Congress to submit this proposed legislation to the people as a national referendum.

I promise you that you will get the shock of your life because the people of this country will overwhelmingly reject this encroachment upon their right to own and enjoy private property.

I say that it is high time freedom-loving people of this Nation stand up and be counted and if the tree of liberty needs refreshing by the political blood of those who ignore the heritage established for us by the Founding Fathers, then so be it.

Gentlemen, I appreciate this opportunity to appear before you today and before leaving I have a request I would like to make. I have charged here today that there are Communist influences in the integration movement. From the mountain of evidence available everyone should realize that they are true. You have heard these charges

before you—you have seen the evidence—why don't you do something about it? Don't sweep this matter under the rug—let's expose these enemies—they are enemies of both black and white in this country—bring them out in the open. As the Governor of a sovereign State, I ask the Congress to investigate these Communist activities that pertain to these demonstrations and this mob action.

This request should not be taken lightly. A letter through the mail to the Justice Department from someone claiming they have been denied the right to vote brings a flood of Federal investigators down the neck of some southern registrar. Here you have had at least two Governors to ask that this Communist matter be investigated. Will you give us this same response?

In closing, I would like to tell you that the public policy of Alabama is for the uplifting of the Negroes in Alabama. During the first year of my administration we have increased the appropriation to Negro educational institutions 22 percent. Of course, that goes for white institutions, also.

We are building three new trade schools to train them for the jobs that we are making available to them by a fast-growing industrial expansion in our State, and we have just completed three other brand-new trade schools for Negro citizens. I do not believe the passage of the legislation would be in the interest of either the white or Negro citizen, but would hamper the solution of problems facing both races.

As I said in my inaugural address in January, my hope and prayer is that God will bless all of the people of my State and this Nation, both black and white.

I thank you.

The CHAIRMAN. Thank you, Governor. I have some questions and comments I would like to make.

On page 20, you ask Congress to investigate certain alleged Communistic activities. We do have two very active committees in Congress in the House and in the Senate to deal with such matters. Charges have been made here which have only been raised in the last week, and that testimony and that evidence will be given to these two commitees which are specifically charged by the Congress, both House and Senate, in these matters.

We are here to consider the merits of the legislation as objectively as we can. I am sure you agree that we should do so.

Governor WALLACE. Yes, sir.

The CHAIRMAN. There are many viewpoints on this legislation. You have expressed one, very forcefully, this morning. This is very helpful to the members of the committee to hear these particular viewpoints on the legislation.

The transcript of this record will be given immediately to the two committees charged with this matter on the specific points you make.

Governor WALLACE. Mr. Chairman, may I make this statement: I realize that you do have two committees of the Congress, and the charge was made here the other day, of course, that Martin Luther King had been consorting and attending meetings with known members of the Communist Party. Of course, I think this committee said they would like to have proof of that, or implied so. Of course, I have the proof. He did attend with a member of the Communist Party. We have other documents from the Senate Internal Security

Committee, which points out that people who were in these meetings with him have long been in Communist-front organizations.

It seems to me, though, that this matter hasn't been investigated as it would have been if it were not involving these particular people. I think if a southern Governor, like myself, went to a meeting and sat next to members of the Communist Party and consorted with them and spoke, I am sure that probably they would investigate me, and I think they ought to investigate Martin Luther King and the entire group. Jack O'Dell, a leading Communist—he is a Communist—Mr. King fired him, he said. And we find out that that is not true, that he is still on the payroll.

That has been exposed in the Birmingham News.

The CHAIRMAN. We have asked the FBI for a report on the matter that was brought up here last week.

I do wish to put in the record whether or not this is your personal opinion, which of course you are rightfully entitled to, when you state on page 15:

> These leaders have now pressured the President into the ridiculous position of placing the stamp of approval on mob violence and rioting in the streets of this country.

I, of course, haven't read everything the President has said on this matter, or the Attorney General, but if you could be more specific as to his words when he placed the stamp of approval on mob violence and rioting in the streets of the country, or if not, place in the record a clarification that it is your opinion that what he has said in general has done this.

Governor WALLACE. Yes, sir. My opinion is that these leaders have pressured the President into the ridiculous position of placing the stamp of approval on mob violence riding the streets of this country. That is not only my personal opinion. I believe it is the opinion of many people in this country.

During the riots in Birmingham, Ala., the President's Office was a virtual switchboard for the Kings, as they call them, Mrs. King. He was there violating injunctions of the courts. I know that Mr. Robert Kennedy told me four times that he wanted to try these matters in the courts and not in the streets. And in my judgment the President of the United States and the Attorney General can stop these demonstrations that are going on in this country, causing the loss of property and life if they wanted to.

The CHAIRMAN. I don't know. I am not aware of all these telephone calls. I like to have for the record, when a statement is made such as this, either the direct quote by the President of the United States when he put his stamp of approval on mobs and rioting in the streets, or whether it is the witness' opinion.

Governor WALLACE. Mr. Chairman, of course it is my opinion that this is the case, because I listened to Mr. Kennedy's speech on television, in which he in effect said if you don't get what you want, you should continue in the streets. It was an invitation to rioting and mob violence. That was my personal opinion, and I believe it is the opinion of many people. I think it was a very sad statement, and I don't think it did the people of this Nation any good.

The CHAIRMAN. But it is your personal opinion?

Governor WALLACE. Yes, sir. And I might say the opinion of many people other than myself.

The CHAIRMAN. On page 1 you said you were appalled and amazed to read certain statements from Pentagon officials regarding military installations. The committee is not familiar with those statements. If you have them for the record, we would be glad to put them in the record.

Governor WALLACE. Senator Magnuson, I don't have the statements here. But I thought it was of such common knowledge because it has been in every paper that they sent out an order, in fact they have cabled various military installations. I have even talked to military officials myself. Of course, this was off the record. But it has been in the papers that they are going to have a civil rights investigation and they recommended the possibility of even moving bases and putting businesses off limits. That has been a matter of common knowledge; it has been in every newspaper in the South.

I don't know, the Washington papers sometimes don't print the things they do in Birmingham. If they do, they carry it on the 50th page.

The CHAIRMAN. They cover the news pretty well in Washington. We think they cover it too well.

Governor WALLACE. Senator Russell commented—I can tell you when they have 485 people injured here in the twinge of an eye in a race riot in the Washington, D.C. stadium the people of this town couldn't find about it in their own papers unless they looked at the 50th or 60th page.

The CHAIRMAN. What we would like to have, if you have it, is the order from the Pentagon that said what you claim it said in your statement.

Governor WALLACE. I don't have a copy of the order but I will be glad to send newspaper clippings.

The CHAIRMAN. Then we can run it down, if you have it.

Governor WALLACE. Yes, sir. I charge that that has gone out from the Pentagon. I make it categorically, that it has happened.

The CHAIRMAN. You also say, on page 2, and I quote:

> The Air Force is encouraging its personnel to engage in street demonstrations with rioting mobs and is even offering training credits as an inducement.

I would like to know who in the Air Force has done this, and where, whether there is an order to that effect, and what this statement is based upon.

Governor WALLACE. Senator, let me say that that has been a matter of the press knowledge. It has been in the press. I have even read editorials about it in the papers. I thought is was of such common knowledge I didn't get a copy of the statement. But I thought everybody knew it.

They have sent out to the Air Force, and have authorized Air Force personnel to demonstrate, as long as they do not wear the uniform nor bring about any injury to Government property. That is a matter of fact. That order has gone out to every Air Force installation in this country. It has gone out to those in our area of the country. Here we have soldiers given the right. Also, on the matter of efficiency rating, they go out and help break down segregation. That has gone out.

I say that is a fact, it has gone out, to Air Force installations, and we resent that. In effect it says that soldiers who are not supposed to

be quartered upon us can be released to walk the streets of our cities and demonstrate and bring about violence.

The CHAIRMAN. I would like to see the direct order or the communication, or whatever it was, so that we can judge it here ourselves.

Senator THURMOND. Mr. Chairman, if you will permit me to interrupt at that point, I have a copy of an order, and I have just sent for it.

The CHAIRMAN. OK.

Senator THURMOND. I will be glad to place it in the record.

Governor WALLACE. I was fixing to say that you are a member of the Senate and chairman of the committee. You can send for the order. The order has been issued, and I think it is intolerable to think——

The CHAIRMAN. We are going to. We wanted you to give us a little guidance as to where the order came from and who issued it and whether the order actually said that, or whether, again, it is the interpretation of someone reading the order.

Governor WALLACE. I believe you are going to find that the order is one that contains things more drastic even than I have stated in my testimony.

The CHAIRMAN. I don't know of any instance where the Air Force has encouraged personnel to get in rioting mobs.

Governor WALLACE. They have given them the right to do so. Every demonstration we have had has turned out into a riot, into a mob. In Cambridge, Md.—they have the right to go to Cambridge, Md., to march and get in demonstrations. They have the right to go to Birmingham. They have the right to go to Newark and get in demonstrations against segregation—the Air Force—black and white.

The CHAIRMAN. I suppose they have the right to engage in demonstrations in my State, in my town, which wouldn't involve any particular mob or wouldn't involve particularly a racial matter.

Governor WALLACE. I never heard of the Air Force itself sending out an order——

The CHAIRMAN. We will take a look at that.

Governor WALLACE (continuing). Which encourages it.

The CHAIRMAN. There are a lot more questions I could ask you. I want to give the committee members an opportunity to ask a few questions. I will ask the Senator from Oklahoma if he has any questions to ask.

Senator MONRONEY. Governor, thank you very much for your attendance here at the committee, and your statements on the bill before us.

I have raised a number of constitutional objections to the use of the interstate commerce clause as the justification for this bill. I was hoping that you would have a contribution to make in your statement regarding the legal status on which we are asked to rest this legislation.

However, I find that most of it is directed against the President and indicating that he is sponsoring and abetting the demonstrations that are causing so much unrest in this country. I find that rather hard to believe, and would like to publicly disagree with at least that portion of your statement. I have heard him on radio and television urge that these matters be handled in the courts and not in the streets, and that was the thrust of his television appearance to which you so violently

object in your statement and more or less charge it as sponsoring or aiding and abetting the present disorders.

If you have any further evidence of the President's incitement of this, I would like you to help the committee by giving us the findings on that information.

Governor WALLACE. I can think of one very good instance in Birmingham, Ala., where we were doing the best we could to contain the mob violence. The President gets on television and says he hopes something can be worked out, and that the white people of the city have restrained themselves, there were not any racial riots because the white people were not involved, other than the policemen, and he gets on the television and says we know that there has been many years of injustice heaped upon the Negroes of Birmingham which inflamed the situation all over again. And of course we Alabamians resent the fact that when we are trying to preserve law and order that we have a statement from the President that inflamed people by saying they have been for many years abused, and that is the word he used.

Senator MONRONEY. Coming from a State that up until the Supreme Court decision was totally segregated, Oklahoma, I can understand that it is difficult. But I do feel that the President, in enforcing the Supreme Court decision, which occurred a good many years ago, requiring desegregation of educational facilities, was not inflaming public opinion and was not endeavoring to stir up mob rule or demonstrations as such when the Federal troops were ordered to preserve order in an effort to carry out the Federal edict that was the law of the land.

Governor WALLACE. Senator, of course I don't subscribe to the decision that the Court is the law of the land. If that is the truth then the Supreme Court in 1962 could not have reversed the prior decision of the case. It is the law of the case. It doesn't apply to every school system in the country. It is the law of the case.

Senator MONRONEY. The Supreme Court held that. They have not reversed it. And today I think anyone who believes in the Supreme Court as being the final interpreter of our laws must accept that the decision was up to the Executive to enforce or to make it a complete nullity and not give effect and force to law.

I know we could argue this point for a good long time. It seems to me that many of these statements accuse some of the colored ministry and others that have joined in some of these demonstrations. I do not support these demonstrations in any way, but neither can I agree that this is an example of Communist conspiracy. There will probably be some Communists hitchhiking on any disturbance. This is natural and normal. Those should be handled by the FBI and by the proper governmental organizations.

But certainly these attempts to frustrate the carrying out of the Court order, such as occurred in Alabama, did give impetus, at least led to more demonstrations following this period than had occurred at an earlier time.

So I don't think that we blame the President's pronouncements for stirring these up any more than we can say that the difficulties in the States that sought to prevent integration also were responsible for this example of extreme agitation over racial relations.

Governor WALLACE. Senator, you had more racial demonstrations in a State like North Carolina, which has been more liberal than any State in integration, than we had in Alabama. Of course the effort that we made in Alabama was in order to raise constitutional questions, but no constitutional question could be raised because of the military might of the National Government.

They just sent troops in and aimed Air Force planes at the university, and mobilized 18,000 men because they didn't want to try the matter in a contempt proceeding in the Federal court.

Senator MONRONEY. I don't recall the Federal Government sending any troops into any area except those where the enforcement of the Supreme Court decision was ordered, in Mississippi and Alabama. In your statement you indicated that this is done in a great many places. The troops that have been used, I believe, at other places such as Cambridge, Md., have been State troops.

Governor WALLACE. No, sir. I didn't say that in my statement. I said, "No Federal troops were sent into these places."

Senator MONRONEY. You are referring to New York, Pittsburgh——

Governor WALLACE. That's right.

Senator MONRONEY (continuing). And places of that kind?

Governor WALLACE. They sent them to Alabama and they sent them to Mississippi.

Senator MONRONEY. Where the test was over the enforcement of the desegregation.

Governor WALLACE. No, sir; they sent troops to begin with, Senator, regarding the demonstrations in Birmingham. They sent in troops, they had sent soldiers to Birmingham—Federal troops into the State. I filed a suit in the Supreme Court of the United States and it was dismissed in about five lines.

Senator MONRONEY. So it is still your feeling that the Federal troops have been sent into Southern States but not into Northern States?

Governor WALLACE. That is correct.

Senator MONRONEY. And it had nothing to do with the integration problem in order to enforce the Supreme Court decision?

Governor WALLACE. I think if they are to send troops into Alabama to control domestic violence—which they have no right to do in the first place—why didn't they do it in Newark? In New York? We controlled the demonstration in Birmingham, Ala. Why didn't they do it in Tallahassee, Fla.? They didn't send any troops there.

Senator MONRONEY. There is actually no Federal court order that involves enforcement of the issues in those States at that time.

Governor WALLACE. There is no Federal court order involving the Birmingham demonstrations either.

Senator MONRONEY. Is that pending?

Governor WALLACE. No, sir; there is nothing pending. In fact the President himself admitted that no Federal laws had been violated on the national television hookup.

Senator MONRONEY. You mentioned, referring to your statement, that the economy of Alabama had greatly improved since the strong stand you made in attempting to prevent integration.

Governor WALLACE. I didn't say——

Senator MONRONEY. What were those figures? I think you said $400 million?

Governor WALLACE. Of course, I didn't say that we have improved since I made any stand, but I did say that we had expanded industry totaling $130 million roughly since the middle of January of this year.

Senator MONRONEY. I understood in your statement, that you felt that this strong position you had taken, being the last frontier of States' rights, as exemplified by your action, had improved the economic situation and led to the attracting of greater amounts of industry to your State?

Governor WALLACE. Senator, I didn't say it in that manner, but I will say it, that I have talked to industrialists from El Segundo, Calif., to New York, and many of them have told us that the same groups of people who tried to integrate, destroy the social order, are the same ones who don't believe in free enterprise, and we know there are free enterprise people in Alabama, and your part of the country, and we are going to build the next plant in your section of the country. We are free enterprise people. I think there is a connection.

Senator MONRONEY. You have had very good luck and you have been very fortunate in the past in your State in helping to acquire industry, and the performance of your workers has helped increase that. You are doing very well in this regard, and are not necessarily attracting industry because of the particular views on the racial situation.

I'm trying to say that I hate to think that racial bias was going to be a magnet to attract American industry.

Governor WALLACE. Racial bias, when you talk about bias, segregation of the races, in our judgment, is in the best interests of all concerned. It is not because we despise people of another color. I have never made a single statement in my whole political career that you will find in any newspaper in anyplace in the Nation in which I reflected on a man because of his color, because I'm not like some of these pseudointellectuals.

I believe there is a guard, and I believe that when we separate people because we in our hearts believe it is for the best interests of all concerned, that there is nothing immoral, irreligious, or sinful about it. In fact, I have lived around members of the colored race, Negro race, all of my life, and I hope to continue to live around them. Some of my closest and best friends——

The CHAIRMAN. Our guests are going to have to refrain from making loud comments among themselves or to the committee on these matters. We appreciate the fact that you have feelings in the matter. But we are so limited as to space that we have to ask you to please cooperate with us.

Go ahead.

Senator MONRONEY. Were you through?

Governor WALLACE. Yes.

Senator MONRONEY. One further comment, in closing: I find difficulty in agreeing with the witness that the sponsors of this legislation, and the President—and I'm not a sponsor of the legislation—were being pressured into this by the threats of violence of demonstrations or things of that kind. I think those men in the Senate who sponsored these bills sponsored them because they believe in the purpose of the

bill. I happen not to be a sponsor. But I'm sure they are acting in what they conceive to be their public duty and not as a result of any threats or any activities or political reward or anything of that kind.

I would like to make myself clear on that point, that every one of these sponsors, I think, is a conscientious man doing his dead level best to enact laws to benefit this Nation.

The CHAIRMAN. We have had this type of legislation before us for years and years and years, and long before any of these recent events have happened. It isn't just recent events that caused the Congress to objectively look at this particular problem. It has been here for many years. I can't count them, but I have worked with civil rights legislation ever since I came to Congress, and it has been in every session.

Governor WALLACE. I don't believe there has ever been a time when there has been a serious attempt to pass legislation nationally other than this time. I don't think anyone ever thought it would have a chance to pass in years past.

The CHAIRMAN. There may not be the same collective feeling about it now, but Members of Congress have been involved in this matter for many, many years.

Governor WALLACE. In fact, I think the Congress, Mr. Chairman, has spent too much time on this type of legislation, and I think we have put first things last and last things first. And I think that we have spent too much time.

The CHAIRMAN. Some Members of Congress disagree with that.

Governor WALLACE. That is my opinion, of course.

Senator MONRONEY. I have no further questions. Thank you very much.

The CHAIRMAN. The Senator from New Hampshire.

Senator COTTON. Governor, you have made a spirited and vigorous statement which is impressive and reflects your deep sincerity. I have listened to it with keen interest.

You have stated on page 5 that:

> I come here today as an American, as a Governor of a sovereign State and as an individual with full respect for constitutional government. I appear to respectfully call upon the Congress of the United States to defeat in its entirety the Civil Rights Act of 1963.

As you indicate, and as you clearly understand, the portion of the civil rights program that is before this committee has to do with public accommodations, so-called.

Governor WALLACE. Yes.

Senator COTTON. There are other portions that have to do with more speedy and effective enforcement of rights of citizenship, of voting rights, and other parts of the so-called civil rights program. In your statement, you show that you know, as we all do, that whatever bill comes out of this or any other committee—and this is likely to be the first committee to report—these other issues will be added to it.

In view of your blanket opposition to all these matters, I'm constrained to ask you one or two questions that have to do not with public accommodations or the social rights of people in this country, but the strict political rights of citizenship.

I have information that indicates that in two counties of Alabama with 15,000 adult Negroes there are no Negro voters even in presiden-

tial Federal elections. Could you indicate whether that is accurate or not?

Governor WALLACE. No, sir; I'm not sure whether that is accurate or not. I just know that every voting place I have seen in Alabama there are Negroes and whites voting and that there are a hundred thousand at least Negro voters in Alabama. I know that the day that I voted in the Governor's race of Alabama I lined up with members of the Negro race in the same line. Negroes are registered and vote all over Alabama. Of course, we don't have a utopia in Alabama, you know. We are human beings there, too. I don't say we have it anyplace. We don't have it here in Washington.

They told me last night not to go out on the street because something might happen to you. We don't have the utopia. We don't have a utopia in Alabama, but we do have Negroes by the thousands who vote, and I feel that any man, qualified under the laws of the State of Alabama, should be allowed to vote.

Senator COTTON. I appreciate hearing that statement on your part.

I was informed, the information I received, on inquiry—and I think it was from the records of the Civil Rights Commission—that in 22 counties in Alabama less than 10 percent of the Negroes of voting age are registered to vote. Would that seem to be out of line with the facts?

Governor WALLACE. I'm not sure. I don't have these facts that you have at my command.

But I can say this, that I don't know of any county at this time that disqualifies anybody because of color if they are qualified under the laws of Alabama.

In fact, many people don't attempt to get registered. We have white people in Alabama who don't vote. I was in a grocery store the other day and three lady clerks said, "I wish I could have voted for you but I just never have registered."

So many Negroes are the same way. They just don't go to register. But I have never seen any effort in my county to keep anybody from registering because of color.

Senator COTTON. What is your county, Governor?

Governor WALLACE. My county is Barber County, Ala.

Senator COTTON. What?

Governor WALLACE. Barber County, Ala. And I might say that the Negroes in my little hometown of Clayton actively campaigned for me for Governor, because they knew me.

Senator COTTON. Yes, I understand, Governor, and my questions about the political rights and voting rights of Negroes are entirely a matter of principle, because if I were political I couldn't get less excited about it. You always vote them Democrat, so we don't get much comfort out of it.

Governor WALLACE. Let me say this: The way they vote in my State is all one way. It is a bloc vote. The other day in a mayor's race in Birmingham one man got 3,600 and the other fellow got 5 in the all-Negro ward. I don't think that that type of voting is conducive to good government.

I do know that in one ward in Mobile, Ala., one man gets 30 votes and the other gets 1,664. There were about 50 white voters in the ward. That is not voting. That is not good for government. I

resent the fact that we have bloc voting. I think therein rises some opposition to Negro voting throughout the country. I think if they voted like you and I voted, not in a bloc, I think it would be a lot better than it is.

Senator COTTON. Regardless of whether they vote right or wrong, or individually or in blocs, would you say that fundamentally it should be the right and privilege of every citizen who qualifies by a fair qualification test applied the same to both whites and Negroes, to have the right and the privilege of voting without hindrance or intimidation?

Governor WALLACE. I think that that every man and woman in Alabama, who is qualified under the laws of our State, regardless of color, should be allowed to vote.

Senator COTTON. I believe that in Bullock County in 1960, only 5 Negroes were registered to vote out of an adult Negro population of 4,500, and that the Department of Justice filed suit in 1961 under the Civil Rights Acts of 1957 and 1960 to get restraining orders against practices that kept Negroes from registering.

Are you familiar with those pending cases?

Govenor WALLACE. I am not familiar with the pending cases, other than to say I think the Civil Rights Commission also said there were thousands of people in New York City who were not allowed to vote because they couldn't read and write the English language.

We have a lot of people who are not qualified to vote by the standards of the Civil Rights Commission, but I am not familiar with those cases.

I do know that in Bullock County, Ala., there are many Negroes who vote.

Senator COTTON. According to the records of 1960, there were five.

Governor WALLACE. I don't know what effort they made to register before 1960 myself. I say we don't have any utopia in Alabama, but you don't have it in any other State in the Union.

In fact, we don't have it here in Washington, D.C., where, Senator, nobody can vote. There are enough votes in this Congress to pass anything you want to, but I am afraid there is some under-the-table stuff about home rule. I suggest that the people here make a spirited effort to turn the city over to inhabitants. There are enough Members of the Congress to do that. I think you ought to. Let's let it be a model of city government run by its inhabitants. It might be something we could copy after, or something we might not want to copy after.

Senator COTTON. May I say this to you, Governor. You were very frank, and I admire your frankness, and I am going to match it.

In your statement you have indicated, as you did just now in your remarks, a certain attitude that you have toward Congress and toward its Members.

You have also in your statement had a good deal to say about the oppression of the South by other sections of the country. It so happens——

Governor WALLACE. Not of other sections—of other special-interest groups, not necessarily of sections.

Senator COTTON. It so happens that I come from the State of New Hampshire. I am a New England Yankee. We have very few race

problems. I recognize that we couldn't be expected to understand all the problems of those who do.

The approach of my people is a thoughtful approach, rather than an emotional approach. So that I am fairly free, I think, as regards political pressure to deal with this issue in an unimpassioned, careful, conscientious manner.

It so happens that I am one Member of the Congress from the extreme North who has been very conservative in his voting and in his position on the matter of Civil Rights. It has been my position that I would vote to endorse the rights of citizenship and the political rights of every citizen of this country of any race or color; and I would vote to see that every citizen of this country had equal employment opportunity at any project in which Federal funds were employed either directly or indirectly. It has been my attitude that I would go rather slow in putting the Federal Government in the enforcement of social rights. And it so happens that I opposed and voted against title III in the Civil Rights Act of a couple of years ago.

However, for more than 90 years this Nation has been pledged to see to it that all citizens have their full voting and political rights. 90 years is a long time to keep a promise. It has only been a few years since the Supreme Court decision which somewhat altered the situation in regard to some problems of integration. And I have agreed with the Supreme Court that we should proceed slowly and with public opinion.

To me, the arguments of those like yourself who feel strongly about what is before this committee would come with much greater potency and persuasiveness if the political rights and the voting rights of their people had been enforced and there had been more indication of an endeavor to enforce them. I must say that to you very frankly.

Governor WALLACE. Senator, let me say, as I said a moment ago, Negroes vote all over Alabama, and in great numbers. In fact, at least a hundred thousand of our 550,000 whites, I think it is, and 100,000 Negro citizens, and they are registering every day. I was in my county courthouse about 3 weeks ago and there were Negroes registering to vote.

So, they do have political rights in Alabama. They do vote in Alabama.

Senator COTTON. In some sections, however, there seems to be a very marked lack of Negro registration when you have 5 out of 4,500.

Governor WALLACE. That was some years ago. There are about 800 that vote in that county at this time.

Senator COTTON. In Bullock County?

Governor WALLACE. No; I beg your pardon. It is nearly 1,100 voting in that county at this time, and there are only about 2,000 white voters in that county. There are about 1,100 Negro voters. In fact, one of the cities of that county has a majority of Negro voters within its border.

Senator COTTON. And is the same test given Negroes——

Governor WALLACE. The same test. In fact, it is easier for Negroes to register now, because they turned down about 2,000 whites in Montgomery County. They turned down about that many Negroes, and the Federal court comes in and makes them put the Negroes on the rolls, but they don't file a suit to put the whites on. So the whites

don't have as much chance to register in certain places of Alabama as Negroes do. So, it is an unequal test in Montgomery. In fact, people who can't fill out the form, whites, are still off the rolls, and are not qualified to vote, but those who didn't pass it who were colored, are now voting in Montgomery County, Ala. That is a matter of public record.

Senator COTTON. So, some of this change since 1960 has been the result of Federal action; has it not?

Governor WALLACE. I am sure that some of it has, but I am not sure about that. I will say this, that in most counties of Alabama that I know anything about, Negroes have always registered and voted. But I think the pendulum swung to this extent: that it is now easier for a man not qualified to vote, if he is a Negro, to be placed on the rolls. But if it is a white man who can't pass the test, there is no remedy for him. He just doesn't vote.

The CHAIRMAN. What is the test?

Governor WALLACE. Sir?

The CHAIRMAN. What is the literacy test?

Governor WALLACE. The test is just to fill out a simple form. For instance——

The CHAIRMAN. Will you put it in the record?

Governor WALLACE. I don't have a copy of it.

The CHAIRMAN. Will you get a copy and put it in the record?

Governor WALLACE. Yes, sir. In fact, one man who was asked the question: "Will you fight in the armed services to defend your country," and he said: "No," but they went ahead and ordered him qualified anyway because they said he just didn't understand the question.

The CHAIRMAN. I don't know about the one man. I want to get the literacy test.

Governor WALLACE. I will get it. We will be happy to send you a copy.

(The material requested was not received at the time of printing.)

The CHAIRMAN. You mentioned the number 500. Those are the number of voters in the State? 500,000—some.

Governor WALLACE. Roughly; I am not sure.

The CHAIRMAN. What is the population?

Governor WALLACE. About 3,250,000.

The CHAIRMAN. And there are about 500,000-plus eligible voters?

Governor WALLACE. No; there are more than that.

The CHAIRMAN. Excuse me?

Governor WALLACE. There are that many whites, I think. I am not sure about the numbers. It is in that vicinity.

The CHAIRMAN. All right.

Senator COTTON. I won't take more time, Governor. I do feel impelled to say this, and the chairman also has said it: I happen to be a member of the committee who has considerable misgivings about the actual issue before this committee, about how far under the Constitution the Federal Government can go in controlling private property. I am not talking about public places, but I am talking about privately owned property.

You have suggested that this committee and the Congress will be acting under fear and intimidation. I would just like to say to you, Governor, and I am saying it very frankly, I would like to say to you that it won't make one single bit of difference how many people

march on this Capitol, if they are foolish enough to march. It wouldn't make one single bit of difference in how I vote, or in my opinion how any member of this committee votes on these issues.

I will say this: that I don't like operating under threats, and on the matter of voting cloture, voting to close debate in the Senate, which I am willing to do in a reasonable time if it is a bona fide attempt to do so to bring these things to a head, it might delay my vote if I am being jostled about when I am trying to get in and out of the Senate Chamber.

I also want to say and to suggest to you that neither am I impressed nor disturbed by your suggestion of what my constituents are going to do to me, or what is going to happen to me if I don't vote in accordance with your position.

I think I know more about the attitude of my constituents than you do, no matter how many letters you are getting. I feel that when you say to this committee, tell us what is going to happen to Members of the Congress if we do thus and so, that in a sense, you are doing exactly the same thing that these demonstrators are seeking to do. In either case, as far as I am concerned, I am not going to act under the whip nor under anybody's threats, whether he is a Negro demonstrator or whether he is a white Governor.

Governor WALLACE. Senator, I haven't asked you, of course, to act under any threats of mine. Let me say this: I feel that the Members of the Congress are behind the public in the attitude about this legislation. They think that the American people are for it. That is my judgment. That is my best judgment.

Of course, this committee invited me to testify. I have expressed myself exactly as to how I felt, therefore, I think to have done otherwise, I would not have been honest with you and with myself.

I think the people of this country—and I know of Alabama—are beginning to resent this omnipotent march of centralized Government in trying to take over and control every aspect and phase of our life. Why, the idea of a bill to tell a beauty parlor who they can operate on, takes over a boardinghouse, takes over the private businesses of this country and puts them under the Federal Government. And, I think consideration of this legislation itself is very significant.

Senator COTTON. You know, Governor, as a matter of fact, I think I am in accord with you on that. I used to be a country lawyer, and I used to try cases. I learned one thing: If the jury is with you, don't drive them away.

Governor WALLACE. I am not trying to drive you away. I assure you of that, Senator; not a bit in the world. In fact, I know that you and Members of this Congress are going to vote like you want to on this legislation. I don't think my coming here is going to change one vote a bit. Everyone of you know how you are going to vote. In my judgment you know.

I came here for the purpose of trying to say something to help awaken the American public. And I have recently been to Pennsylvania and I have been to the International Lions Convention, and I have been invited to speak in various places outside of my own State, and I find more people today opposed to this type of legislation than were opposed to it years ago.

I think you are going to find that the American public generally is going to react in a manner that will defeat this legislation. Or, if you pass it, there will be political repercussions to those who had something to do with the passage in the following November, and Novembers to come. That is my attitude; that is my feeling. I am not trying to be disrespectful. That is the way I feel about it.

Senator COTTON. I thank you, Governor. I am sure we are glad to have you here, and to hear your views. As far as the rather strong way that you express them, I will say that I have been married for 36 years to a southern woman, and I am accustomed to duress. [Laughter.]

As I have seen the industries from my State go to your section, I think you are taking care of yourselves very well indeed. We will vote our own conscience, I am sure.

The CHAIRMAN. Governor, you made a very important point about home rule in the District. I won't belabor this. I voted for home rule for the District, I don't know how many times. I suggest, and I won't belabor the point, that you read the history of what happens to home rule when it gets to the Senate and House floor.

I think you might find some interesting things in relation to the votes of certain sections of the country.

Governor WALLACE. Senator, I know you are referring to the fact that southerners oppose home rule.

The CHAIRMAN. Yes.

Governor WALLACE. And I notice that is the case. Ordinarily, I would oppose home rule, and have in the past, but I know that southerners get a lot of under-the-table help from folks in other parts of the country because there is enough Members of this Congress in the House and Senate from other parts of the country who talk about civil rights to give home rule to the District of Columbia if they wanted it. I make the statement they just don't want it. That is my opinion; that is my best judgment. And if they didn't play under the table with the southerners you would have home rule.

I think there is a lot of hypocrisy in this whole business about home rule.

The CHAIRMAN. Some of us have said so on the Senate floor.

Governor WALLACE. I have read talks to that effect.

The CHAIRMAN. I presume you would vote for it if you were in Congress?

Governor WALLACE. If I were in the Congress, I think my attitude would be to let's give home rule to the District of Columbia. Let's let the city of Washington be a model of government by its inhabitants. And then let's see if it is good or bad. And then, we might be able to model or not model after it in other parts of the country.

But I tell you what, I rather doubt that home rule will ever come to the District of Columbia. It doesn't look like it.

The CHAIRMAN. I shan't belabor the point. That is recent legislative history.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Governor Wallace, a point was raised here with regard to certain leaders who are encouraging these demonstrations. I believe it has

been stated that the President has discouraged the Negroes from demonstrating.

Last week, however, the Secretary of State stated here—this is on the record—that "if I were a Negro and my rights denied, I would demonstrate." So it might be well if the President would get his word down to his Secretary of State, would it not?

Governor WALLACE. That's correct, and I suppose he didn't know that there were injunctions against demonstrations in most all of these cities.

But they violate State injunctions at will. They say they ought to go by the law, but they violate injunctions right and left.

Senator THURMOND. With regard to the Air Force issuing orders, I have sent to my office since this hearing began and have obtained two letters which I shall read at this time. The first letter is:

Headquarters, 1608th Air Transport Wing (H) (MATS), U.S. Air Force, Charleston Air Force Base, S.C.

It is dated June 8, 1963. The subject is: "Civil Rights Demonstrations." It is directed to: all personnel of Charleston Air Force Base. It reads this way:

In the event of civil rights demonstrations in this area similar to those which have taken place in other areas of the South, the following is promulgated in the interests of the welfare of the individual and of the command.

Because of the possibility of injury to or apprehension of those persons involved, all personnel assigned to Charleston Air Force Base are instructed that they will not participate in any such demonstration, or to otherwise become involved as a spectator or bystander. Areas where demonstrations are in progress are declared to be off limits to persons assigned to this airbase.

And this letter is signed by James C. Sherrill, Brigadier General, U.S. Air Force, commander.

That letter makes sense to you, does it not?

Governor WALLACE. Yes.

Senator THURMOND. Now I hold in my hand a second letter that comes from the same headquarters, dated June 26, 1963—16 days later. It reads this way:

Subject: Civil rights demonstrations.

1. Previous instructions on this subject dated June 8, 1963 are revoked.

2. Air Force policy is that no Air Force member will be restricted from demonstrating as a private citizen as long as (1) it is done during off-duty time, (2) the demonstrators wear civilian clothes, and (3) there is no imminent danger of injury to Air Force personnel or damage to Government property as a result of this demonstration.

3. My previous instructions were conceived on the basis of protection of the individual members of this command from injury and/or detainment which might impair vital mission accomplishment. The precepts of my concern remain the same, subject to the Air Force policy as stated above.

Signed, James C. Sherrill, brigadier general, U.S. Air Force, commander.

Governor, in the first case the commander issued an order which he thought was proper and practical under the circumstances and would provide protection to the individual members of his command from injury or detainment which might impair vital missions.

And the second letter, after the letter had been received from Washington, evidently, down to that commander, reverses and cancels his letter and states that the members of the Air Force can partici-

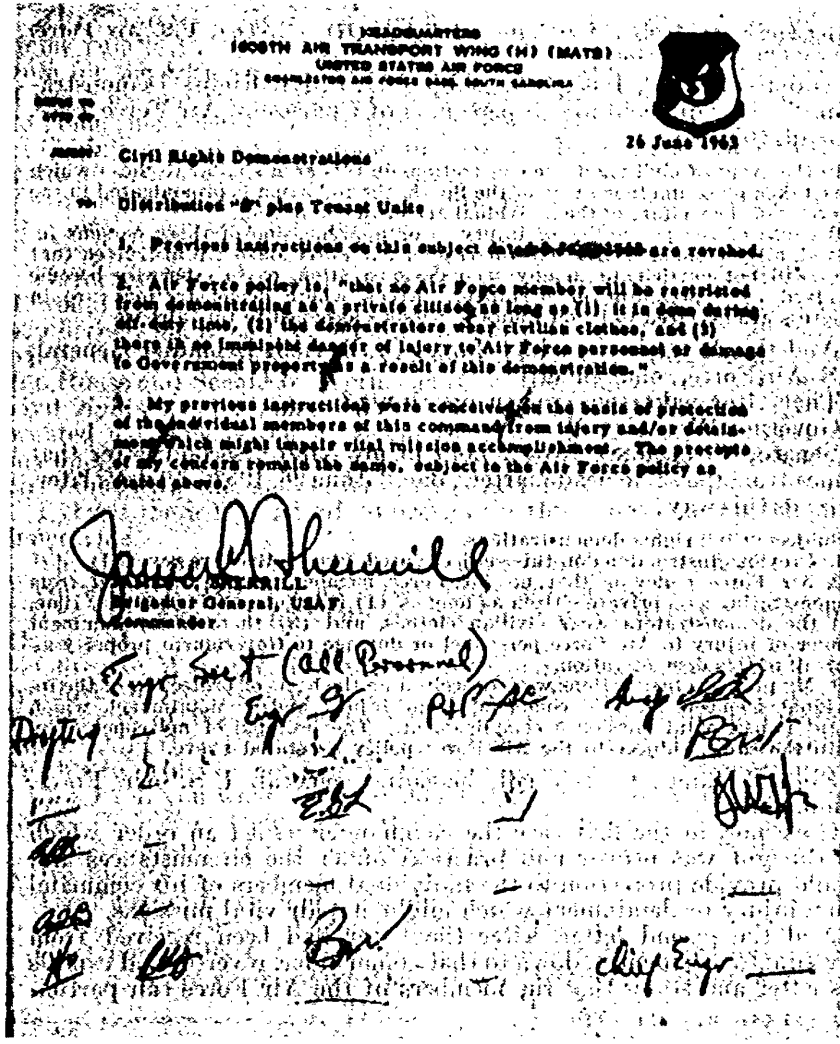
pate in demonstrations. And that is what they have been doing, and there is no question about it.

There has been instance after instance of it. In fact, it came over the news today that a Negro paratrooper was in the demonstration. It came over the news this morning. I heard it. Various others heard it. It furthermore said he was in uniform. So I just want to clear the record on that point. I understand he was in uniform. That is what the news said.

Governor, from the standpoint of the armed services——

The CHAIRMAN. We will put both of those in the record, accompanied by the Governor's statement that the Air Force is encouraging personnel to engage in rioting and mobs.

(The document follows:)



HEADQUARTERS
SOUTH AIR TRANSPORT WING (H) (MATS)
UNITED STATES AIR FORCE
CHARLESTON AIR FORCE BASE, SOUTH CAROLINA

26 June 1963

SUBJECT: Civil Rights Demonstrations

TO: Distribution "B" plus Tenant Units

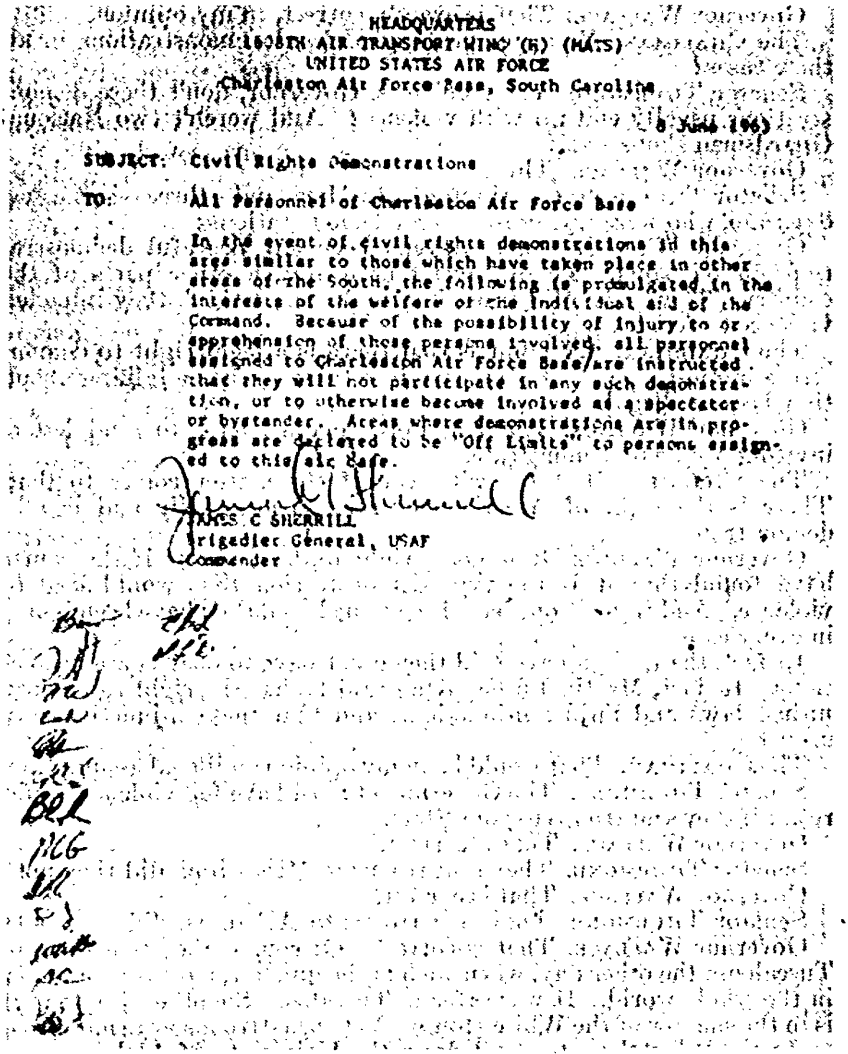
1. Previous instructions on this subject dated [illegible] are revoked.

2. Air Force policy is, "that no Air Force member will be restricted from demonstrating as a private citizen so long as (1) it is done during off-duty time, (2) the demonstrators wear civilian clothes, and (3) there is no imminent danger of injury to Air Force personnel or damage to Government property as a result of the demonstration."

3. My previous instructions were conceived on the basis of protection of the individual members of this command from injury and/or demonstrations which might impair vital mission accomplishment. The precepts of my orders remain the same, subject to the Air Force policy as stated above.

JAMES C. SHERRILL
Brigadier General, USAF
Commander

Engr Secy (all Personnel)
Engr Sf
Pers Ofc
Ops Ofc
Comptroller
Engr
Chief Engr



HEADQUARTERS
1608TH AIR TRANSPORT WING (H) (MATS)
UNITED STATES AIR FORCE
Charleston Air Force Base, South Carolina

8 June 196)

SUBJECT: Civil Rights Demonstrations

TO: All Personnel of Charleston Air Force Base

In the event of civil rights demonstrations in this area similar to those which have taken place in other areas of the South, the following is promulgated in the interests of the welfare of the individual and of the Command. Because of the possibility of injury to or apprehension of those persons involved, all personnel assigned to Charleston Air Force Base are instructed that they will not participate in any such demonstration, or to otherwise become involved as a spectator or bystander. Areas where demonstrations are in progress are declared to be "Off Limits" to persons assigned to this Air Base.

JAMES C SHERRILL
Brigadier General, USAF
Commander

Governor WALLACE. I consider that letter encouragement.

In fact, I consider it a solicitation of Air Force personnel to engage in demonstrations.

Senator THURMOND. Though not an expressed invitation to engage in demonstrations, why did the Air Force Command here in Washington send letters down suggesting that they may be permitted to demonstrate if they did not have that in mind?

Governor WALLACE. That is the suggestion to demonstrate. That is an invitation to demonstrate. There is nothing else but that.

Senator THURMOND. Isn't it a clear implication that they may not only demonstrate, but that it is suggested they might want to demonstrate?

Governor WALLACE. That is exactly correct, in my opinion.

The CHAIRMAN. You are speaking of legal demonstrations in all these cases?

Senator THURMOND. The trouble is, Governor, don't these demonstrations usually end up with violence? And weren't two National Guardsmen shot——

Governor WALLACE. Three.

Senator THURMOND (continuing). In Maryland—three—just a few days ago, who were trying to control demonstrations?

Governor WALLACE. There haven't been any peaceful demonstrations in Alabama. There haven't been any in other parts of the country. They have all turned into violence. I think they intended violence to occur.

The CHAIRMAN. My point is that there is a legal right to demonstrate in most cases. If they turn into things you are talking about, they become illegal.

Governor WALLACE. The Air Force doesn't have to send letters inviting people to demonstrate.

The CHAIRMAN. I agree with you if the matter comes to that. There is the right of American citizens to peacefully and legally demonstrate.

Governor WALLACE. It is not a right to demonstrate if the courts have found that it is the type demonstration that would lead to violence. And injunctions have been issued, and they have been issued in every case.

In fact, the leaders have said they don't have to obey State injunctions. In fact, Martin Luther King said he has the right to disobey unjust laws and unjust injunctions, and that these injunctions are unjust.

The CHAIRMAN. That would be in my opinion an illegal assumption.

Senator THURMOND. The Government must have felt violence would result if they sent troops to your State.

Governor WALLACE. That is correct.

Senator THURMOND. They sent troops to Mississippi, did they not?

Governor WALLACE. That is correct.

Senator THURMOND. They sent troops to Arkansas, did they not?

Governor WALLACE. That is correct. Of course, they sent them to Tuscaloosa the other day, when we had the quietest, most peaceful city in the whole world. It was safer in Tuscaloosa the other day than it is in the shadow of the White House. Yet 18,000 troops were mobilized and poised, I reckon, to shoot down the University of Alabama.

The CHAIRMAN. I just hope we don't equate the type of demonstration you are talking about, if that occurs, with the legal right to demonstrate in all the States that I know of.

In Seattle the other day the wives of the fishermen had a march down the street protesting certain Japanese treaties. It was a peaceful demonstration, and they had the right to demonstrate under our laws.

So I hope we don't equate all demonstations or the right to petition by demonstration in the same category as one leading to violence. I think you will agree with me there.

Governor WALLACE. Yes.

Senator THURMOND. Governor, it is a little strange that this Air Force letter came down about the time the Negroes were demonstrating in this country, however, is it not?

Governor WALLACE. Of course, Senator, that is correct.

Senator THURMOND. Could it have been anything but a suggestion to go and demonstrate?

Governor WALLACE. In fact it was a suggestion that armed service personnel demonstrate in the streets of my State, for instance, and join with groups who have stuck policemen with knives and burned buildings down and destroyed property and injured people in our State.

We resent it. I think the Air Force ought to withdraw such a letter as that, and the Constitution says the troops cannot be quartered upon you. The effect of this is just quartering troops on top of us in the streets of our cities, which endangers the life and health of every man, woman, and child in a city where a demonstration occurs.

And I think that this committee and this Congress ought to do something about it.

The CHAIRMAN. In other words, they would have been better off if they had said nothing one way or another?

Governor WALLACE. Sure; they shouldn't have said anything, Senator.

The CHAIRMAN. You know——

Governor WALLACE. The military ought to try to work up a way to defend—they are supposed to defend the Nation. They are not supposed to enter into social and political demonstrations. I reckon they would all be out brawling in the streets when the "red alert" comes if they follow out this Air Force directive here.

They have even suggested that they should move bases, provided they didn't destroy segregation in the environments, in the cities in which the bases are located. That would destroy the defense posture of this country because I thought these bases were placed for military reasons and now they are going to move them, they say, because of political reasons.

Senator THURMOND. So you feel that this letter that was sent down by the Air Force was unwise?

Governor WALLACE. Yes.

The CHAIRMAN. Senator Thurmond, I hate to interrupt, but are you both referring to a report of the President's Committee on Equal Opportunity in the Armed Forces in this last matter?

Governor WALLACE. I'm referring to the directive that was sent down, with the letter that they could demonstrate. I think we are referring to the report that you are talking about.

The CHAIRMAN. The other matter of bases?

Governor WALLACE. Yes, that is correct.

The CHAIRMAN. I think the part that you are referring to, from this report, which was made June 13, occurs on pages 70 and 71. I will place that in the record so the committe can evaluate it.

Governor WALLACE. Thank you very much.

(The material referred to follows:)

EXCERPT FROM THE REPORT OF THE PRESIDENT'S COMMITTEE ON EQUAL OPPORTUNITY IN THE ARMED FORCES, OF JUNE 13, 1963

Approval of an establishment is not, of course, the final step. There must be procedures for dealing with complaints that approved establishments have not fulfilled their guarantees, and for withdrawing approval if such complaints are substantiated.

Should all other efforts fail, the services must consider a curtailment or termination of activities at certain military installations near communities where discrimination is particularly prevalent. While compelling military considerations must prevail, it is often possible to conduct certain activities at any one of a number of locations. Where this is true, alternative communities' attitudes and practices should be carefully weighed. Such relocation of activities is particularly important at bases that play an important role in the training of new recruits or officers or in the orientation of representatives of foreign governments. The objective here should be preservation of morale, not the punishment of local communities which have a tradition of segregation.

In this context, one further comment is appropriate. The Armed Forces have, in the past, unfortunately not given attention to the important morale factors presented in off-base communities at the time that new installations are opened or changes made in the deployment of forces as between bases. Where tactical considerations make a variety of sites eligible for consideration, the military decision should, among other things, strenuously emphasize the necessity of obtaining from the communities involved explicit guarantees against the continuation or establishment of patterns of discrimination against members of the Armed Forces and their dependents. At these moments of decision the economic well-being of the community will serve as a potent influence toward assuring the conditions necessary to maintain morale and efficiency.

Senator THURMOND. Governor, you are familiar with the fact that the Committee appointed by the President did recommend to commanders of air bases, Army camps and so forth, that they go out and try to desegregate the community around there.

Governor WALLACE. I believe it is in the report that you are filing; yes, sir.

Senator THURMOND. You are familiar with that?

Governor WALLACE. Yes, sir; I am familiar with it, Senator.

Senator THURMOND. Do you think that is a proper function of an Army commander, a Navy commander, or Air Force commander, to be called upon to go out and try to change the social pattern of the surrounding community and try to desegregate it?

Governor WALLACE. I think it is the most utterly ridiculous suggestion that I have ever heard made. It seems that the Government would put its mind on Cuba and other matters of that sort and quit trying to destroy the customs and traditions of people in our part of the country for political reasons, that we might have a better defense posture. I think it is utterly ridiculous.

Senator THURMOND. Is that not injecting the commander into political matters?

Governor WALLACE. It certainly is.

Senator THURMOND. And yet army officers were muzzled in the Pentagon and can't talk about communism on the claim that that is a political question.

Governor WALLACE. That is correct.

That is what we are trying to show the American people, and I think the American people are beginning to catch on to what a lot of people in our part of the country have been saying for many, many years.

Senator THURMOND. Have you heard an officer in the defense establishment within the past year make a single strong speech against communism?

Governor WALLACE. No; I haven't.

Senator THURMOND. Aren't they literally scared to death to mention such a subject?

Governor WALLACE. In my judgment, they are.

Senator THURMOND. Let's move on.

Governor Wallace, if this so-called civil rights bill passes, is not an era of confusion, if not chaos, in the retail business in America on the way due to an unprecedented stretching of the law-making power, such as is being proposed here?

Governor WALLACE. Yes, sir. In fact it is going to put many people out of business.

Senator THURMOND. And this without the support of a single Supreme Court decision?

Governor WALLACE. That is correct.

Senator THURMOND. Governor Wallace, is not Congress being urged by the administration to yield in effect to a stampede of street demonstrations and pass a law which creates virtually a Federal dictatorship over the relations of private business and its customers?

Governor WALLACE. That is correct.

Senator THURMOND. Governor Wallace, has the Supreme Court ever ruled that the Federal Government expanded the Interstate Commerce Clause to cover control over who may or may not be served in business?

Governor WALLACE. In fact, the decision of 1883 was to the contrary. And they have never made any such ruling since then.

Senator THURMOND. Governor Wallace, by using the Executive order device and relating it to the racial problem, would not the Federal Government feel authorized to regulate who shall or shall not be given a job, and whether promotions are being made to suit the wishes of the administration in power if this bill passes?

Governor WALLACE. That is correct, Senator, and I have a situation in my own city of Montgomery at the moment in which 1 Negro—of 60 persons on the civil service list 2 are Negroes—1 ranks 30, and the other 51 and they are going to get the job. In fact there has already been a disclosure of that by an investigation, and they are going to give these jobs to people who are way down the list, but they are going to give these jobs on the basis of color, instead of—this is what you call discrimination in reverse.

Of course, it doesn't do any good to talk about it.

The CHAIRMAN. Will the Senator from South Carolina yield to me?

The other day I happened to handle an appropriation, as Chairman of the Subcommittee on Independent Offices, which includes the Civil Service Commission. We questioned them about this matter of sending teams, which they have done, into certain parts of the South to look at the registers. I don't know what they have actually done. They are going to make a report to us. I said to them, "If you are going to look at discrimination in civil service, why shouldn't you send teams to all parts of the country, rather than just to get discrimination no matter where it sticks its head up." They said they hadn't done that but they are going to do it.

Governor WALLACE. They have sent them to Alabama, Senator.

The CHAIRMAN. They are going to make a report to me. I think it is wrong to send a team to look at this particular thing in just one area. I don't care whether it is the State of Washington or the State of Alabama. We are going to see what we can do to correct that.

Governor WALLACE. It is happening, it is happening in my State.

They have already come to the Veterans' Administration and also to social security. People have been elevated to jobs, are given jobs because of color.

The CHAIRMAN. I don't know about the individual cases, but the policy of discrimination in civil service should be investigated nationwide and not just in one area.

Governor WALLACE. Thank you. I am glad you agree with us.

Senator THURMOND. Governor, I agree with you all the way.

Governor Wallace, if this bill passes, could it not also mean that the Federal Government as well as the States would assume the right to use the granting or withholding of license as a method of opposing alleged race discriminations?

Governor WALLACE. Yes, sir.

Senator THURMOND. Could it not also mean that Federal authority would be exercised to interfere with what are called equitable wage or salary scales for particular classifications of jobs?

Governor WALLACE. That is correct.

Senator THURMOND. Governor Wallace, with the racial problem as its leverage, would not Federal control of employment practices become a powerful instrument of national politics?

Governor WALLACE. Yes, sir.

Senator THURMOND. Governor Wallace, if the proposed law on public accommodations is held valid by the Supreme Court, is there any end to the powers that could be exercised on the mere pretext that it affects interstate commerce?

Governor WALLACE. Of course, the passage of this bill will just destroy the free enterprise system in this country, and I think the next step will be land reform. I think then these same groups who are today saying we need to be compensated, we need to have preferential treatment, they are going to march in the streets and say you have got more land and I don't have any, so we are going to take yours away from you and we are going to divide it up. And, of course, this Government, I think, has even helped in that regard in Japan and other places after the war. And so land reform is the next step.

Anyone who laughs at that and thinks it is not so, just remember that.

Senator THURMOND. Governor Wallace, does not the Constitution speak only of the power of Congress to regulate interstate commerce and not the behavior of persons or their rights to select their own customers?

Governor WALLACE. That is correct. Of course, that is what the Constitution says, and, of course, we folks who practiced law a long time, we hardly know what the law is any more. It is just what the Supreme Court and district say it is, I suppose.

Senator THURMOND. Governor Wallace, is it not true that what is beginning to bother many small business people, especially restaurant owners, is that the moment they open their doors to all kinds of customers they begin to lose patronage and they know that if they allowed white persons, for instance, in soiled clothing and of uncouth appearance to frequent the restaurants, other persons will stay away?

Governor WALLACE. Yes, of course. They know that.

Senator THURMOND. Yet if this bill passes, if Negroes dressed in the same way should be refused a seat in the restaurant among white

customers, could not the owner be threatened with Federal punishment?

Governor WALLACE. Not only threatened but he could be punished.

Senator THURMOND. And even if the owner argued that he was not discriminating on the basis of race but because of the personal appearance of some of the customers, can he be assured the Supreme Court will not say that this is merely an excuse and that he was motivated by local customs?

Governor WALLACE. It wouldn't make any difference what he said. It is what the Federal district court thought about the matter.

Senator THURMOND. Governor Wallace, from the standpoint of those who want to see individual rights preserved—which means the right of every private business to use its own judgment even if it be discriminatory—if a man has private property, if it is his own land, doesn't he have the right to discriminate? Discrimination means making a choice, doesn't it, as to whether he wants to have this fellow visit him or not visit him. Don't we discriminate every day in choosing the newspapers we read?

If we choose the Washington Star instead of the Washington Post; or if we choose the U.S. News & World Report instead of the Nation magazine; or if we make a choice of anything else, to buy this home or that home or something else, isn't that a matter of discrimination? Isn't the word "discrimination" there used in the sense of making a choice or not with the idea that there is bias or evil involved?

Governor WALLACE. That is correct. It has been in the past that a man may refuse to serve people with blue eyes if he wanted to, if the property belonged to him—the ownership of private property. He could use it as he saw fit in that regard. This legislation says that a boardinghouse, or the Attorney General said he wasn't sure, he said that businesses, small businesses, he said this was a moral issue but that small businesses might not be affected. If this is a moral issue it ought to affect all businesses, small and large. I don't consider it a moral issue, Mr. Senator and Mr. Chairman. I think it is a pure political issue.

Senator THURMOND. Governor Wallace, if this bill passes, could not the choice ahead well be acceptance of Federal authority or the expense and worry of politically generated lawsuits?

Governor WALLACE. Yes, sir

Senator THURMOND. Governor Wallace, if the Negroes desert their own restaurants, the Negro owners will have less business, will they not?

Governor WALLACE. That is correct.

Senator THURMOND. It has been suggested that they may wish to visit white restaurants. Will that not hurt the Negro restaurants?

Governor WALLACE. That is right.

Senator THURMOND. Similarly, the white owners who cater to an integrated group of customers may find these gradually losing the trade of those white persons who may decide to patronize private clubs more than before, or organizing new private clubs; is that not true?

Governor WALLACE. That is true.

Senator THURMOND. So whichever way the subject is viewed, is there likely to be an economic impact due to shifting the customers in the restaurant business?

Governor WALLACE. Yes, sir.

Senator THURMOND. And I use the restaurant business as an example. The same would apply to barbershops, beauty shops and other businesses, would it not?

Governor WALLACE. That is correct.

Senator THURMOND. Governor, it is said that this is to give Negroes more jobs. If they obtain those more jobs and the white persons are caused to lose their jobs to make way for the Negroes, will this not create tension and ill feeling and could it bring about a very undesirable situation?

Governor WALLACE. It has already created tension and ill feeling. And, of course, this legislation and this policy of the Government is going to affect labor, members of unions, and already there is a great amount of discontent among people in Alabama who belong to unions because they feel that this administration is going to attack the seniority system and is going to cripple the unions.

In fact, that is what members of the unions tell me, and I talked with a group of steelworkers just the other night, from Birmingham. I can assure you that they are opposed to this program and opposed to this legislation and opposed to the policy of this Government on this matter.

Senator THURMOND. Governor Wallace, can we ever accept the doctrine that because an objective is worthy or thought to be worthy, the means of obtaining it do not matter?

Governor WALLACE. Of course that is cruel philosophy.

Senator THURMOND. Governor Wallace, is any President justified at any time in seeking to impose unconstitutional remedies in order to satisfy the pressures of the mob?

Governor WALLACE. No, sir; under no circumstances. In fact if these were white mobs, if these were white mobs the policy of this Government would be to suppress the white mobs. And I would say it would be the policy of many Members of the Congress to pass legislation to curtail the activities of white mobs.

But, we haven't had any white mobs. They are just demonstrators. But if the white people were doing the same thing, they would be denounced by almost three-fourths of the Congress for political reasons. But since they are Negro mobs, they are demonstrators. But these demonstrators have endangered the lives and health of our people; we resent it. They have not only endangered the lives and health of the white people, but they have endangered the lives and health of the Negro people in our part of the State. And I want to make this statement: I commended publicly a number of times the restrained attitude of white and the whole majority of the Negro people of Alabama during the Birmingham demonstration, because the overwhelming majority of the Negro people were restrained as well as the whites.

This was a minority group of whites that brought this trouble on. This was Martin Luther King and this fellow O'Dell as an accompanist, and I want you to look into that, and Martin Luther King, of course, invited, was in—this man Abner Berry. There has been some question raised, is he an accompanist? Do you have proof?

Yes, sir, Abner W. Berry, in testifying before Judge Medina with 11 Communists, he admitted he was a member of the Communist Party. Governor Barnett offered in testimony this picture. I have the pic-

ture, too, of Berry, here sitting with Martin Luther King. And Berry is an admitted Communist by his own testimony in the case of 11 Communists before Judge Medina.

He testified on August 22 and 23, and outlined his Communist Party activities during the previous 20 years.

I would like to give this to the committee, if you don't have a copy of this.

The CHAIRMAN. Is he in Alabama?

Governor WALLACE. I would say the Governor of Alabama, Mr. Chairman, if he were caught sitting, consorting with a Communist, I dare say this administration would already have investigated me.

The CHAIRMAN. Is he in Alabama? Are these people in Alabama?

Governor WALLACE. These are in Monteagle, Tenn., at the Highlander Folk School. The people sitting there with him otherwise belong to a great number of Communist-front organizations as stated by the Senate Internal Security Committee. I think that bears investigation.

Also, I would like to introduce this article in the Birmingham News that points out that the man who has been consorting with Martin Luther King and helping him in demonstrations is a member of the Communist Party, and that he is still on the payroll and still drawing money from the Southern Conference of Religious—whatever that organization is called.

(The news article follows:)

[From the Birmingham News, June 30, 1963]

KING'S SCLC PAYS O'DELL DESPITE DENIAL

(By James Free, News Washington correspondent)

WASHINGTON, June 29.—The Rev. Martin Luther King's Southern Christian Leadership Conference organization continues to pay expense money to, and accepts the services of, Jack H. O'Dell, who was exposed by this newspaper last October 25 as a concealed member of the National Committee of the Communist Party, U.S.A.

This was learned Saturday from a highly authoritative source. And it is contradictory to a statement by the Reverend Dr. King to a reporter in Atlanta this week to the effect that O'Dell has not been associated with the Southern Christian Leadership Conference since December 1, 1962.

King told the reporter he had investigated the reports that O'Dell was a Communist and found nothing to support this. But King added that he had found that O'Dell had associated with Communists.

REPORTED RESIGNED

King said on December 1, 1962: "While Mr. O'Dell advises us that he rejects the implication of the charges made against him, in order to avoid embarrassment to the SCLC, he has tendered his resignation. We have accepted it pending further inquiry and qualification," King said.

King told a reporter in Atlanta this week that since acceptance of O'Dell's resignation on December 1, 1962, O'Dell had not been connected with SCLC.

It has been learned, however, that later in December 1962 O'Dell several times identified himself as affiliated with the New York office of the SCLC and was actively working on mailing procedures and funds appeals of SCLC.

Moreover, three times during January of this year, O'Dell registered at the Waluhaje Apartments, 239 West Lake Avenue, NE., Atlanta, where he represented himself as being from the New York office of SCLC.

PAID BY SCLC

It is known, too, that at least one of O'Dell's trips to Atlanta that month was paid for by SCLC.

In January 1963 also, O'Dell traveled with the Reverend Dr. King and other SCLC officials from Atlanta to Savannah, Ga., via Delta Airlines.

O'Dell lives at 488 St. Nicholas Avenue, New York City, and continues to work outof the SCLC offices at 312 West 125th Street, New York City.

The Birmingham News story on October 25, 1962, identified O'Dell as acting executive director of SCLC activities in Southeastern States, including Georgia, Alabama, Mississippi, and Louisiana. And the story continued:

"From his birth in Detroit in 1923 until as late as 1958 he (Jack H. O'Dell) was known as Hunter Pitts O'Dell. This O'Dell, by whatever name, operates as a concealed member of the National Committee of the Communist Party, U.S.A., according to a highly authoritative source.

WAS SAILOR

"Until a few weeks ago, O'Dell was the regional consultant to the conference staff, which has headquarters in Atlanta. He became acting director recently. Main functions of the staff are to set up voter registration schools, workshops for promotion of civil rights activities, and public meetings.

"After attending Xavier University, New Orleans, La., O'Dell for several years was a sailor in the merchant marine. In July 1950, however, he was expelled from the National Maritime Union at Galveston, Tex. The union took exception to his circulation of pro-Russian petitions attacking the Government of the United States.

"On April 12, 1956, identifying himself as Hunter Pitts O'Dell, a New Orleans waiter, he testified before the Senate internal security subcommittee. He invoked the fifth amendment and refused to say if he was a southern district organizer for the Communist Party.

WOULDN'T TALK

Robert Morris, counsel for the subcommittee, said information had been received that O'Dell was, in fact, a district organizer for the Communist Party in New Orleans; and that O'Dell gave "directives to the professional group" in that city and that he operated under three different names—the other two being John Vesey and Ben Jones.

"It was learned that hundreds of documents seized at O'Dell's residence, 2310 Louisiana Avenue, by New Orleans police clearly established his key position in the Communist movement in the South.

"On July 30, 1958, identifying himself as Hunter Pitts O'Dell, a Montgomery, Ala., insurance man, he appeared before the House Committee on Un-American Activities in an Atlanta hearing. O'Dell invoked the first and fifth amendments and declined to answer committee questions about his Communist activities."

The Reverend Dr. King has been president of the SCLC since its organization in New Orleans in 1957.

He said on December 1, 1962, that O'Dell "has never had any administrative post in the SCLC" and that nearly all of O'Dell's work for the SCLC had been outside of the South.

Governor WALLACE. I would like to say that David Ruskin, I understand that—I don't have a copy of the Daily Worker, but I will make this statement, that the Daily Worker in one of its issues in sometime past pointed out that his manager, Ruskin, attended a 1957 meeting of the Communist Party in this country.

If you have a man who is a manager, who has been attending the Communist Party convention in this country, it seems to me that that bears looking into.

Senator THURMOND. What is the name of the last man you mentioned?

Governor WALLACE. Ruskin—R-u-s-k-i-n. I understand he was sentenced January 22, 1958, by Judge Norta, in Pasadena.

Senator THURMOND. The people whose names you mentioned a few minutes ago, you say they are admitted Communists?

Governor WALLACE. In fact, Abner W. Berry in his testimony admitted he was a Communist and pointed out his Communist activity.

He outlined his Communist Party activities during the previous 20 years in this trial. According to his own sworn testimony, he joined the Communist Party in March 1929 at Houston, Tex., and in 1930 became a unit educational director in the party in Houston. In 1931, he became press director of the Kansas City district of the party, and in 1932 the district organizational secretary in the same district. By 1934, he had become section organizer of Kansas City (Mo. and Kans.).

According to his testimony, he moved to New York in 1935, where he was first assistant executive secretary of the Harlem section of the Communist Party, and in 1936, became executive secretary of the Harlem section. He said he served as a member of the National Committee of the Communist Party, U.S.A., from 1936 until 1942, at the same time serving as executive secretary of the Harlem section.

Berry was in the Army from November 7, 1942, until July 1, 1945. According to Berry's testimony, he served as State educational director of the Communist Party in Michigan from November 1945 until April 1947. He was named to the National Committee of the Communist Party again in July 1945 and served in that position until August 1948.

Berry has from time to time been listed as a member of the staff or editor of the Daily Worker, the Worker, and the Harlem edition of the Worker. (The Worker, Feb. 20, 1949; Daily Worker, Apr. 24, 1951; and Daily Worker, May 1, 1951; all carry articles describing editorial work of Berry in these publications.)

According to Daily Worker, October 18, 1937, Berry was a member of the National Executive Council of the National Negro Congress, which organization has been cited by the Attorney General as Communist.

Senator THURMOND. What was Berry's connection here with Martin Luther King and these Negro leaders?

Governor WALLACE. He was at this meeting in Monteagle, Tenn., at the Highland Folk School at which Martin Luther King was the speaker, and the two are pictured within 2 feet of each other at this gathering.

Senator THURMOND. Do you have any information about Communist gatherings of others in that connection?

Governor WALLACE. I would like to read about Aubrey W. Williams here, and this is a report of the Senate committee, signed by James O. Eastland, chairman, Olin D. Johnston, John L. McClellan, Price Daniel, William E. Jenner, Arthur V. Watkins, Herman Welker, and John Marshall Butler, of which this is a photostatic copy. It is about the Southern Conference Educational Fund, Inc.

Hearings were held in Louisiana—would you like me to read that?

Senator THURMOND. Yes. Go on and read it if you want.

Governor WALLACE. Hearings were held in New Orleans, La., on March 18, 19, and 20, 1954, respecting subversive influence in the Southern Conference Educational Fund, Inc., and various groups who are leading these demonstrations belong to this group.

The principal points in the testimony are as follows:

The Southern Conference for Human Welfare was conceived, financed, and set up by the Communist Party in 1938 as a mass organization to promote communism throughout the Southern States. Earl Browder, former general secretary of the Communist Party in the United States, in a public hearing, identified the Southern Conference for Human Welfare as one of the Communist Party's "transmission belts." Under date of March 29, 1944, the Southern

Conference for Human Welfare was cited by the Special Committee on Un-American Activities as a Communist front and, on June 12, 1947, by the congressional Committee on Un-American Activities as a Communist-front organization "which seeks to attract southern liberals on the basis of its seeming interest in the problems of the South," although its "professed interest in southern welfare is simply an expedient for larger aims serving the Soviet Union and its subservient Communist Party in the United States."

The Southern Conference Educational Fund, Inc., was initially an adjunct of the Southern Conference for Human Welfare. After the exposure of the Southern Conference for Human Welfare as a Communist front, it began to wither, and was finally dissolved, but the Southern Conference Educational Fund, Inc., continued. The official paper, the Southern Patriot, which was published by the Southern Conference for Human Welfare, was taken over by the Southern Conference Educational Fund, Inc., which professes the same ostensible purpose.

The below-named persons were identified in the hearings as former officials of the Southern Conference for Human Welfare, who are or have been officials of the Southern Conference Educational Fund, Inc., and it lists of course Aubrey Williams, Modjeska M. Simkins, Dr. Alva W. Taylor, Dr. James A. Dombrowski, Mary McLeod Bethune, Dr. Charlotte Hawkins Brown, Roscoe Dunjee, Myles Horton, Virginia Durr, Clark Forman, and Leo Sheiner, listed as belonging to the Southern Conference for Human Welfare.

And then, listed over here—I will introduce this in evidence—belongs to the Southern Conference Educational Fund. I think some of them do not belong—yes, they are connected and all members.

Aubrey Williams is in that picture. I would like to read what the congressional committee said about him:

Aubrey W. Williams was identified as president of the Southern Conference Educational Fund, Inc., who had been a member of the board of the Southern Conference for Human Welfare. He also identified himself as editor and publisher of the Southern Farm and Home, a farm publication. Mr. Williams was identified by a witness as one who had been a member of the Communist Party. He was also identified by another witness as one who accepted the discipline of the Communist Party. Mr. Williams denied that he had ever been a member of the Communist Party or that he had ever accepted Communist Party discipline, but he admitted that he had been connected with a number of Communist-front organizations. He admitted also that on September 11, 1947, he made the following remarks in an address at Madison Square Garden, New York City with reference to the Government's loyalty program:

"What they demand is that any man who admits to being a member of the Communist Party be fired immediately on the grounds that no man can be loyal to the United States and be a Communist. It is my belief that it is precisely at this point that we take our stand and defend the right of any Communist to maintain his position as an employee of the Government of the United States. To take any less position than this is to throw overboard such primary rights as freedom to think and to hold whatever beliefs one chooses."

That is Aubrey Williams, Mr. Chairman, who is in that picture, and that is part of this report.

I would like to read of another man there, Myles Horton, who is in the picture.

Myles Horton was identified as a former member of the board of the Southern Conference for Human Welfare and as a director of the Southern Conference Educational Fund, Inc. He also identified himself as a teacher at the Highlander Folk School, at Monteagle, Tenn., and said that he assumed "the full responsibility for having first conceived the idea of the Highlander Folk School and having come down to the Tennessee mountains for the purpose of starting this school."

A witness who had been a member of the Communist Party testified that when he was Tennessee district organizer of the Communist Party he made arrangements with Myles Horton and others for the Communist Daily Worker to be sent regularly to the Highlander Folk School, and for a Communist student to go to the Highlander Folk School to recruit students into the Communist Party. The witness further testified that the Highlander Folk School cooperated closely with the Communist Party, and that when he asked Myles Horton to become a member of the Communist Party, Horton replied:

I am doing you just as much good now as I would if I were a member of the Communist Party. I am often asked if I am a Communist Party member and I always say "No." I feel much safer in having no fear that evidence might be uncovered to link me with the Communist Party, and therefore I prefer not to become a member of the Communist Party.

Aubrey W. Williams and Dr. James A. Dombrowski (heretofore unidentified) were also affiliated with the Highlander Folk School.

Senator THURMOND. Are there any others in that picture that you wish to give information about?

Governor WALLACE. I am not—let's see. That is all that I can identify. That is all that I can identify who are in the picture, present there with Reverend King.

Senator THURMOND. Would you recall the names of the ones you just mentioned there, who were sitting there in that picture with Martin Luther King?

Governor WALLACE. Abner W. Berry, Myles Horton, and Aubrey Williams.

Senator THURMOND. As I understand, you are not saying Martin Luther King is a Communist, but you are just showing his association there with these Communists; is that correct?

Governor WALLACE. I am not saying he is a Communist because I have no proof of that. I would like to point out that I have a copy of the Augusta Courier, sent to me by a lady from Canton, Ohio, in which she wrote a letter saying, "I stand with you and the people of Alabama."

She sent me a copy of this paper which is widely circulated. I get it each week myself. So, it is distributed widely in the country. And here, on its page, the headline says, "Martin Luther King—Member of More Commie Fronts Than Any Red in United States." I am reading from this paper. I have never talked to Karl Prussion.

"Martin Luther King is a member of more Communist-front organizations than any Communist in the United States," declared Karl Prussion, who was a counterspy for the FBI for 22 years in the ranks of the Communists in a speech in Augusta recently.

He made that speech, I believe, over a radio station. I believe you are probably familiar with it. I would like to give this to the committee. There is a charge in a newspaper. There have been no libel suits filed. I think——

Senator THURMOND. Who was the FBI agent who said that?

Governor WALLACE. This paper says Karl Prussion—P-r-u-s-s-i-o-n—who was a counterspy for the FBI for 22 years in the ranks of the Communists, said the above in a speech recently at Augusta. This is May 13, 1963, the Augusta Courier.

That charge should be looked into, in my judgment. I don't vouch for the accuracy of that statement at all, but there it is.

(The newspaper article follows:)

[From the Augusta Courier, Augusta, Ga., May 18, 1963]

MARTIN LUTHER KING MEMBER OF MORE COMMIE-FRONTS THAN ANY RED IN UNITED STATES—FBI COUNTERSPY FOR 22 YEARS TELLS INSIDE STORY ABOUT MULATTO PREACHER

"Martin Luther King is a member of more Communist-front organizations than any Communist in the United States," declared Karl Prussion, who was a counterspy for the FBI for 22 years in the ranks of the Communists in a speech in Augusta recently.

Prussion also declared that Martin Luther King belongs to at least 60 Communist-front organizations.

This was all emphasized in an editorial which was broadcast on WHDW radio station in Augusta on Monday, April 29, 1963.

WRDW RADIO STATION

The WRDW radio editorial follows:

Is Martin Luther King a Communist?

This was the question posed to Mr. Karl Prussion, counterspy for the FBI for 22 years in the Communist ranks.

Mr. Prussion's answer, "Martin Luther King is a member of more Communist-front organizations than any Communist in the United States. Martin Luther King belongs to 60 Communist-front organizations."

There are those who scoff at the idea that the Communist conspiracy has any connection with the racial strife in this country. Mr. Prussion stated that Martin Luther King is being used as a tool of the Communists.

FAIL TO READ SIGNS

There are those who are so anxious to hold high the banner of the civil rights issue that they fail to read some of the writing on the banner. Mr. Prussion said, in effect, that the Communist Party hopes to incite civil insurrection in the South with the purpose of then fanning the flames into a holocaust in the northern racial strife areas. To date, the Communists have been defeated in this by due process of law in the South, where law enforcement agencies and level-headed citizens have been able to contain the aggravations of the racial issue.

Concerning the NAACP, while we do not infer that all members of the NAACP are Communists, we believe Mr. Prussion when he said, "All card-carrying Communists are members of the NAACP."

It is customary for many persons not to listen to, nor long remember things they do not like to hear. We fail to remember that in 1950 the Communist Party set up one Fidel Castro in New York City and began to glorify him as the coming leader of Cuba—so much that he was labeled by some news media as "The George Washington of Cuba."

In 1950, Fidel has no intentions of telling whose cherry tree he planned to chop down—we probably wouldn't have believed him if he had told us.

HARRY TRUMAN'S INDIGESTION

We wonder if Harry Truman's recent spell of indigestion could have been brought on by a memory of how he was a party to handing over a good part of Europe to Russia at the Potsdam Conference in return for Stalin's promise that these countries would be allowed to conduct free elections for the government of their choice?

At the end of this infamous agreement Truman gleefully played the "Missouri Waltz" for the murdering dictator and later remarked that Joe Stalin wasn't such a bad guy after all.

Governor Brown, of California, when roly-poly Khrushchev was greeted by him with words, of, "We admire you, Premier Khrushchev," must have wondered when Khrushchev later remarked in Moscow, "When you spit in the face of an American, he calls it dew."

THE CALIFORNIA EPISODE

And it was out of the California episode that came the expression so senselessly used, "I'd rather be Red than dead." What a contrast to that statement

engraved by Patrick Henry on every true American's heart, "Give me liberty or give me death." But—we're on the way back—Americans all across this land are waking up. We have been mesmerized long enough by the Communists.

However, the fight is far from being over—we've got to get out of the U.N.—we've got to control foreign aid—and don't let anybody kid you with any fool statement that we have little to fear from the Communists.

Right now, there is a greater ratio of Communists to non-Communists in the United States than there was in Russia when the Communists staged their revolution in that country.

What to do about it?

Let your Congressman—your Senator—know you've had enough of left-wing government.

Put your right foot forward.

Senator THURMOND. This Martin Luther King you are talking about is one who has been all over the country leading demonstrations and creating dissension and starting riots and troubles?

Governor WALLACE. That's correct.

And he also is the one who has been making statements that we don't have to obey unjust laws, which means I suppose that they can decide what laws are just or unjust.

Senator THURMOND. Governor, we were asking you some questions about the end justifying the means, and so forth. I want to ask you this: Does not American history recall many a tragedy because governments have come to the doctrine that the end justifies the means?

Governor WALLACE. Yes.

Senator THURMOND. Is it any answer to say that since the objective is good and the principle of equal rights is correct we need not worry about the letter of the law or any acts of deception?

Governor WALLACE. Of course, that is very poor philosophy.

Senator THURMOND. Is not this Machiavellian philosophy?

Governor WALLACE. That's right. The end justifies the means.

Senator THURMOND. Isn't the Machiavellian statement that the end justifies the means at variance with the concept of the written Constitution?

Governor WALLACE. Absolutely, Senator.

Senator THURMOND. Governor Wallace, isn't this true, that in countries which have destroyed property rights you soon find that human rights also are destroyed?

Governor WALLACE. That is correct.

Senator THURMOND. Do you feel this bill is constitutional?

Governor WALLACE. Well, of course, in my judgment it is not constitutional, and I don't even believe the present Supreme Court could declare it constitutional.

Mr. Chairman, I'm not surprised at anything the present Supreme Court decides. I think the Supreme Court based years ago probably would have held such things unconstitutional to begin with. Of course, a bill of this sort wouldn't have been considered a few years ago.

It is unconstitutional even in the light of the findings of the present Court, in my judgment, they would find.

Senator THURMOND. Governor Wallace, if this bill should pass, and people should be required to serve others that they do not wish to serve, or sell to others they do not wish to, or receive customers they do not wish to, do you feel that it would be practical and workable in Alabama?

Governor WALLACE. This bill will not be workable in Alabama, and I don't believe it is going to be workable anyplace in the country.

But, of course, I know for sure not in Alabama. You are going to make everybody in our State, you might say, a law violator. You can't carry on the ordinary functions of business and have a business community with any such legislation as this if this is enforced.

And if it is going to be enforced you will have to remove your troops from different places in the world, Vietnam and other places, to enforce it because it is unenforceable in Alabama.

Senator THURMOND. Do you feel it is impractical and would be unworkable throughout most of the States of the Nation?

Governor WALLACE. In my judgment, yes. And I believe that Members of this Senate and this Congress are going to hear more and more from their constituents that they are against it.

Senator THURMOND. Do you feel that it is a violation of the 5th and 14th amendments to the Constitution which provide that no person shall be deprived of life, liberty, or property without due process of law?

Governor WALLACE. I believe it is contrary to and opposes both of those amendments.

Senator THURMOND. Do you feel that this is contrary to the American concept of private ownership of property which is one of the basic principles of our form of government and our Constitution?

Governor WALLACE. Absolutely, and in fact, as I said a moment ago, it destroys property rights in this country, and it is the forerunner of land reform.

Senator THURMOND. Do you feel that if this bill passes it will create more tensions and cause more demonstrations and tend to divide our people on the theory it is going to help some in some way?

Governor WALLACE. The passage of this bill is not going to ease any tensions in this country. It is not going to ease any in Alabama, although we have less there than we do in most parts of the country. In fact this is going to aggravate any problem you have in mind trying to solve.

Senator THURMOND. Do you know in Savannah, Ga., right now they are having trouble, and in fact the attorney general of Georgia was to testify here tomorrow. I have a wire here saying that:

Because of the intense gravity of the situation in Savannah, Ga., I am constrained to request privilege of submitting to your committee statement re my views on S. 1732 to be inserted into the committee record in lieu of personal appearance. Am on standby alert for any emergency involving exercise of police power through the courts on direction of Governor should local and State law enforcement officers be unable to cope with the situation. Advise if privilege granted and if so prepared statement will be mailed to you Monday, July 15.

Do you feel that the situation will get worse if this bill passes, as is outlined here by the attorney general of Georgia, or will get better if this bill passes?

Governor WALLACE. It is going to get worse if this bill passes, and I think Governor Barnett the other day said that you are going to upset the white people of this country when you tell them that they must use their property in whatever manner the Federal Government says it must use it, and if they don't use it in that manner they will wind up being jailed, imprisoned.

I believe there is a section of the act that provides a reasonable attorney fee goes in favor of the person who has been aggrieved. That

means you can put a property owner out of business in one lawsuit if he loses in the Supreme Court. In fact that portion of the bill makes it almost impossible for you to resist the operation of the act because you will be punished by an attorney's fee shackled upon you that could run anywhere from maybe $5 to $25,000 as far as I know. I don't know what they will consider reasonable attorney's fees.

Senator THURMOND. Incidentally the attorney general of Georgia was scheduled to testify today, following you.

Governor WALLACE. I would like to——

Senator THURMOND. The attorney general of Arkansas is to testify tomorrow.

Governor WALLACE. I would like to say: This bill doesn't just affect Alabama. It affects beauty shops and barber shops and boarding houses and businesses in every State in the Union. That is what we are trying to let people in the Nation know, that this is not a bill aimed to people in Alabama and the South. It is aimed at everybody in the country.

Senator THURMOND. It will affect every business establishment in the Nation in every State?

Governor WALLACE. It will affect every labor union in the country. It will affect every workingman in the country. The civil rights passage and even the public accommodations bill in my judgment is going to cause white people for instance to lose jobs in labor unions, to be given to people because of color.

Senator THURMOND. Is this bill really saying in essence that we are willing to exchange freedom for the opportunity to placate certain pressure groups?

Governor WALLACE. That's correct. And this pressure group of mobsters. I never thought I would see the Federal Government making an all-out effort to yield to the mob. But when the folks of whom this Congress has spoken so vehemently in years past, mob action—I suppose you have white mobs. I am not for white mobs. Suppose you had white mobs asking for some consideration in some manner. Would this Congress be in a dither about passing legislation to satisfy a white mob?

In my judgment not only that, they would probably pass an act but to send troops upon them and call out the United Nations troops.

Senator THURMOND. Governor, if this bill passes, will it not destroy a portion of freedom now reserved to the American people to own property and use their own private property as they deem fit and advisable?

Governor WALLACE. Absolutely correct.

Senator THURMOND. There are a lot of other questions I could ask you, Governor, but I will not take any more time. I want to thank you for your appearance here. I want to congratulate you for your fearlessness and for your courage in standing up for the Constitution of the United States and standing for freedom, and standing for the American form of government in spite of what news media may say today on the stand that you have taken.

As a man who believes in the Constitution, I know you feel very deeply about these matters. We appreciate your coming here. We are very grateful to you for coming here.

Governor WALLACE. Thank you, Senator.

May I make this statement to you in closing: I appreciate the great stand you have taken and the work you have done to maintain the constitutional government of the country.

I saw in the newspapers, I believe here in Washington, in which they are calling upon Negroes not to demonstrate in Washington. The newspapers of Washington have no objection to them demonstrating in Alabama. If they are going to demonstrate in Alabama they have a right to demonstrate in Washington.

They ought to give us the same support in trying to keep down demonstrations that endanger the lives and health of our people. We resent that attitude of asking the demonstration to be held in Alabama, but resisting demonstrations being held in Washington.

Senator THURMOND. If a man tried to stand up for the Constitution, isn't it a fact that some of the liberal news media today try to claim he is a racist?

Governor WALLACE. Absolutely. In fact, in the recent Tuscaloosa incident in which they thought that we were advocating mob violence and thought we were going to have a revolution in Alabama, 400 or 500 newspaper people came, and they were disappointed and upset that we didn't have riots and didn't have killings and didn't have destruction of the University of Alabama. In my opinion, I believe categorically they were disappointed.

The people of my State believe in orderly process of government, Mr. Chairman. We kept peace at the University of Alabama and we didn't have a single rock thrown, not a single catcall. And it wasn't because the people of Alabama, Tuscaloosa, agreed with the destruction of the right of Alabama to run its own school system. It was because we believed in law and order, and we do believe in law and order.

We went into court. Martin Luther King is in the streets, and I'm in the courts insofar as Alabama is concerned because I filed lawsuits, and I have never taken one action that brought about mob action. In fact, I stopped mob action.

We had no mob action on the part of whites in Alabama. And the mob action we had on the part of colored has been a minority group of people in that State because the overwhelming majority of Negro citizens have not engaged in these mob activities.

Senator THURMOND. Governor Wallace, in closing, do you believe in equal opportunity for all peoples?

Governor WALLACE. I believe in equal opportunity for all the people. I feel that, for instance, in the Mississippi matter, if this Government had spent the $6 million that they spent in putting one man in one place where people didn't want him, to build 10 fine trade schools for Negroes, segregated schools, you would have taught thousands of Negro people how to make work with their hands.

In fact, we are building three additional trade schools in Alabama. We already have four. And I'm the author of the bill that built the largest Negro trade school in the South. And today there are hundreds of Negro boys and girls—men and women now—who are making good livings as a result of my legislation.

I also served on the board of trustees of Tuskegee Institute because I have been a great advocate and believer in Negro education. In fact, I don't know if anybody has that distinction in this room here, of having served on the board of trustees of Tuskegee Institute.

My administration is making the largest increase in Negro education that any institution in Alabama history has made. We are attempting to bring new industry to Alabama to employ our people. I believe in equal job opportunity for all the people.

Senator THURMOND. Thank you, Governor.

Thank you, Mr. Chairman.

The CHAIRMAN. The time is getting short.

The Senator from Kentucky.

Senator MORTON. Governor Wallace, I notice on page 6 of your testimony you state:

> The free and uncontrolled use of private property is the basic and historic concept of Anglo-Saxon jurisprudence.

I don't find much argument there. You say on page 7, referring to this bill before us, that:

> It places upon all businessmen and professional people the yoke of involuntary servitude—it should be designated as the "Involuntary Servitude Act of 1963."

Governor, is it not true that the city code in Birmingham, Ala., forbids any restaurants to serve whites and Negroes in the same room unless they are "separated by a solid partition extending from the floor upward to a distance of 7 feet or higher, and unless the separate entrances from the street is provided for each compartment."

My question is this: Isn't that also telling a man how to run his business?

Govenor WALLACE. Senator, I'm not sure whether that ordinance exists or not. You say it does. I'll say it does. If that ordinance does exist—and it does if you say it does—it was passed by the city commissioners of the city of Birmingham, local government. If the people in Birmingham didn't like that ordinance, they could defeat the city commissioners in the city in the next election, or they, under the laws of Alabama, could sign a petition and change the form of the city government. So they have some recourse.

But you don't have any recourse in my judgment when the Congress passes a bill in Washington and puts the Federal Government in it, and bureaucrats and bureaucracy runs it, and tells you who can and who cannot.

Senator MORTON. I think there is some recourse and you pointed it out. Those in Congress stand for election periodically, just like the city council of Birmingham stands for election periodically.

Governor WALLACE. We all know, Senator, without belaboring the point, that local government is closer to the people. And you know that the further away you get from the people of Washington, the less contact and chance they have to rectify wrong. That is basic and academic. I believe you agree with that.

Senator MORTON. I agree with that. My hometown is Jefferson County, Ky.—not Jefferson County, Ala.—but they have a lot in common in that they are the largest counties in their separate States. The board of aldermen, which corresponds to your city council, in my own home city, passed an ordinance in regard to these public accommodations, and as a citizen of the community I was proud of the fact that it was done by that branch of government that is closest to the people and not by edict or not by some proclamation by the mayor. It was done by the 12 elected members of the board of aldermen who have to stand for election.

I would like to get back to the questioning of my colleague, the Senator from New Hampshire, in the matter of voting in Alabama. I gathered from your colloquy with him that there has been quite an increase in many of the counties in the registration of Negroes since 1960. I think your own experience in your home county indicates that.

Governor WALLACE. No, sir; there hasn't been much increase since 1960. Negroes have been voting in my county in about the same numbers for years and years and years. He had reference to another county. It was not my home county.

Senator MORTON. I have before me the 1961 report, "Report No. 1 of the U.S. Commission on Civil Rights, Book 1." I have been looking over for the last few minutes a tabulation for the State of Alabama, broken down by counties.

In each case, the first figure given is the total white population based upon the 1960 census. Then it lists the white total of voting age, then the number of whites registered, and the percentage.

Then it gives the nonwhite total population and the percentage of total nonwhites to the total population. It then under voting age population delineates the nonwhite total, number registered, percent registered, the percentage of county registration and the percent of county total.

As I have gone through this I have developed a rather interesting pattern. This could have changed since 1960.

Based on 1960, this is an interesting pattern. In those counties where you have the higher percentages of Negroes to total population you have far and away the lowest percentage of total Negroes eligible that are registered. For example, Dallas County, the white registration eligibility is 64 percent. In Dallas County the Negro population is 67.7 percent of the entire county.

Governor WALLACE. Senator, you say "eligible to vote." Do you mean on the basis of who determined the eligibility?

Senator MORTON. On the basis of age. I assume it is the basis of age.

Governor WALLACE. That is correct. But that is not a basis for eligibility to vote.

Senator MORTON. I grant that. You brought out in your former colloquy that many white people were denied the vote because they didn't get into it.

Governor WALLACE. That's right.

Senator MORTON. Nine-tenths of 1 percent of the Negro population that are over 21 are actually registered.

In Greene County, where the Negroes amount to 81 percent of the total population, we find only 3.3 registered, although we find 105 percent of the white population over 21.

We find in many counties——

Governor WALLACE. I carried that county for Governor, too.

Senator MORTON. I don't want to belabor the point, now, Mr. Chairman but I wanted to call attention to the fact that some of the figures indicate a very high number of Negroes over 21 eligible to vote. Here is a county that has 63.4 percent.

Governor WALLACE. That record is out of date in the first place because there have been many registered in the counties that you are talking about in the last 3 years.

Senator MORTON. That is why I asked you at first, because I understood that you had a stimulated registration since 1960, for whatever cause it might be.

Governor WALLACE. Of course, I stated a moment ago that we have thousands of Negroes voting in Alabama, and they are registering every day and will continue to register as long as they are qualified under the laws of the State.

And many have registered who are not even qualified under the laws of the State because they have preference now through the Federal courts. A white man claims civil rights are violated and lands in the Federal courts in our area of the country. With the blacks it is almost automatic.

I make that statement categorically because there has been no effort by the district attorney and the Justice Department to put these white people on the rolls who are not allowed to vote because they couldn't fill out the proper examination as the colored could not do, also.

I say this, Senator, that we made much progress in all those matters in the last number of years, and I don't think that the fact that there are a few percentage of colored voting in any county in Alabama is any reason for the Central Government to take over the voting processes of the State because there never has been a Federal election in the history of this country.

People talk about Federal elections. They are State elections. The State pays for the election. They hire the election officials and provide the voting equipment and the ballots. We elect Federal officials. But there is no such thing as a Federal election.

Senator MORTON. Governor, the point is, I notice as I go through here a definite relationship, in inverse proportion, if you will. In most instances these several counties, the higher the Negro population is to the total population of the county, the lower indeed is the percentage of Negroes registered to vote.

Governor WALLACE. I say in those counties, Senator, the answer to that is that the largest percentage of Negroes are not qualified under Alabama's law to register, because at least you ought to be able to read and write, and at least discern a simple questionnaire that is to be filled out, because I don't think you should be allowed to vote unless you can pass qualifications set by the State.

Of course, it applies to all people equally. We have a constitutional amendment now in the legislature of the State that I hope is passed that is going to give the same literacy test to people who attempt to qualify. It is given to those in the armed services, to get in the armed services.

We feel that this argument that a man's shouldn't vote—if he can fight for his country he should be able to vote, we feel that if we put the same test that the Armed Forces put to a man to get in the armed services, that that ought to be a fair and good test.

The CHAIRMAN. About 40 percent I believe were rejected in the draft.

Governor WALLACE. Yes, sir; for mental reasons.

Senator MORTON. There are counties here, for example Randolph County, 63.4 percent of the Negroes over 21 are registered. In Morgan County, 43.3 percent.

Mr. Chairman, I ask that this table, so that all members and any others who are interested may be able to study it, on pages 253, 254, and 255 of the document to which I referred, be made a part of the record at this point. I think it will be helpful in developing the matter.

I also ask that the pertinent paragraphs and explanation of how the report was developed be also put in the record if the staff will research out the portion.

The CHAIRMAN. Without objection it will be put in the record.

(The requested information follows:)

[Figure and pertinent information taken from the 1961 U.S. Commission on Civil Rights Report, Vol. 1]

The material on which the Commission's reports are based has been obtained in various ways. In addition to its own hearings, conferences, investigations, surveys and related research, the Commission has had the cooperation of numerous Federal, State, and local agencies. Private organizations have also been of immeasurable assistance. Another source of information has been the State advisory committees which, under the Civil Rights Act of 1957, the Commission has established in all 50 States. In creating these committees, the Commission recognized the great value of local opinion and advice. About 360 citizens are now serving as committee members without compensation.

The first statutory duty of the Commission indicates its major field of study—discrimination with regard to voting. Pursuant to its statutory obligations, the Commission has undertaken field investigations of formal allegations of discrimination at the polls. In addition, the Commission held public hearings on this subject in New Orleans on September 27 and 28, 1960, and May 5 and 6, 1961.

STATUS OF THE RIGHT TO VOTE

Nine years ago the Department of Justice prepared a brief history of protection of constitutional rights of individuals during the preceding 20 years. On the right to vote, this report stated: "In 1932, the question as to the right of Negroes to vote involved 12 Southern States—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia." Apparently, even at that time, Negroes had no difficulty in registering and voting in the majority of our States.

The accuracy of this conclusion is borne out by the experience of the Commission on Civil Rights in the brief span of its operations. Although the Commission has received 382 sworn complaints from persons alleging that they had been denied the right to vote or to have their vote counted by reason of race, color, religion, or national origin, with the exception of 3 complaints from New York, all such complaints originated from Southern States mentioned in the Department of Justice's report. (The complaints from New York involved Puerto Rican American citizens who, although literate in Spanish, could not satisfy the English literacy test of that State.) Nor has other evidence of racial discrimination in voting in any of the other 37 States come to the Commission's attention.

In 1960, Negroes constituted 10.5 percent of the total U.S. population—18,871,831 out of 179,323,175 persons. Negro population throughout the 50 States and the District of Columbia varied from a low of one-tenth of 1 percent in North Dakota and Vermont to a high of 53.9 percent in the District of Columbia, with a majority (53 percent) living in the 12 Southern States mentioned above. Thus in 1960, 47 percent of all Negro American citizens resided in 38 States which had no recent history of discriminatory denials of the right to vote.

In 1932, "In these [12 Southern] States, Negroes were so effectively disfranchised, regardless of the 14th and 15th amendments to the Constitution, that considerably fewer than a hundred thousand were able to vote in general election[s] and virtually none was permitted to vote in the primary election[s]." However, this situation had drastically altered by 1952.

The most important change, accomplished through private lawsuits, was the virtual elimination of "white primaries" in 1944. A second significant change was voluntary State action abolishing the poll tax as a prerequisite for voting: Louisiana in 1934, Florida in 1937, Georgia in 1945, South Carolina in 1951, and Tennessee in 1953. Today, only five Southern States—Alabama, Mississippi, Arkansas, Texas, and Virginia—still require payment of poll tax as a prerequisite for voting.

By 1947, when the number of voting-age Negroes in the 12 Southern States was 5,069,805, the number of registered Negroes had risen from 100,000 in 1932 to 645,000; by 1952, this number exceeded 1 million. Today, there are 5,131,042 nonwhites of voting age in these 12 States, of whom a total of 1,361,944 are registered to vote.

The Commission's investigations and studies since 1957 indicate that discriminatory disfranchisement no longer exists in all of the 12 Southern States. The Commission used four principal criteria to determine the presence of discriminatory disfranchisement: (1) Sworn complaints to the Commission; (2) actions instituted by the Department of Justice pursuant to the new civil remedies of the Civil Rights Acts of 1957 and 1960; (3) private-party litigation to secure the right to vote; and (4) the lack of any registered Negroes, or minimal Negro registration, in counties where there is a substantial Negro population. The absence of complaints to the Commission, actions by the Department of Justice, private litigation, or other indications of discrimination, have led the Commission to conclude that, with the possible exception of a deterrent effect of the poll tax—which does not appear generally to be discriminatory upon the basis of race or color—Negroes now appear to encounter no significant racially motivated impediments to voting in 4 of the 12 Southern States: Arkansas, Oklahoma, Texas, and Virginia.

In 1961, then, the problem of denials of the right to vote because of race appears to occur in only eight Southern States—Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee—in which less than 40 percent of the total Negro population resides. Even in these 8 States, however, with a total of 3,787,242 nonwhites of voting age, some 1,014,454 nonwhites are registered to vote. Moreover, discrimination against Negro suffrage does not appear to prevail in every county in any of these States. The Commission has found that in Florida, North Carolina and Tennessee, it is limited to only a few isolated counties. Although arbitrary denial of the right to vote is more widespread in the remaining five States, there too it exists on something like a "local option" basis.

This is not to say that exclusion of Negroes from the suffrage, however local, is not a matter of national concern. Toleration of even a single instance of such practice constitutes a partial repudiation of our faith in the democratic system. Nevertheless, it seems worthwhile to point out that the majority of Negro American citizens do not now suffer discriminatory denial of their right to vote.

While the Commission's studies do not allow a definitive statement as to the number of counties where discrimination is present—or the number where it is absent—they do indicate that there are about 100 counties in the eight Southern States mentioned in which there is reason to believe that substantial discriminatory disfranchisement of Negroes still exists. The problems involved in each of these States will be considered below. The Louisiana story will be considered separately, because of the extensive nature of the Commission's investigations and hearing within that State.

The Commission's prime source of information is the formal public hearing where all interested parties can be subpenaed and heard under oath. While this is the most accurate fact-gathering device directly available, the Commission, for various reasons, has been able to hold only two hearings on the subject of voting; one in Montgomery, Ala., in 1958 and 1959, and the second in Louisiana in 1960 and 1961.

An equally fruitful source of information is the study of lawsuits initiated either by private individuals or the Department of Justice. The Commission has studied all such litigation arising in the past 2 years. Cases of this nature have occurred, during this period, in six of the eight States involved in the following report.

Other sources utilized have been Commission staff investigations of particular complaints, general field studies conducted by the Commission (such as its depth study of the black belt counties), information from the Department of Justice, and voting statistics. With regard to the latter (as is observed in ch. 6), statistics do not in themselves conclusively prove (or disprove) discrimination, but they may give rise to strong inferences. At least one court has held that the lack of any registered Negroes in a county where they were in a majority, without more, indicated discrimination. Even where some Negroes are registered, if the number is very low compared to the total Negro population, an inference of discrimination is difficult to escape. While no definite ratio can be set as an invariably reliable indication of discrimination, both in this chapter and in the black belt study, the Commission has used 3 percent of the voting-age population as a reasonable threshold of suspicion.

TABLE I.—*Alabama*

County	White population [1]	Voting age population			Nonwhite population			Voting age population			
		White total [1]	Number registered [2]	Percent registered	Nonwhite, total [1]	Percent of county, total	Nonwhite, total [1]	Number registered [2]	Percent registered	Percent of county registration	Percent of county, total
Autauga	10,839	6,353	4,614	72.6	7,900	42.2	3,651	125	3.4	2.6	36.5
Baldwin	38,759	22,236	16,340	73.5	10,329	21.0	4,327	900	19.9	5.2	16.9
Barbour	11,850	7,338	6,400	87.2	12,850	52.0	5,787	400	6.9	5.9	44.1
Bibb	9,940	5,807	5,692	98.0	4,417	30.8	1,990	200	10.1	3.4	25.5
Blount	24,613	14,368	11,609	80.8	836	3.3	378	100	26.5	.9	2.6
Bullock	3,781	2,387	2,200	92.2	9,681	71.9	4,450	5	.1	.2	65.1
Butler	12,575	8,363	8,402	[3] 100.5	10,985	44.7	4,820	831	17.2	9.0	36.6
Calhoun	77,805	44,739	24,557	54.9	18,073	18.8	9,036	2,000	22.1	7.5	16.8
Chambers	23,959	15,369	12,361	80.4	13,869	36.7	6,407	400	6.2	3.1	29.7
Cherokee	14,610	8,537	7,650	89.6	1,603	10.4	782	350	44.8	4.4	8.4
Chilton	21,615	12,861	11,401	88.6	4,078	15.9	1,947	750	38.5	6.2	13.1
Choctaw	9,012	5,192	5,560	[3] 107.1	8,858	49.6	3,982	150	3.8	2.6	43.4
Clarke	12,987	7,899	8,100	[3] 102.5	12,751	49.5	5,833	400	6.9	4.7	42.5
Clay	13,372	6,470	7,229	[3] 111.7	2,028	16.4	926	350	37.8	4.6	12.5
Cleburne	10,212	5,870	5,518	94.0	699	6.4	385	75	19.5	1.3	6.2
Coffee	24,220	14,221	10,901	76.7	6,363	20.8	2,985	588	19.7	5.1	17.3
Colbert	37,524	21,680	17,024	78.5	8,982	19.3	4,575	1,300	28.4	7.1	17.4
Conecuh	9,674	5,907	3,336	56.5	8,088	45.5	3,535	300	8.3	8.3	38.1
Coosa	6,847	4,201	4,203	100.0	3,579	36.2	1,794	397	22.1	8.6	29.9
Covington	29,880	18,466	15,788	85.5	5,751	16.1	2,876	835	29.0	5.0	13.5
Crenshaw	10,266	6,310	6,196	98.2	4,643	31.1	2,207	493	22.3	7.4	25.9
Cullman	45,051	25,848	17,350	67.1	521	1.1	285	150	52.6	.9	1.1
Dale	25,459	14,861	7,400	49.8	5,607	18.0	2,743	600	21.9	7.5	15.6
Dallas	23,982	14,400	9,195	63.9	32,715	57.7	15,115	130	.9	1.4	51.2
De Kalb	40,596	23,878	19,915	83.4	821	2.0	441	85	19.3	.4	1.8
Elmore	20,221	12,510	9,225	73.7	10,308	33.8	4,908	275	5.7	2.9	27.8
Escambia	22,052	12,779	11,000	86.1	11,459	34.2	5,685	1,000	17.6	8.3	30.8
Etowah	81,982	48,563	32,726	67.4	14,908	15.5	7,561	1,955	25.5	5.6	13.6
Fayette	13,574	8,277	8,500	[3] 102.7	2,574	15.9	1,291	450	34.9	5.0	13.5
Franklin	20,756	12,412	10,967	88.4	1,232	5.6	645	350	54.3	3.1	49.4
Geneva	18,945	11,357	7,281	64.1	3,365	15.1	1,606	14	.9	.2	12.4

Greene	2,546	1,649	1,731	[1] 105.0	11,054	81.3	5,001	166	3.3	8.8	75.2
Hale	5,726	3,594	3,350	93.2	13,811	70.7	5,999	150	2.5	4.3	62.5
Henry	8,321	5,165	4,631	89.7	6,965	45.6	3,168	400	12.6	8.0	38.0
Houston	36,832	22,095	12,850	58.2	13,886	27.4	6,899	675	9.8	5.0	23.8
Jackson	34,443	19,298	13,599	70.5	2,238	6.1	1,175	269	22.9	1.9	5.7
Jefferson	415,035	256,319	124,260	48.5	219,829	34.6	116,160	11,900	10.2	8.7	31.2
Lamar	12,168	7,503	9,152	122.0	2,103	14.7	1,027	600	58.4	6.2	12.0
Lauderdale	54,355	31,089	18,605	59.8	7,267	11.8	3,726	900	24.2	4.6	10.7
Lawrence	19,033	10,509	9,420	89.6	5,463	22.3	2,471	645	26.1	6.4	19.0
Lee	31,458	17,547	9,256	52.7	18,296	36.8	8,913	1,500	16.8	13.9	33.7
Limestone	28,884	16,173	9,450	58.4	7,629	20.9	3,579	650	18.2	6.4	18.1
Lowndes	2,978	1,900	2,240	[1] 117.9	12,439	80.7	5,122	0	0	0	72.9
Macon	4,406	2,818	3,310	117.5	22,312	83.5	11,886	1,000	8.4	23.2	80.8
Madison	95,283	54,516	21,650	39.7	22,065	18.8	10,666	1,350	12.7	5.9	16.4
Marengo	10,264	6,104	5,898	96.4	16,834	62.1	7,791	139	1.8	2.3	55.1
Marion	21,104	12,656	11,191	88.4	733	3.4	403	194	48.1	1.7	3.1
Marshall	46,894	26,907	19,175	71.0	1,124	2.3	637	50	7.8	.3	2.3
Mobile	212,873	121,589	55,025	45.3	101,428	32.3	50,793	9,488	18.7	14.7	29.5
Monroe	11,030	6,631	5,800	87.5	11,342	50.7	4,894	200	4.1	3.3	42.5
Montgomery	104,485	62,911	29,000	46.1	64,725	38.3	33,056	2,995	9.1	9.4	34.4
Morgan	52,307	30,955	17,027	55.0	7,647	12.6	4,159	1,800	43.3	9.6	11.8
Perry	5,943	3,441	3,235	94.0	11,415	65.8	5,202	265	5.1	7.6	60.2
Pickens	12,098	7,336	6,266	85.4	9,784	44.7	4,373	550	12.6	8.1	37.3
Pike	15,242	9,126	7,950	87.1	10,745	41.3	5,259	200	3.8	2.5	36.6
Randolph	14,501	9,196	7,415	80.6	4,976	25.5	2,366	1,500	63.4	16.8	20.5
Russell	23,365	13,761	7,878	57.2	22,986	49.6	10,531	700	6.6	8.2	43.4
St. Clair	21,116	12,244	8,200	67.0	4,272	16.8	2,035	800	39.3	8.9	14.3
Shelby	26,049	14,771	10,650	72.1	6,083	18.9	2,889	350	12.1	3.2	16.4
Sumter	4,743	3,061	2,650	86.6	15,298	76.3	6,814	450	6.6	14.5	69.0
Talladega	44,525	25,635	17,866	69.7	20,970	32.0	9,333	2,650	28.4	12.9	26.7
Tallapoosa	24,888	15,310	13,600	88.8	10,119	28.9	4,999	700	14.0	4.9	24.6
Tuscaloosa	77,719	47,076	22,869	48.6	31,328	28.7	15,332	5,000	32.6	17.9	24.6
Walker	48,584	28,148	19,300	68.6	5,627	10.4	2,890	1,200	41.5	5.9	9.3
Washington	10,066	5,293	6,000	[1] 113.4	5,306	34.5	2,297	600	26.1	9.1	30.3
Wilcox	4,141	2,634	2,950	[1] 112.4	14,598	77.9	6,085	0	0	0	69.9
Winston	14,777	8,559	7,996	93.4	81	.5	47	15	31.9	.18	.5
State total	2,266,308	1,353,058	860,073	63.6	980,432	30.1	481,320	66,009	13.7	7.1	26.2

[1] Source of population data: Bureau of the Census, 1960.
[2] Source of registration statistics: Birmingham News, Sept. 18, 1960, p. 1. Voting age, 21.
[3] Permanent registration.

Senator THURMOND. Mr. Chairman, I would like to ask the Senator: What period did that cover?

Senator MORTON. This is the report of 1961, based on figures available in 1960.

Senator THURMOND. Did I understand the Governor to say that the figures since have increased, and that the number voting has increased since this table was prepared?

Governor WALLACE. That is correct. I understand that maybe Bullock County, as you say, shows in that statement five voters.

The CHAIRMAN. You can have your State auditor bring it up to date for us from the 1962 election.

Governor WALLACE. I don't know if the State auditor can do it. But the Civil Rights Commission here in Washington has a copy of it, Senator.

I think that that report shows, though, that Negroes do vote in great numbers in Alabama. And I think that that report does show that if there has been discrimination, that this matter is being handled.

Therefore, that is evidence against any further intrusion by the Federal Government in this matter of voting processes of the State.

Senator MORTON. I am not critical in any way of the progress you are making: I know you are progressing.

At the time this report was made there were 66,000 registered nonwhite voters in the State of Alabama, according to this report.

That is all, Mr. Chairman.

Senator THURMOND. Mr. Chairman, I am not going to object to this. Of course, as you mentioned this morning, the voting question is really on another subject. However, I hope that since this has come up, I hope that tomorrow when the question comes up about this film that the attorney general of Arkansas wants to show, showing Martin Luther King with some of these people, whose names have been called here this morning, at this school, that it will be shown, even though that may not be exactly related here either.

In other words, if we are going to bring in extraneous matters on voting, I think we might as well bring in this film which the attorney general of Arkansas wants to show tomorrow.

The CHAIRMAN. The chairman doesn't know what the attorney general of Arkansas wants to show. If he wants to show a film we will take it up with the committee and see what they think about it.

I want to suggest, Governor—and this has no direct bearing on this legislation—that the qualifications for getting into the military vary so much at different times that you would find that someone couldn't pass a qualification test now, which is more restricted because they don't have as much need for the people, and you would eliminate a lot of bona fide voters.

Governor WALLACE. They discriminate against a man when they won't let him in the service.

The CHAIRMAN. I lot of them are rejected not because they couldn't be used in the service but because at the present time there wouldn't be any particular billet for them.

I just happen again to have come from the selective service hearing, with General Hershey. Forty percent have recently been rejected, as what are called mental rejects. That doesn't mean that they aren't good people, or that they couldn't be qualified to vote. It means that the particular standards of the service in this particular case

were higher, and they wanted to get the 60 percent that were the better qualified.

So you run into a very serious problem there of the change.

Governor WALLACE. The purpose of this legislation, Senator, as I understand it, of those who introduced it, is to try to—their purpose and motive are to have a test to apply equally to all people, because so many court tests have held that the application has been unequal, and that is what they are driving at. They are not driving at trying to disqualify people; they are trying to provide a test that would stand up in the courts to be applied equally.

The CHAIRMAN. If you are doing what you want to do, to get more people to vote down there, I think this would be restrictive.

I am giving you my opinion.

Governor WALLACE. We want more people to vote who are qualified under the laws of the State.

The CHAIRMAN. The Senator from California.

Senator ENGLE. I have no questions at this time, Mr. Chairman.

The CHAIRMAN. The Senator from Alaska.

Senator BARTLETT. Thank you, Mr. Chairman.

Governor Wallace, reference has been made to these National Guardsmen who were injured over in Maryland. It was said they were hurt in the pursuance of their duty. Do you know if this is correct?

Governor WALLACE. In Maryland?

Senator BARTLETT. Yes.

Governor WALLACE. I am not sure. I don't know. I have read in the paper where some National Guardsmen were injured. Whether they were injured in the line of duty is something I don't know.

Senator BARTLETT. I don't know either. But I do seem to recall having read in a newspaper that the commanding officer said they were off duty, had gone over there not to demonstrate, but to see what was going on, and he regretted their presence, although he didn't say they shouldn't have been there.

You have mentioned, Governor Wallace, the names of a Mr. Berry, and a Mr. Ruskin, and a Mr. Horton. Are these men Negroes?

Governor WALLACE. Mr. Berry is a Negro. Mr. Williams is white. And I believe—do you have a colored map? It will show you. No, it is black and white. Mr. Horton, fourth from the right, is white. Mr. Horton is white, Mr. Berry is colored, and Mr. Williams is white.

Senator BARTLETT. Thank you.

You alarm me, Governor, when you state that Pentagon officials are threatening withdrawal of military bases to accomplish political purposes. What Pentagon officials are these?

Governor WALLACE. I am referring to the statement that has already been issued into the report of the committee, and whether we call them officials or not. I am referring to this matter here.

Senator BARTLETT. Are you referring to the President's Committee on Equal Opportunity in the Armed Forces?

Governor WALLACE. I think that is what I am referring to, yes.

Senator BARTLETT. The members of that committee are not Pentagon officials.

Governor WALLACE. Let me amend my statement by saying that they are not. They are members from the executive branch of the Government. In fact, I am glad to hear this because I think people

in the armed services think this is a ridiculous idea. I am glad to hear the Pentagon officials are not behind it. In fact, I amend my statement.

Senator BARTLETT. You say on page 2 of your statement, in fact, you ask the question:

> Is the real purpose of this integration movement to disarm this country as the Communists have planned?

I would infer from the fact that you ask the question that you have a fear that this is so. Is my inference correct?

Governor WALLACE. Senator, will you ask the question over? I am hard of hearing.

Sentaor BARTLETT. On page 2 of your statement, you ask this question, and I quote:

> Is the real purpose of this integration movement to disarm this country as the Communists have planned?

Governor WALLACE. Yes, sir.

Senator BARTLETT. From the fact that you have asked this question, I might infer that you entertain the fear that this is the case. Am I right?

Governor WALLACE. I entertain that fear; yes, sir. I can't categorically point out the why's and wherefore's but is this movement to transfer bases out of the South because of the integration matter? It would certainly put our defense posture in an untenable position.

I just ask is that the purpose of it? What is the purpose?

I think when any committee would recommend that we move bases from a section of the Nation that were placed there for defense purposes because local people won't change their customs and traditions, whoever made that report ought to have his background investigated.

I still stand upon that, Senator.

Senator BARTLETT. On page 5 you gave the committee your opinion that Ben Bella is a Communist. I don't know whether he is a Communist, anti-Communist, or what he is. I should like to have you give us some more details as to your views of his Communist attitude.

Governor WALLACE. I said in my opinion he was a Communist. Of course, in my best judgment he is a Communist, because I think any man who takes property away from property owners as they have done in Algiers and gives it to those who didn't have it, and I think any man who would join in a movement to force all but 6,000 of the white people of Algiers to have to leave that nation for fear of their lives, and I feel that any man who would come to this country and then fly to Castro and embrace him and say, "You are a great man, one of the greatest in the world," I think a man who would do those things is a Communist. And I think that is pretty good proof.

Senator BARTLETT. On page 6 of your statement you said—and the Senator from Kentucky alluded to this previously—that—

> The free and uncontrolled use of private property is the basic and historic concept of Anglo-Saxon jurisprudence.

I will agree with the Senator from Kentucky that this is so. However, is it not true that almost from the founding of this Republic, certain controls have been made upon the use of private property?

Governor WALLACE. Of course, control has been made upon the use of private property.

Senator BARTLETT. For example, this very committee has legislative jurisdiction over the railroads, and some very substantial controls have been put over that form of transportation, have they not?

Governor WALLACE. That is a utility, and occupies a different position than a barbershop or beauty parlor or a hotel.

Senator BARTLETT. It is private property, though, is it not?

Governor WALLACE. It is private property, but it is a utility that operates under franchise granted by the Government, or the State.

Senator BARTLETT. The same could be said of airlines, trucks, television and radio and so forth?

Governor WALLACE. Oh, yes. Yes, sir. But that truck doesn't have to haul—I mean, a private trucking outfit today can decline to haul my goods if he doesn't want to.

Senator BARTLETT. There are some very substantial Federal controls over agriculture. Should we remove those?

Governor WALLACE. The controls over agriculture have been voted by the farmers. As long as people have a right to vote as they do, and require certain vote as you do in agriculture control, that is one thing. The wheat farmers the other day voted against controls. So, I would go along with this legislation, let the people vote on this legislation. If it passes, I will abide by it. If it doesn't pass, I wouldn't abide by it.

Senator BARTLETT. The city people might say that they ought to be able to vote upon these agricultural measures, too, since they are in the majority. Are they permitted to vote?

Governor WALLACE. No, sir; they are not permitted to vote, as I understand it. Of course, you folks in the Congress here, you all can correct that if you would like to. You have the voice to do it. I can't correct it. I don't have any judgment on that. But I do say that the farm controls are placed upon the farm people only after they vote them upon themselves, which is not the case in the passage of this act here.

Senator BARTLETT. You told the Senator from Kentucky, Senator Morton, that there is compulsory segregation in Alabama in privately owned facilities.

Governor WALLACE. I didn't tell him it was compulsory segregation in Alabama. I think that he—if you call the passage of this act, the city of Birmingham, compulsory segregation, I suppose you might call it that. I would say it is not telling the majority of the people of Alabama that they have to do what they don't want to do. I am not familiar with the ordinance.

Senator BARTLETT. Are there any State laws relating to privately owned facilities or publicly owned facilities on this proposition?

Governor WALLACE. There have been State statutes, but it seems to me there have been some court decisions regarding them; for instance, such as the inter-intra travel on public conveyances, like buses and trains, and I think that is the only statute I can think of at this time.

Senator BARTLETT. Can you think of any other city statutes, ordinances——

Governor WALLACE. No, sir; I can't think of any at this time. I do not say they are not ordinances that exist, but——

Senator BARTLETT. Insofar as those ordinances do exist, do they or do they not constitute public control of private businesses?

Governor WALLACE. Yes, they do. But as I said a moment ago, it is a local government duty. And the local government is close to the people. You can see the mayor, you can see the members of the city council. And you can rectify a wrong easily there if you don't like what is happening insofar as the city government is concerned. You and I both know that. When the Federal Government way up in Washington takes over to control that government, that the city government had regulations placed upon it, it is completely without the reach of the average citizen.

Senator BARTLETT. The other day, Governor Wallace, a witness appeared here from Missouri. I think his name was Mr. Hicks. In the early part of his testimony he told us that he is sure that he would have to close for want of patronage a resort he owns and operates in Missouri if this bill became law because he wouldn't have enough customers. If my recollection is right, and I have not consulted the transcript, a bit later, in response to a question put to him by the Senator from California, Mr. Engle, he said, well, maybe if this became a law he would have more customers. But he didn't want it that way. He wanted the right to choose and select himself, and he had no anti-Negro bias but he wanted to have that independence.

What I can't understand, and I would like to have you comment upon this, is this: If this was a law, and there was no segregation whatsoever, and people of whatever color had to go into whatever public places were available, how would they be forced out of business? It seems to me they would have more patronage instead of less, because they would have the whites who would have nowhere else to go, and they would have the colored people, too, providing that the customers could pay the bills.

Governor WALLACE. Senator, of course, I don't know what your problem is in Alaska. I have never been there.

I can say this for Alabama, which is a pretty popular State, that the passage of this bill, if rigidly enforced, would put many people out of business. In fact I say that it would put them out of business.

Senator BARTLETT. You say that, and it has been said repeatedly before. But tell me why, if there was no segregation anywhere, would any place be forced out of business? It seems to me that this would only give a potential for more customers.

Governor WALLACE. Of course, it wouldn't give a potential for more customers. It is just that that is the social philosophy and attitude, for instance, of the people of Alabama. It is also the attitude of people in New York because you have got discrimination, if you call it that, in New York. The Civil Rights Commission says that you have more segregation in Chicago than you have in the South. And I think that—what you are saying is just not going to be the case.

You have segregation all over the United States. You are going to continue to have segregation. We people in Alabama and in the South have tried so far to go above the board by passing ordinances and legislation and statutes. We have tried not to resort to that which is resorted to in other parts of the country, hypocrisy, gerrymandering and residence segregation, because we have just practiced and preached the same system and we find in many parts of the country they practice one system and preach another.

Senator BARTLETT. I assure you I agree with you wholeheartedly when you say this problem is not confined to the South. We all know that. We all recognize that. We know that in one degree or another it exists everywhere.

Governor Wallace, would it be a fair statement that your logic is that racial demonstrations are Communist inspired; the bill is to quiet the demonstrations; therefore the bill is an attempt in one manner or another to appease the Communists?

Governor WALLACE. I didn't say, of course, that this bill was an attempt to appease the Communists.

Senator BARTLETT. I know you didn't.

Governor WALLACE. I said that the Communists in my judgment are involved in these demonstrations. And that they have made it impossible to keep them peaceful. And therefore this Congress has this legislation before it for consideration because of the demonstrations. The demonstrations have been supported by the Communists, they have been involved in it. I have made you statements and showed you people here today who are involved in the Communist movement who have been the sidekicks and advisers of the leaders of the demonstrations.

Let me say this: Are they in it? I say let's check into it. I believe that they are, in my best judgment they are. I am not saying that this committee, nor this Congress——

The CHAIRMAN. Senator Eastland has a big staff to do this. I am going to turn it over to him.

Governor WALLACE. Fine. I think that would be splendid.

Senator BARTLETT. You do feel one way or another there is a Communist inspiration.

Governor WALLACE. Yes, sir; I certainly do.

Senator BARTLETT. What would you say if I proved to you that a southern segregationist Governor was a student leader in a Communist school? If I said that and proved it, would you agree that segregation was a Communist technique?

Governor WALLACE. You say you are going to prove that a southern Governor was what?

Senator BARTLETT. A student leader in a Communist school.

Governor WALLACE. Is a student leader in a Communist——

Senator BARTLETT. Was. Would you agree then that segregation was a Communist——

Governor WALLACE. Segregation existed long before he became Governor. I don't know when he became Governor. We had segregation long before that man was born. I don't know who you are talking about. I wouldn't say the segregation is the result of Communist influence at all. Segregation has been in this country long before the revolution of 1917. But you never had any demonstrations like you have had now before 1917. I don't think you can show that you have had any demonstrations of this sort to exist prior to that time.

Senator BARTLETT. So it doesn't follow that a southern Governor who attended a Communist school could be described as a leader of the effort to preserve segregation and therefore this was a Communist technique?

Governor WALLACE. No, sir; I don't think any—trying to preserve segregation is a Communist technique for this reason: The Daily

Worker is for integration and it supports the communism in this country. If the Daily Worker were for segregation and the Communists were for segregation, maybe we could say that the Communists are pushing segregation. But they are opposed to it.

Senator BARTLETT. You gave the committee this paper, the name of which is Highlander Folk School.

Governor WALLACE. Yes, sir.

Senator BARTLETT. I notice a reference in it to Commonwealth College, which is on the Attorney General's list. And yet I am informed that Governor Faubus was a student leader there.

Governor WALLACE. Of course, you will have to let Governor Faubus speak for himself on that point. Governor Faubus is not a Communist and never has been.

Senator BARTLETT. I agree. I agree wholeheartedly.

(Subsequent to the hearing, Senator Bartlett asked that the following letter and excerpt be included in the record:)

GAINESVILLE, FLA., *July 19, 1963.*

Senator E. L. BARTLETT,
Senate Office Building,
Washington, D.C.

DEAR SENATOR BARTLETT: I regret that my telegram to you concerning Gov. Orval Faubus' youthful Communist connections was vague. Perhaps I tried to pack too much information into the 50 words permitted.

No doubt the enclosed Xerox copies of two pages from my doctoral dissertation will make the facts clear. In citing this information, you may give the source either as my dissertation or as the Commonwealth College papers at the University of Arkansas.

I would greatly appreciate your reading this information into the transcript of the Commerce Committee's civil rights hearings. Doing so would not be smearing Governor Faubus, for the facts have been raised in his past gubernatorial campaigns; he has admitted the facts, pleaded guilty to youthful indiscretion, and been reelected. Thus it can be seen that my reasons for wanting this on record are not malicious; rather, I think it is of vital importance to record this as proof that a man's past associations do not necessarily determine present beliefs. In view of the fact that many persons feel the civil rights movement is Communist inspired because of past connections of its leaders, I think it should be pointed out that at least one leader of the anti-civil-rights faction has a similar background.

Sincerely,

DONALD H. GRUBBS.

[Xerox copies from Donald Hughes Grubbs' "The Southern Tenant Farmers' Union and the New Deal," unpublished Ph. D. dissertation, University of Florida, 1963]

Easily the most sweeping and colorful reply came from H. L. Mencken:

"Bring it [Commonwealth] to the Maryland Free State, and I'll give you an unconditional guarantee of free speech. You will be at liberty to teach spiritualism, vegetarianism, communism, Calvinism, or cannibalism, or all of them together. You will be next door to Washington, and hence to the brain trust, with its enormous reservoir of advanced thinkers. I engage to find 200 head of revolutionary young professors to help you and to give a seminar in moral theology myself."[1]

One of the star witnesses for the college was a young Commonwealth student who came, with others, to Little Rock to testify against the bill. Two decades later, as Governor of his State, he was to cause a greater furor in the same city, but perhaps his action as a young man in 1935 was more constructive. The young student's name was Orval Faubus. Commonwealth College was no different from any other college, said Faubus; he had not been taught to overthrow the Government while there. He felt that the sedition bill was the un-American part of the picture, he indicated, adding that his 18 years in the Boy Scouts

[1] Miss Addams, Meiklejohn, Graham, and Mencken are quoted in Commonwealth College Fortnightly, Apr. 1, 1935, CCF, reel 2.

should prove that he, personally, was no Communist. And he may not have been, although he did give the principal speech, "The Story of May Day," at Commonwealth's 1935 May Day celebration. At about the same time, the college discontinued the old practice of having all the various political factions on campus nominate their own candidates for student offices. Instead, a "united front," including the Communists, chose a single, unopposed slate headed by none other than Orval Faubus, the young farmer-schoolteacher from Combs, Ark. Thus did future Governor Faubus win his first big election with Communist support. The United Front also picked Faubus as a delegate to the All-Southern Conference for Civil and Trade Union Rights in Chattanooga; unfortunately, Faubus and his fellow conferees were run out of Chattanooga by a mob. Faubus also earned his classmates' gratitude by showing them how to cook the slippery eels that swam in the college creek. He was an excellent eel catcher, not inappropriate training for a future politician.[8]

The protests from Faubus, Thomas, and many of the State's clergymen, teachers, lawyers, editors, and professors were sufficient to save Arkansas from the sedition bill. It was defeated in the senate, 24 to 6, but the battle was not over: two members of the legislative investigating committee, Representatives Marcus Miller and Minor Milwoe, introduced a second bill which, Miller and Milwoe assured the public in an effort to reduce criticism, was aimed only at Commonwealth. This bill, incredibly, would have permitted any prosecuting attorney or any five citizens to petition for an injunction to close any educational institution as a nuisance, with provision for immediate sale of the institution's property to satisfy any fine and costs which might be levied by any local court in Arkansas; any property which could not be immediately sold, the bill provided, was to be destroyed. The immediate uproar over this police state measure was so great that Miller and Milwoe quickly withdrew it.[9]

Governor WALLACE. I have submitted that to you, and I said let's look into it. I suggest there are Communist influences.

If this committee makes a thorough investigation with the proper committee, maybe we will find otherwise.

Senator BARTLETT. I certainly agree that Governor Faubus isn't a Communist. I would go further and say that he has no sympathy whatsoever for anything pertaining to communism. But I am informed that he was a student leader in this school, which is on the Attorney General's list.

Governor WALLACE. Of course, the Communist Party, as you know, in this country advocates integration, and also approves of the demonstrations.

If they approve of my attitude, if they approve of Governor Faubus' attitude on this matter, then you might want to look and see if the Communist movement wasn't involved in the segregation matter. But the Communists are opposed on this.

Senator BARTLETT. I have no further questions. Thank you.

Governor WALLACE. I will conclude by saying that Ben Bella himself has stated—I think publicly—that he was a Marxist. There may be some differentiation but he does say he is a Marxist.

Senator BARTLETT. Let me quickly add that I am not trying to defend Ben Bella. I know nothing about his political philosophy at all. I just wanted to know that which you told me, your reasons for saying that he is a Communist.

Governor WALLACE. I know the Senator is not defending Ben Bella.

---

[8] "Faculty of Labor College Protests," n.d. [March 1935] in Claude Williams papers; Commonwealth College Fortnightly, May Day, June 1, June 15, 1935, in Commonwealth College papers, University of Arkansas.

[9] United Press dispatches, Mar. 26, Mar. 27, 1935, in CCP, reel 1; Commonwealth College Fortnightly, Mar. 1, Mar. 15, 1935, CCP, reel 2; Arkansas Gazette, Mar. 7, 1935.

Senator THURMOND. Mr. Chairman, the hour of 12 o'clock having arrived, I make a point of order.

The CHAIRMAN. The point is well taken.

The committee will resume tomorrow in room 1202, New Senate Office Building, at 9:15 tomorrow morning.

(Whereupon, at 12 noon, the committee was recessed, to reconvene at 9:15 a.m., July 16, 1963, in room 1202, New Senate Office Building.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

TUESDAY, JULY 16, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 9:27 a.m. in room 1202, New Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order.

We will proceed this morning. We are a little late getting started. We were waiting for other Senators who will be along here in just a few minutes.

Yesterday when we recessed the Senator from South Carolina was in the process of asking some questions. We will proceed this morning with a continuation of these questions.

FURTHER STATEMENT OF HON. GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA

We are glad to have you with us this morning, Governor.

Governor WALLACE. Thank you, Senator.

Senator THURMOND. Thank you, Mr. Chairman.

Governor Wallace, yesterday I was asking you questions along the lines of the Constitution, whether or not you felt that this public accommodations bill would violate the 5th and 14th amendments of the Constitution which provide that no person shall be deprived of life, liberty, or property without due process of law.

Is it your opinion that it would be a deprivation of property without due process of law if this bill passes?

Governor WALLACE. Yes, Senator. And, of course——

Senator THURMOND. Speak a little louder. I can't hear.

Governor WALLACE. Yes, Senator. In fact, this bill, if it were enacted, in my judgment would strike the death knell of the private property ownership in this country.

Senator THURMOND. There is another provision of the Constitution that provides that private property cannot be taken without due compensation. Would it not be equivalent to the taking of the person's property if he is forced to serve or sell to whom he does not wish to, and then he loses business or is forced to closed his business, an instance of which was given by Governor Barnett of Mississippi last week concerning a restaurant owner? Would that not be equivalent to a taking of property without just compensation?

Governor WALLACE. Yes, Senator.

In fact, in my judgment, there are a number of businesses in Alabama that I can think of, for instance, moving picture theaters, which

as you know in some instances operate on a small margin for many reasons, television, and so forth. I would say it would endanger the life of every motion picture house in the State of Alabama and it would be the effect of taking a man's property without compensation.

Senator THURMOND. Someone has said if we open up the restaurants, motels, and all of the businesses to everybody, then business would increase. I would like to ask you whether in your opinion that would increase business?

Governor WALLACE. No. That wouldn't increase business. We in Alabama are happy and content to continue as we are now. And I'm sure that every cafe owner in Alabama, I would say the majority of the cafe owners in Alabama, the restaurant people, are satisfied as it is, and object to this portion of the legislation.

Senator THURMOND. In fact, would it not decrease business for the reason that a great many people who did not care to attend an integrated eating place may decide they would form a private club and then would not patronize a restaurant that caters to the public generally?

Governor WALLACE. Senator, in my judgment it would decrease business, and I don't know of any restaurant owner, any business in Alabama, that would come under the provisions of this act that is in favor of this act. So they certainly don't think it will increase business.

Senator THURMOND. I presume you would favor, of course, a business on a voluntary basis; if a private establishment wants to serve one, that you would favor his doing so, that you would not deprive him of it, that that is the right of the individual businessman and the business establishment concerned?

Governor WALLACE. I feel a private business ought to serve who it wants to serve and not serve who it doesn't want to serve. I think they have the right not to serve people with blue eyes if that is what they want because that business belongs to the private individual.

Senator THURMOND. If a man owns a piece of property doesn't he have the right to use that property as he sees fit? Otherwise aren't we entering into a socialistic stage, the next stage of which is communism, under which government controls the use of the property and therefore the owner loses the right to control that property as he sees fit?

Governor WALLACE. Yes, Senator.

Of course, we have seen excesses in the attempt by the Central Government to force public integration of public facilities, and as you and others have stated, now we see an all-out effort on the part of the Federal Government through the Congress to enforce integration in private business.

I would say, as I said in my testimony, on a provision of the bill, conceivably it could be held that a private club could be invaded by process of the Government to force people into a private club. In fact, I believe that is true.

In fact, there is no telling, if this legislation passes, what type decisions will come from the Court, because it is very ambiguous, and it is broad and all inclusive. Of course, I think it is a very dangerous piece of legislation and I would like to say, Senator, this is not a sectional matter. I feel that the people oppose this legislation throughout the length and breadth of this country because there are many Members of the Congress from other parts of the Nation who oppose

this public accommodations section of the bill because it does attack the ownership of private property.

Senator THURMOND. Governor, isn't this——

Governor WALLACE. In fact, if you will pardon me, Senator, I believe as one member of the CORE, I believe the Chairman of it, that other night said: "We must have compensation, not equality." I believe this was the substance and effect of what he said. I didn't hear or read all of it. If I'm mistaken I withdraw it.

If that is the case, that leads me to believe that the next step is compensation, and how would compensation come? It will be taking your property away from you and the chairman's property away from him, and ours, and dividing it up amongst those who say they have been discriminated against.

Let me say this, something that came out yesterday, Senator: I don't have the figures with me but I would be willing to get all of this up, but I have seen it before and I even heard some members of the Negro race say this yesterday: "There are more businesses owned in Montgomery, Birmingham, and Atlanta by Negroes than are owned in the larger cities of the country such as New York."

It is not unusual for Negroes to own, to operate Federal savings and loan associations in Alabama, own radio stations, own television stations, own insurance companies, own banks, hotels, motels. Private ownership of property among Negroes is very common. In the county I live in, Negro landowners are not the exception, they are the rule. If anyone cares to check the books of the assessor of the taxes of my county, he will find that that is true.

In fact, what I'm trying to say is that Negroes have enjoyed more ownership of private property and businesses in a segregated society than they do in a place like New York where, in a place like Harlem, I doubt if many Negroes in my judgment own property.

Mr. Chairman, we have 11,000 Negro schoolteachers in Alabama. I think we have about 3,700 in the State of New York. But you have the same Negro population. So a Negro——

Senator THURMOND. Say that again. I want the audience to hear that and I want the committee to hear that.

Governor WALLACE. In Alabama we have 11,000 Negro schoolteachers whose average salary is higher than that of the average white teacher in Alabama, which is a matter of public record. New York, I think, has 3,700 to 4,000 Negro schoolteachers with the same number of Negro population. So you have about three times as much opportunity, as professional teacher, in Alabama to acquire employment as you do in New York.

Michigan, I understand, has 450 Negro schoolteachers for a population of 90,000 to 100,000 Negro schoolchildren. On that basis, pro rata you might say that if Michigan had the same number of Negro pupils as Alabama does, 237,000, I believe, they would have about 1,600—they would have, well, not that many—1,200 or 1,300 schoolteachers whereas Alabama would have, Senator, I may be off with my figures a little bit, but it is pretty close, around 12,000.

We feel that a Negro professional person has more opportunity in Alabama than he does in Michigan, pro rata.

Senator HART. Would the Senator permit me to comment now that the State has been introduced?

Senator THURMOND. If it is necessary to comment.

I will be through in a few minutes if you want to wait. If it is urgent——

Senator HART. Many Negroes leave Alabama to go to Michigan.

Governor WALLACE. Senator, that may be true but they don't go to Wyandotte, or Dearborn.

Senator HART. No, they don't.

Governor WALLACE. Negroes can't live in those towns in Michigan. There is not a single city in Alabama that a Negro can't live in. If anybody ran for office in Alabama on the theory, on the proposition that we are not going to let Negroes live in this municipality, we would form a lunacy commission and send them to an asylum.

Senator THURMOND. You say there are two towns in Michigan where Negroes cannot live?

Governor WALLACE. I understand that is the case: Dearborn, Wyandotte, and Owosso. In fact, the mayor there runs on a segregated platform.

Senator THURMOND. Let's move on.

Senator HART. Let's not.

The CHAIRMAN. We are going to have to ask our guests to please refrain—to be as quiet as possible and to cooperate. We have a large audience. It is difficult to hear. I know you will cooperate. We are glad to have you here. Please help us out in these hearings.

The Senator from South Carolina will continue with his questioning on the thesis that two wrongs make a right.

Senator THURMOND. Governor Wallace, isn't this bill before us now——

Governor WALLACE. Senator, excuse me a moment.

About the schoolteachers, let me say that Georgia has 12,000 Negro schoolteachers, and South Carolina 8,000 or 9,000. There are just professional opportunities for Negro schoolteachers in a segregated South that do not exist in some of the other States of the Union. We feel that is quite significant.

Senator THURMOND. Aren't the opportunities better for the Negro in the segregated South than they are in the integrated South, and isn't that illustrated and proven by the very fact that you have just stated?

Governor WALLACE. In my judgment, yes. In fact, he is better off.

Senator THURMOND. Governor Wallace, an effort has been made for the last several years to go into the public schools and other public places on the theory that there must be equality, in other words, that there must be public desegregation, and that where the State has anything to do with financing the particular agency then it must be up to the public.

But isn't this particular bill an effort now to go from public integration to private integration because here the State has nothing to do with this private property. It is an individual's own property; it is his store, his restaurant, his barber shop, his beauty shop. It is his own private property, just like his home.

Governor WALLACE. Yes, Senator.

Of course, as I said a moment ago, if you want public desegregation, you force private integration. The theory now that they are going on is that a store has an investment with the State in that it gets police protection and fire protection. But that also goes for a private club. If a private club catches on fire in a city, they will also give it police protection.

I believe under the provisions of this act you can go into a private country club, or any other club, and say that interstate commerce is involved, they are traveling in interstate commerce, and they could be forced to be admitted.

Senator THURMOND. Governor Wallace, do not some restaurant owners have a restaurant downstairs and have their home above it, and under this bill would they not be forced to take anybody who wanted to be served, and this might create disorder and trouble for the family above, and might disturb them in their rest or whatever they were doing?

Governor WALLACE. That is correct. Although, as I said yesterday, I believe the Attorney General says that this bill probably won't affect some small businesses. But he goes further and says it is a moral issue. If this is a moral issue, I don't see how you can exempt small businesses. If it is a moral issue, it is a moral issue.

Of course, I don't think it is a moral issue. I suggest it is a political issue.

Senator THURMOND. I might state that Mr. Marshall, Chief of the Civil Rights Division in the Department of Justice, testified that it will just about cover all businesses. I believe that was the week before you came here.

Governor WALLACE. It will. In fact it will cover more businesses than probably they intimate at this time. I think the purpose of it is to cover all businesses, and let the Federal Government take over and control everybody's property.

I don't say that is the thought of those who supported the legislation but that is the way it will be interpreted by the court system of the country when the time comes for the various provisions and cases arising thereunder to be adjudicated.

Senator THURMOND. Governor Wallace, isn't it a fact that some beauty operators have their business in their home; they just set aside one room and they even let their customers sit in their sitting room, and they serve them in a room in their home?

Governor WALLACE. That is correct.

Senator THURMOND. Would this not force those people, against their will, to serve people in their homes, so to speak, if this bill passes?

Governor WALLACE. Yes, sir. Under this bill, in my judgment, that could very well happen and would happen.

Senator THURMOND. Governor Wallace, I want to ask you this question: Down South and other parts of the country where they prefer segregation, is it an insinuation that there is an inferiority or is it brought about because it brings about the most law and order, it is the wishes of the most races, and it is for the best interests of the public in general?

Governor WALLACE. Of course, we people in the South, you know, have a system that was practical and sane and sensible and had some commonsense to it, and we did have peace and tranquility, and it is true that people of the South didn't have as much of the economic goods of the order of this country as other parts of the Nation. That was not the fault of segregation. It was the fault of discrimination imposed after the War between the States.

It ought to be the eternal credit of the people of the South who pulled themselves up by their own bootstraps that they brought the

Negro along with them. We lived in peace and tranquility for many, many years and I would like to say if I were a Negro I would resent the 1954 decision of the Supreme Court because that decision, in effect, said, "You are inferior, and you cannot get a good education and you cannot develop unless you mix with whites." That decision actually branded the Negroes inferior. I would resent that if I were a Negro.

Senator THURMOND. Isn't forced integration an admittance on the part of those who want it most, desire it most, and take action to enforce it, that there is an inferiority when those who favor segregation for their own reasons feel that there is no inferiority but feel that it is better under certain circumstances for the races to be segregated?

Governor WALLACE. Why, sure. People who say we must mix with other people in order to develop and mature and develop our personality, that admits inferiority.

But segregation in the South—in other words, I can't send my children to a Negro school, and they can't send theirs to mine; in my county, for instance.

In other words, if my child tried to go to a Negro school we are opposed to that as much as the Negro going to the white school. I can't send my child there if I want to, but they can't send theirs to my school. It works both ways.

I think there is nothing sinful, immoral, or irreligious about segregation: that is, since it is based on what we consider to be in the best interests of everybody concerned. I would like to repeat again, it is repetition, I think anybody who segregates any human being because he dislikes them or because he hates—let me say this: Segregation is not synonomous with hatred.

A lot of the leftwing propaganda mentions hatred and says hatred has no place in our order. And they mention segregation. I have found more downright ill feeling right here in the city of Washington than I have ever found in any city in Alabama. I have never heard people in Birmingham, Ala., or Montgomery, Ala., talk about opposite races as I have heard them talk here.

We have never had a football game, we never have had anything to happen in Alabama as has happened in this city of Washington which is a personification of the dream of total integration. You can't have a football game here, an Ohio football game, without 500 or more people being injured.

I would like to say that the people in Washington, I don't think they know that yet because I don't believe it has been in the Washington papers, but it was in the papers in Alabama.

Senator THURMOND. Yesterday you told how you had helped the Negro people. You stated you had been a trustee of a Negro college, I believe.

Governor WALLACE. Tuskegee Institute.

Senator THURMOND. Tuskegee Institute, one of the finest Negro colleges in the United States. And you mentioned that you had taken other steps to help Negro people.

Many people in the South have helped Negro people. I have loaned and given many of them money to go to college and school. I have defended them as a lawyer without charge when they could not pay, and have done other things.

And yet those of us who favor a choice, not necessarily segregation, but a choice, leaving it to each State to determine what the people of their State think is best, have been stigmatized by such papers as the Washington Post, New York Times, and others.

I want to ask you, do you feel that the liberal press of this country is performing its duty to the public when it pursues such a course as that and tries to insinuate hatred on the part of southerners or northerners or others who wish to leave these matters to the State as the Constitution provides?

Governor WALLACE. Senator, in fact, these papers that you are talking about seem to be so trite in their opinion about everything, but they have been wrong. They were wrong about Mao Tse Tung, they were wrong about Castro, and they were wrong about Ben Bella, and they are just as wrong about the matter of segregation and hatred.

In fact, I made a statement yesterday that some of our liberal visitors here laughed at, but I doubt if they—I would be glad to have them come to my county with me and see exactly how we get along and how people respect each other, and how we have lived in peace and harmony and continue to do so, and how every effort the whites make for educational opportunities within our country and city is made for the Negroes as well and vice sersa.

I would be glad to carry them with me. They would have to pay their own expenses, I reckon.

Senator THURMOND. Governor Wallace, isn't it a fact that the Negroes of Alabama have as good opportunities or better for education than those in New York?

Governor WALLACE. I would put our Negro high schools and Negro colleges in Alabama beside any high school in New York, any college in New York: for instance, Tuskegee Institute. I would put it next to any Negro college in America. And it is operating under a State charter. Even though it is a dire institution, in that it receives money from many, many sources, the State of Alabama, out of the goodness of its heart, even though it is not a public school, gives it $600,000 a year.

That will be increased—I believe it was $575,000, but there has been a recommended increase this year, and I would like to point out that that institution is not a public institution, a quasi-public, but we give it over a half million dollars a year.

Senator THURMOND. Governor Wallace, isn't it a fact that students who attend the public schools in Alabama attend with more peace and more tranquility and a better feeling than those do in New York under the pressures under which they operate in this forced integration manner with a great many who do not approve of it?

Governor WALLACE. I wish you could make an objective survey of the Negro high schools in Alabama, and then make one of an integrated school here in Washington or New York. Just make an objective report. You will see that Negroes themselves, the school students themselves, enjoy segregated facilities in Alabama. In fact, we have some of the finest Negro schools in the United States in Alabama. And that goes, of course, for your State too.

Senator THURMOND. Isn't it a fact until these outside agitators went to other States and began inciting riots, creating demonstrations, and tending to divide the people, that there was a fine brotherly feeling and a genuine interest in the members of the other race?

Governor WALLACE. Yes; that is correct, Senator. And might I say, even at this moment, which is commendable, the race relationships in Alabama, in Birmingham, are today better than I have found where I have visited in other parts of the country. I commend both races in Alabama for the fact that they have been very restrained during all of this agitation and tension that has existed caused by people who interfered because, in my judgment, they are only interested in it for other reasons, as I stated before.

Senator THURMOND. Governor Wallace, do you not feel that the only way that will be a lasting way to have an integrated place, barber shop or business on a private establishment, would be for the change to come in a voluntary manner; that those who own the business and those who patronize it wish to do it in a voluntary way, as was pointed out here last week in a certain town up here in Maryland, and that if it comes in any other way, such as a law that forces the owner of a business to serve those or sell to those he doesn't wish to, that a division and tension will be created and instead of bringing people together it will tend to divide them?

Governor WALLACE. In fact, I think everybody knows that in their hearts, that this matter of force is already dividing the people of this country, which is regrettable indeed—especially force on the people of the section from whence I come. We just don't like force. In fact, our whole history shows that, and our whole background. I don't like it myself. I am going to do the best I can to resist it and I have no apologies to make for it.

I will say if this passes and becomes a law it will virtually take a good part of the U.S. Armed Forces, it is going to take a good part of the U.S. Armed Forces to enforce it if they intend to enforce it. In my judgment this legislation is going to make law violators out of everybody in the country—not everybody, but almost—I would say a majority of the people of this country.

Senator THURMOND. In other words, if this bill should become law, it will practically require a Federal gestapo to enforce it because it is against the wishes of the people, and as Abraham Lincoln said, "With public opinion you can do anything, and without it you can accomplish nothing."

Governor WALLACE. It is unenforceable without a police force.

Senator THURMOND. How is that?

Governor WALLACE. It is going to be unenforceable without a huge police force that is going to have to spend all their time trying to compel people in beauty shops and barber shops in Alabama to integrate, instead of putting their minds on Cuba and other matters—putting first things first and last things last.

This legislation is not enforceable. There is just not any reason for the central government, the Federal Government here, to pass any such legislation. If the State of Pennsylvania wants to pass it, or the State of Michigan, that is a matter for the States. If the State of Alabama does not want to, it ought to be left to the States of the Union.

Senator THURMOND. In the first place, Governor, isn't this legislation unconstitutional?

Governor WALLACE. Of course, in my judgment, it is unconstitutional. I believe the present Supreme Court would declare it unconstitutional, and that is saying a lot.

Senator THURMOND. As far as they have stretched the Constitution——

Governor WALLACE. As far as what?

Senator THURMOND. As far as they have stretched the Constitution, even they would hold this particular bill unconstitutional.

Governor WALLACE. As far as they have stretched it and thrown it out the window and every other thing, you might be able to say, I don't think the present Court would declare this act constitutional.

Senator THURMOND. Is this legislation wise even though it is contitutional, or should be held constitutional?

Governor WALLACE. It is not even wise in my judgment if it were constitutional, the matter of using force by the Federal Government to tell people what to do with their private property. It is almost unthinkable. In fact, it is hard to imagine a bill introduced in this country such as this.

Senator THURMOND. Assuming this legislation is constitutional, which you say in your opinion it is not, and assuming it is wise, which in your opinion you say it is not, is it necessary?

Governor WALLACE. It is not necessary at all. It is unnecessary. In fact it is a political piece of legislation in my judgment, as I have already said.

Senator THURMOND. Is this legislation practical?

Governor WALLACE. No, sir; it is not practical.

Senator THURMOND. Governor, if this bill should be passed, do you think this is going to bring an end to demonstrations?

Governor WALLACE. No, because they say now they must have compensation. Of course compensation must come from, I would say, redistribution of property. I think this is leading up to it. They said in 1957, if you pass a Civil Rights Act, what it is going to do. Well, we were not satisfied with the 1957 act. We come back with other acts. If you pass this act, in my judgment you are going to have a clamor for more legislation by this minority leader group of the mob leadership, because they will never be satisfied. I think their whole purpose is to create chaos and to disrupt internal conditions in this country. I don't think there is any way to appease them.

Let me make this statement: We have a man, Mr. Chairman, Father Foley, who is a member of the Civil Rights Advisory Commission in Alabama. He is an integrationist. He serves on that advisory committee in my State. He advised Martin Luther King publicly—it was in the press in Alabama—that he shouldn't hold demonstrations in Birmingham.

And Reverend King, according to Father Foley, in a direct quote—and he is from Springhill, Ala., and is a proven teacher at Springhill College in Mobile—he said that Reverend King said:

> We have got to have demonstrations because the treasury is empty. So we stuck policemen and injured 69 people and burned down buildings and slashed and destroyed property of the cities.

In fact two buildings were looted and burned and the demonstrators refused to let the firemen come in and put out the fire. They stoned the firetrucks and cut the hoses and a whole city block in Birmingham almost burned to the ground.

Father Foley said Reverend King said the treasury was empty. Of course, Y. T. Walker came out later and said Father Foley was a blatant liar. But I believe Father Foley.

That is the situation we had in Birmingham, "The treasury is empty, and we have got to have demonstrations." I resent the fact that people have demonstrations in Birmingham because the leader says the treasury is empty. And I can tell you that restraint of the people in our part of the country has been commendable, but there is no use in carrying this thing too far, because after all there is a breaking point to their patience. I think you gentlemen know that, too.

Senator THURMOND. Governor Wallace, wasn't it said by those who pushed the civil rights bill of 1957, "Pass this bill and take the real civil rights away, and we will have no more clamor for civil rights."

Wasn't that promulgated then?

Governor WALLACE. Yes, sir.

Senator THURMOND. And the effort was made to make the Congress and the public feel that if we just pass that bill, then there will be no more desire or effort to try to force civil rights.

Governor WALLACE. I understand the 1957 act was for the purpose of investigating bowling conditions. Is that correct? I am not too sure about that. Of course, as you know——

Senator THURMOND. That was one of the main features.

Governor WALLACE. They went into every phase of activity in the country.

Senator THURMOND. That is where the right of trial by jury if you remember was denied people. The Constitution says if a man is charged with a crime, he is entitled to the right of trial by jury. The 1957 act provided that if he were brought up on contempt that if the punishment were more than $300 or more than 45 days, he could get a trial by jury, otherwise he could not. The Constitution made no exception, and therefore that is the reason I took the position then that that was a violation of the Constitution, and that is the reason I talked as long as I did on the bill. I wasn't talking against the Negroes. I have no hatred against Negroes. I get along with them well and I like them, and I will help them.

But, the liberal press of this country has tried to portray me, and other members from the South in the Congress, and people generally who have tried to pursue a course they have felt is best for both races, as being bigots and as being racists and as being people who want to take advantage of others. Is that not true?

Governor WALLACE. That is true. In some of these same papers you are talking about are the ones who brought Castro to power because they said he was a great man. But you know they either were mistaken or they deliberately brought him to power, I don't know which. But anyway he came to power and they gave him moral support.

On the matter of the jury business, Senator, this bill as I understand, of course, injunctive processes I believe would be used to enforce the provisions of this act. And, of course, injunctive processes are for the purpose of avoiding jury trials.

In fact, there has been a calculated attempt in this country to abolish jury trials in the matter of civil rights cases. I can't think of anything that is more a civil right than a man to have a trial by jury. I think if you will study American history that is one reason the American Revolution was brought on because the colonists were tried by contempt processes instead of jury trials because they were being turned loose by the juries and so they resorted to the contempt processes.

I would say a man could be sent to a penitentiary here under this bill, a Federal penitentiary without a trial by jury. I think that is one of the most dangerous trends in this country is trying people without a trial by jury.

Senator BARTLETT. Governor Wallace, isn't it true that under this bill we are considering, that there is no provision for trial by jury?

Governor WALLACE. No, sir.

Senator BARTLETT. And a man could be sentenced without a trial by jury?

Governor WALLACE. A man could be sentenced without trial by jury under the general contempt statute which says only the judge must not abuse his discretion in providing the sentence. It makes the judge the prosecutor, the judge is the prosecutor and the judge, and he is even the witness in the case.

I believe, although I could be incorrect on this, I am not sure, since my troubles with the Federal courts I can't do too much practicing in the Federal courts anymore, you know I have been tried in them, let me say that I believe the Supreme Court has upheld 3- and 5-year sentences without trial by jury. Anyway they have upheld sentences involving much punishment.

Senator THURMOND. Governor, do you think if this bill should pass that it is going to end the racial troubles and stop those who are trying to divide our people who have incited these riots and created these demonstrations from going any further?

Governor WALLACE. No; this is not going to solve the problem, and I don't believe that there are many people in the country who feel that it will. We are going to have to approach these problems more realistically in their solution.

I mentioned yesterday something, for instance, the money we spent in Mississippi could have been spent to build Negro trade schools, segregated trade schools, if you like. But at least 10 could have been built that would have trained thousands of Negro youth to take their place in this modern complex society in which we live.

Of course, the money was spent putting one man in one place just to show the State of Mississippi that it could be done.

Senator THURMOND. Governor Wallace, do you feel that if this bill passes, and two or three other civil rights bills pass, that that will end the trouble?

Governor WALLACE. No.

Senator THURMOND. Isn't there a desire on the part of those, and a sinister motive on the part of those who are creating these demonstrations now, and stirring up the Negro people now; isn't there a motive on their part to divide our people?

Governor WALLACE. The people who are involved in stirring up—not everyone is involved, but the Communists——

Senator THURMOND. Not all of them are participants. I mean those who are leading these demonstrations, like Martin Luther King, of the Southern Educational——

Governor WALLACE. You could pass every one of these acts at this session of the Congress, and I will tell you that there will be something else they will be demonstrating about next year because the treasury might be bare again. And it is a good way to replenish the treasury, to have marches and demonstrations.

Senator THURMOND. Do you believe the passage of civil rights bills is going to satisfy such leaders as James Farmer with the CORE organization, Committee for Racial Equality?

Governor WALLACE. He has already said——

Senator THURMOND. Incidentally, I think it would pay this committee to look into the record of this CORE organization and also Mr. Farmer.

Governor WALLACE. In fact, I think it would pay you to look into the directorship of CORE, and see how many members—I have just asked this committee to ask for the Communist-front organizations of members of the advisory committee of CORE.

I think it would be good to look and see if they are in the Communist-front organizations. I think you will find that they are. In fact, it is my best judgment that you will. I think your office has some information to that effect, does it not, Senator?

Senator THURMOND. We have a great deal of information. I won't try to say here what we have.

Governor Wallace, how long were you on the bench in Alabama?

Governor WALLACE. Six years. Six years.

Senator THURMOND. You have a very fine record there as a judge, being an able judge, and sincere judge, an honest judge, a judge whom the people respected—the white people and the Negro people.

Again, I want to ask you, in your opinion as a judge and as a lawyer, is this legislation constitutional and should it be passed?

Governor WALLACE. No, sir; it is not constitutional, and it is not going to help ease tensions in the country. In fact, it is going to create tensions. You mentioned that I was a judge. In fact, one of the leading NAACP members and demonstrator lawyers in Alabama publicly stated in my court after trial on 60-odd cases regarding compensation he had never been treated any fairer by his clients in my court. That is the way I operated.

This will not ease tensions. It will increase tensions.

Senator THURMOND. Do you believe in equal justice for all people regardless of their color—white, Negro, tan or otherwise?

Governor WALLACE. I believe in equal justice, and I would challenge this committee, this chairman, to contact the leading Negro lawyers of Alabama who have been involved in integration suits and otherwise, who have been in my court, and ask them what type treatment did you receive from Governor Wallace when he was a circuit judge.

I will rest my case with that statement.

Senator THURMOND. Do you believe in equal educational opportunities, in equal economic opportunities, and equal political opportunities for all people?

Governor WALLACE. Of course I do. Yes.

Senator THURMOND. And simply because you think the people of each State ought to be allowed to handle their social problems, and determine what is best to preserve law and order, and prevent riots and dissention and tensions does not indicate that you in any way favor discrimination on the part of or against any people?

Governor WALLACE. No, sir. I'm not against any people because of their color. Of course, this is repetition. I believe that God made everybody and I'm one of these fellows who, as I said yesterday, I'm

not one of these intellectuals who think there is no God. I think there is one. In fact, I know there is one. And I believe that He made all of the human family and that He loves all of the human family, and that anybody who mistreats anybody because of color, knowingly, I feel sorry for him.

Senator THURMOND. Governor, I want to express my deep appreciation to you for coming here and for the frank and courageous testimony you have given to this committee and to the American people.

Governor WALLACE. Thank you.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Governor, I hope you don't believe or want to leave the implication that we are here to investigate your integrity as a judge or lawyer. We are here to consider a piece of legislation.

Governor WALLACE. I suppose I——

The CHAIRMAN. I am sure you are a pretty good lawyer and I am sure you were a good judge.

Governor WALLACE. Thank you, Senator.

I have read so much of the leftwing press I reckon sometimes it puts me on the defensive.

The CHAIRMAN. The Senator from Oklahoma, do you have any questions?

Senator MONRONEY. I have no further questions.

The CHAIRMAN. The Senator from Texas?

Senator YARBOROUGH. I have no questions, Mr. Chairman.

The CHAIRMAN. The Senator from Michigan.

Senator HART. Governor, you introduced a very solemn note in your conclusion. It has such delicacy about it for I think we are all a little sensitive in attempting to be theologians. I certainly would not have raised the question had you not concluded on such a solemn note.

It is your belief, you say, that God made us and loves us all——

Governor WALLACE. Yes, I believe that.

Senator HART (continuing). And there is an eternal destiny for us?

Governor WALLACE. Yes.

Senator HART. What will heaven be like? Will it be segregated?

Governor WALLACE. Of course I don't think that you or I, either one, know what heaven is going to be like, Senator.

Senator HART. I can't hear you.

Governor WALLACE. I say that I don't think that you or I, either one, know exactly what heaven is going to be like. But I do have faith that there is an eternal destiny for all of us.

But of course God made me white and you white and He made other people black. That is His handiwork. In effect, He segregated us. I'm not a theologian now. I do say that sin emanates from the heart. If I do something because I despise someone, then that is one thing. If I do something because I think that is what is in his and my best interests, that is another thing.

I believe that Negroes and whites segregated in Alabama is in the best interests of both groups. I believe that. Therefore there is nothing wrong with it.

If I believe that the Negro should be segregated because I hated him, I think that would be sinful because I think anyone who hates any human being because of color he ought to be pitied.

Senator HART. As you say, God loves him.

Governor WALLACE. Yes, He does.

Senator HART. Then it would be presumed, though again we have to acknowledge we are not theologians——

Governor WALLACE. Yes.

Senator HART. That in heaven we shall be one family under a loving Father, permitted to go where we want, and if we consume food in celestial circles, eating together. Isn't that a logical concept of a loving Father?

Governor WALLACE. Well, Senator, let me say this: We could prolong an argument about segregation according to the Bible, and we can show many instances, I suppose some people can, of segregation being practiced in Biblical times. But there wasn't any integration or segregation of schools or restaurants as we know of them from the days of Christ. I don't think that there are any teachings and social integration. In fact there is no mention about schools that I know of in the Bible. Therefore, I think they would be segregated because we feel it is in the best interests, that there is nothing irreligious about it.

I think sin emanates from the heart.

Senator HART. I acknowledge that I make comment in an area where a person must be very tentative and very reserved and restrained in comment. But I could not resist a response to the last note that you made in your comment to Senator Thurmond.

You insisted, as I'm sure you believe deeply yourself, that you wanted to do justice to the Negro, politically and otherwise. What is the Negro participation in State government in Alabama?

Governor WALLACE. Negro participation in State government is pretty active. He votes.

Senator HART. I had in mind what offices does he hold by appointment at your hand?

Governor WALLACE. I'll say this, Senator, that in Alabama's history more Negroes have held office in Alabama during its history than have held office in Michigan.

Senator HART. The clock of history is 1963. What does he hold by appointment at your hands today?

Governor WALLACE. Depending on swings back and forth as to holding office. Negroes run for office and can run for office. But I still feel that people should be elected on the basis of what the electorate wants. I don't think we want to force people into public office.

But Negroes participate, Senator, in every election that we have. And we have numbers of Negroes on school boards, Negroes on executive committees. I don't know of any mayor or members of our legislature who are Negroes.

Senator HART. Do you know any Negro that you have appointed to office?

Governor WALLACE. Yes, I do.

Senator HART. Who is he?

Governor WALLACE. I appointed about a hundred Negroes to office.

Senator HART. What office?

Governor WALLACE. Notary public. I haven't appointed any Negroes to office, no, sir.

Senator HART. You have not?

Governor WALLACE. No, sir; I have not.

Senator HART. I thought you said you did.

Governor WALLACE. I did. I mean—well, the notaries public I take that back. I did appoint some. I appointed a hundred. I appointed notaries public. They are offices and you have to have trust and confidence in the persons you appoint.

Senator HART. Is it your opinion that you are cooperating in offering political opportunity to Negroes in Alabama by assuring them if they send a dollar they can become a notary public?

Governor WALLACE. Of course you asked me had I appointed anybody, any Negro to office. That is an office. I didn't mean to be facetious about it. That is an office in Alabama. I have appointed people to that office.

Senator HART. What is the function of a notary public?

Governor WALLACE. A notary public, as you know, is a man who takes oaths, affirmations, and of course notaries public are very important in our State because it is hard to carry on any business or commerce without notaries.

Senator HART. Any Negroes in the court system of Alabama?

Governor WALLACE. Our court system is elected by the people. They can run.

Senator HART. Are there any in office?

Governor WALLACE. No, but they can run for office.

Senator HART. What about some offices they don't run for? Are there any Negroes in the State police system of Alabama?

Governor WALLACE. Not in the State police system. No, sir. Not in the State police system.

Senator HART. What about the prison system of Alabama? They don't run for office there either.

Governor WALLACE. We have many Negroes there. Are you talking about Negroes in prison? I wasn't trying to be funny. I thought you were making a facetious remark, that you have them in prison.

Senator HART. No; I was very serious.

Governor WALLACE. We have a number——

Senator HART. I'm trying to find out to what extent you in Alabama have done anything about this.

Governor WALLACE. There is no use for you and I to sit here and prolong this matter because Negroes—there are not any Negroes holding office in the legislature nor in the State police force nor any judicial system of Alabama. But there is nothing to prevent them from running for Governor, nothing to prevent them from running for the legislature, nor running for the judicial system of Alabama. I don't think we ought to advocate forcing people into office because of color.

Senator HART. Governor, this matter of running for office, then, involves votes.

Governor WALLACE. Yes.

Senator HART. Who appoints the voting registrars in Alabama?

Governor WALLACE. The agricultural commissioner and the Governor appoint one, and the State auditor appoints one.

Senator HART. Included in your answer that you never appointed a Negro to office is you have never appointed a Negro to be a voting registrar?

Governor WALLACE. No; I have not. No, sir. I have never appointed one.

Just a moment; I haven't appointed any registrars. They don't come up until October.

Senator HART. What is your thought with respect to introducing a Negro to the voting area by way of appointment of a registrar?

Governor WALLACE. I don't think that has anything to do with it. I'll say this to you, Senator, that I don't intend to appoint any Negro as voting registrar at this time. But I don't say that I will not.

You see, I appoint registrars, as you know, we folks in politics usually appoint people who support us. It just so happens that the Negroes didn't support me in this last election.

However, let me say this, and——

Senator HART. I figure it was a very discerning vote from what I have heard here.

Governor WALLACE. In 1958 the Negroes supported me for Governor. I received their total bloc vote in 1958. But I did not receive it in 1962.

But even at that, I have submitted a budget to the State legislature to give the biggest increase to Negro education in any comparable period in Alabama's history, a 22-percent increase across-the-board, $600 average teacher salary increase for every Negro schoolteacher in Alabama.

Senator HART. Governor, I hope you review the bidding between now and October and see if some of these Negroes whom you describe as friends of yours might not be qualified for appointment as a voting registrar, because I am disturbed at the percentage of registration, white and Negro, in so many Alabama counties. You are more familiar with them, I am sure, than I.

Governor WALLACE. Yes, sir.

Senator HART. To tell the Negro he has these opportunities and then to look and see what in fact the voting registration list disclosed, is sort of whistling in the wind.

How many counties are there in Alabama?

Governor WALLACE. Sixty-seven.

Senator HART. In about a third of them there is less than 15 percent of the Negroes registered?

Governor WALLACE. Yes, sir; Senator. There are, as I told this committee yesterday, I was in a store the other day and there were three ladies, white ladies, who said that I am glad you were elected. I would have voted for you had I—if we were qualified to vote. So, we have a lot of white people who are not qualified. They don't present themselves for registration. A lot of Negroes don't do the same thing. A lot of Negroes can't qualify under the simple test that we give in the State.

But, Senator, let me say this: that every Negro that has been turned down in Montgomery County, because of being unable to pass the simple test given to them that is forced by the voting rules of the Federal courts, whereas every single one of the whites who were turned down are still turned down. No one forced them on the rolls, but they did force the Negroes on the rolls.

Senator HART. I sense the stepped-up activity by the Department of Justice in terms of voting suits in Alabama will cause some complaining.

Governor WALLACE. That is right, and most everyone they have forced upon the registration rolls could not qualify under the laws of the State in an objective application of the test to the Negro.

In fact, one person was forced upon the polls, the rolls, who in answer to the question, "Would you bear arms in defense of this country?" and he said "No." He just didn't understand the question. I don't think the matter——

Senator HART. I have seen some incredible answers that have been accepted by voting registrars, too.

Governor WALLACE. Senator, we don't have a utopia——

Senator HART. This is an area as I say we could discuss at length. I am sure I can't persuade you to my point of view. I rather assume I have a rather fixed attitude on this, too. But I was disturbed additionally by your insistence that if this bill became law, we would need, as you put it at one point, an Army to enforce it, or something like that?

Governor WALLACE. Yes, sir.

Senator HART. What would your attitude as the chief executive of Alabama be with respect to the compliance by the people of Alabama with this law?

Governor WALLACE. With this law?

Senator HART. Would you help or harm the effort to enforce it?

Governor WALLACE. I wouldn't make any effort to help enforce it; no, sir. In fact, I think this is the type of legislation that creates situations in this country—well, you can have other demonstrators, too, you know. But I wouldn't make any effort to help enforce this act. In fact, it wouldn't be my——

Senator HART. Would you encourage compliance with the law?

Governor WALLACE. I wouldn't urge compliance with it.

Senator HART. You would not?

Governor WALLACE. I would just go ahead and be Governor of Alabama and let the Federal folks force the compliance of this. I wouldn't encourage compliance with it; no, sir. I want to be frank with you and tell you the truth. But, of course, that doesn't indicate that I am advocating disobedience of the law. It is just that it is not my responsibility to make speeches and urge compliance with Federal statutes.

If a man doesn't comply with one, that the district attorney and the Justice Department's matter of seeing it is enforced.

Senator HART. I have never read the oath of office given the Governor of Alabama. Does it not have something to do with maintaining law and order?

Governor WALLACE. Yes, sir; uphold the laws of the State of Alabama and the Constitution of the United States. But it doesn't say that the Governor of Alabama has to go out and ask for strict compliance with any statute, if a man violates the statute it says that he himself must obey the law. I would not advocate disobedience of any law.

Senator HART. Governor, I would like to make a comment that does not require an answer. It is raised by your suggestion that in Michigan if we look around we will see acts of discrimination there, too. This is quite true. I think I have tried since I have been in Congress to understand the irritation and annoyance that a southern Member

must feel when a northern Member gets up and talks about voting discrimination, schools where children who play together are not permitted to go together, and the denial to the Negro of public facilities paid for by all. I do my very best to understand the resentment that must occur to a southern Member of Congress because he knows that in those areas from which we are sent there is discrimination, too.

I would like to make the point that I have made this point at home. I have said that ours is a sophisticated form of discrimination. Yours is a hard-nosed form. But I am not at all sure which form is the more offensive to the Negro. He doesn't expect to be invited to the party in the South; he is invited in the North, and then many times made to feel miserable.

But, we are wrong both ways. We are wrong both ways. And the emphasis in the North is on housing and job discrimination. In the South it is in an area which I think is more basic, it is this business of just being permitted to vote, this business of being permitted to get a cup of coffee.

For the life of me, I don't see what a Negro parent can do if he was a member of the Armed Forces, had grown up in the North, was assigned to duty in the South, and had to take his family there; I just don't know how a parent explains this problem to a child.

No longer can you feel free to go here, there, and elsewhere for accommodation, for creature comfort, for any variety of things that are much more basic than the irritations I find in the North.

But, I agree with you that this is a problem the country over. In the North, it is a sort of person-to-person discrimination; it isn't public policy. And in a way the northerner can do more about curing it, I suppose, than the southerner, because the northerner can cure it by his own personal conduct. He isn't inhibited by any public prohibition against association.

So, our exchange has been, I am sure not disagreeable, but we have not been in agreement on anything until this point. I just want to conclude on that.

Governor WALLACE. Senator, thank you. I wouldn't think you want me to endorse you. Anyway, let me say that I agree with you this much—Mr. Chairman, if you don't mind my saying this to the gentleman—you said that we have hard-nosed public policy, but at least we are open and above board about it. A Negro knows where he can go and a white knows where he can go. But he doesn't know where he can go in Michigan, because he may be embarrassed. We are not hypocritical about it.

We have said to the world we believe and practice segregation, and in many parts of the country, including your State, you say "We are for integration," and then you practice segregation. I think that if there is anything devious about any of it, it is more devious in your State, if it is like you say it is, than it is in Alabama. We are open and above board about it.

Senator HART. It isn't devious in terms of public policy. The public accommodations law of Michigan is more insistent upon the equality of treatment than the law that we are considering here. Individuals in the North many times preach a much better game than they play.

Governor WALLACE. Yes, sir.

Senator HART. This is the sort of thing that must infuriate the southerner—the white southerner.

Thank you.

The CHAIRMAN. The Senator from Vermont.

Senator HART. Mr. Chairman, may I be excused? At 10:30 the Committee on the Judiciary opens consideration on other aspects of this subject.

The CHAIRMAN. You may be excused.

Senator PROUTY. Governor, had I been born in a section of the country where segregation of the races has been a custom for a great many years, it is entirely possible that I would have views different from those which I possess.

On the other hand, had I been born a Negro, I am sure I would feel highly incensed over the fact that I had been denied rights which are available to American citizens generally.

Let me say initially, while I think you were entirely wrong in your efforts to prevent the entrance of two students to the University of Alabama, I do highly commend you for making very certain that there was no rioting or bloodshed of any nature in connection with that entrance. I think you deserve a high degree of credit for that.

Governor WALLACE. Thank you, Senator.

Senator PROUTY. I might say, also, that I share your concern about some of the foreign policies of this administration, particularly as they relate to Cuba. But I don't think that is germane in this particular discussion.

During the testimony of various witnesses, maintaining your point of view, it has been suggested that some of the leaders of the Negro groups had a Communist relationship at one time or another.

I hope, Mr. Chairman, that some of these people will be invited to testify before the committee, and I hope, also, that they will be permitted to testify under oath in order that we may bring all the facts out.

Such a procedure is important, because the reputations of some members of the Negro community may have been damaged as a result of certain testimony which has been given. I think they should have an opportunity to reply, and I would hope that they would prefer to reply under oath.

The CHAIRMAN. The chairman stated yesterday that many of these matters which were brought up yesterday and on Thursday and Friday would be turned over to the FBI. One or two of them will be turned over to Senator Eastland's committee, which has a staff. They may have investigated some of these people already.

The Governor quoted from the Senate Internal Security Committee reports in some cases.

The committee is going to proceed with all legitimate witnesses in this particular matter pertaining to the legislation. We hope to do that and do that in all seriousness and relevance.

Who we are going to have appear on these other matters, of course, will be a matter for the committee to decide.

Of course, the chairman will entertain suggestions from any members.

Senator PROUTY. Would the chairman indicate now how long he thinks the hearings will last? It seems we are getting to the point

now where much of the testimony will be repetitious. If that is true I am not sure that further hearings will serve any useful purpose. I am not asking the chairman to state a fixed date or anything of that kind.

The CHAIRMAN. We are hopeful that we can be through with the so-called regularly scheduled witnesses by the end of this month, which would be approximately another 2 weeks; this includes those who have asked to testify, and those who are logical witnesses on the legislation. After that the committee will have to determine whether it wants to proceed further.

I think the committee will have to determine what is relevant to this hearing, and what is not. As you say, sometimes we get repetitious. Of course, I have handled many hearings, and this happens all the time. I understand that. But many people want to be heard, and they have a perfect right to be heard. We are glad to have them. We will work that out.

Senator PROUTY. Governor, I think that the passage of this or any comparable legislation is not going to solve the problem in the immediate future at least. I think changes will be made through education, and the greater exercise of voting rights.

And frankly, I am more concerned about what is going to happen after the passage of civil rights legislation than I am during the consideration of the legislation, because I think a great many Negroes have been led to believe that a tremendous number of job opportunities are going to be available to them immediately. I think if we are realistic and honest we know that this may not be the case.

Governor, I would like to ask you this question: Do you think a racial problem exists in this country today?

Governor WALLACE. Yes, sir, a racial problem exists in this country today, and it is the result of playing politics with the matter.

It exists in the large cities of the East and Midwest; but we do not have the racial problem, contrary to the headlines in the papers, in Alabama and in our part of the country, that you have in Washington, D.C.

And the majority of the Negroes in Alabama are not incensed about segregation. It is a way of life for both groups.

The racial problem is in Chicago, Los Angeles, Philadelphia, right here in Washington, D.C. You know that. You can't get in a taxicab without talking about it.

It does exist.

Senator PROUTY. It exists, and has been tossed about in politics.

For example Walter Lippmann and Joeph Alsop, both close to the administration, repeatedly state that if civil rights legislation is defeated the Republican party will be to blame.

They fail to point out that there are 67 Democrats and 33 Republicans in the Senate of the United States and 258 Democrats and 177 Republicans in the House of Representatives. They are rendering the administration no service, they are rendering the country no service, when they take an attitude which is not objective.

I don't want to get into the political angle any more, but I agree it does exist.

But you admit that there is a problem, regardless of who created it, what started it.

What is your answer to the problem? How can we solve it?

Governor WALLACE. If you just leave as much politics as you can out of it, that will go the longest way toward solving it.

We were slowly evolving in our country and moving forward; friendly, tranquil, peaceful. And, of course, the 1956 decision came about.

And so much preaching in the big cities of the East and Midwest about the land of milk and honey. Everybody was going North because you held out to them that this is the land of milk and honey. Then when they got here they found out that was not true. They are stacked on top of one another, ghettoes all over the big cities, and it has created social and economic problems.

Had these people stayed in their natural state, a State where they were born and raised, this matter would have been closed.

Senator PROUTY. What can we do about it now, assuming the conditions exist as you suggest?

Governor WALLACE. Put the emphasis on education. Of course this Congress, if it wants to pass educational bills, they always want to talk about segregation and integration. What we want to do is work to provide more funds for education within the States.

And if the central government would just give some tax relief to people so that the States themselves might have some of this money that I consider wasted all over the world, to use back in their respective States for additional educational opportunities and facilities for the Negro youth.

That is the solution to the problem: education.

Senator PROUTY. Governor, do you believe that the educational standards in Negro schools in the South—I am not talking in terms of Alabama particularly now—are equal to those afforded to the white students?

I am thinking in terms of the faculty.

Senator WALLACE. Senator, in fact, the solution is to let the States handle the problem. That is the solution.

In the school system of Alabama we have equal facilities. We have some physical plants for Negroes that are not as good as the physical plants for whites in this particular city.

They may go to a city like, Tuscaloosa, Ala., and we find that the facilities are just as good or better. You will find in many places in Alabama that you have newer, finer physical plants for Negroes than you do for whites.

But overall we have a system of equal education in Alabama.

Senator PROUTY. I am not concerned about the buildings. I think too many educators place too great an emphasis on the quality of the buildings. I am concerned with the teaching.

Governor WALLACE. Let me say this about our teachers:

The average degree of the average Negro teacher—there are more degrees among Negro teachers in Alabama than there are among whites.

The average salary of a Negro teacher in Alabama, the average salary of a Negro teacher is higher than the salary of the average white teacher; which, of course, points out that they have more degrees, because the salary is based on degrees.

So if you have more degrees among Negro teachers, teaching the Negro schools, if a Negro has had an equal opportunity and has gone

to a college and has a degree, then under that set of facts they have just as good, or better teaching. They don't have any better, but they have just as good.

The teacher of Negroes, if you go by degrees—and that is all I can go by—I am not an educator; if the Negro has a doctor's degree or Ph.D. degree, or a master's degree, I assume that that Negro teacher is qualified to teach.

The CHAIRMAN. What is the average in Alabama?

Governor WALLACE. The average what, Senator? The average salary?

The CHAIRMAN. Teacher salary.

Governor WALLACE. The average salary in Alabama—you asked me a question—$3,600 or $3,700 is the average salary, because I think you start from $3,200 and go up to $4,000. That is for the State.

The CHAIRMAN. We can get those figures.

Governor WALLACE. In other words it is around $4,000 now. It is going to be about $4,600. That doesn't take into consideration that which is applied to that by local school boards. That is the State's participation.

The CHAIRMAN. We can get those figures.

Senator PROUTY. Governor, many of the Negroes in Washington who have come here from the South are functional illiterates. They are not qualified for any skilled employment. Does that suggest that they have not had the educational facilities in the South that they should have had?

Governor WALLACE. It doesn't suggest that they haven't, because if you will just come and make an objective study you will see that here is the school, and it is staffed with teachers. And it is a good physical plant. But people just won't go to school; and when they go to school you can't keep them in school.

What can you do about it? You can't put everybody in jail.

We have hundreds and thousands of Negro youth who just won't go to school. And when you put them in the school they will drop out. You pass a lot of them because they don't care about schools.

You know that's true right here in the District of Columbia. The school is there and the opportunity is there. But they don't take advantage of it. And then they get up 10 or 15 years later and they say "I want that man's job who applied himself and acquired an education."

We can't force people, we can't put everybody in the penitentiary because they won't go to school. They had the opportunity, but they haven't taken advantage of it.

Senator PROUTY. Do you have a law requiring children to go to school up to a certain age?

Governor WALLACE. Yes, sir, just like the law we have against adultery, and I am telling you you just can't enforce it.

Senator PROUTY. I won't argue with you on that question.

What about the teachers in your schools, do they obtain their education in Negro colleges for the most part?

Governor WALLACE. Most of them obtain it in Alabama. Many of our teachers obtain education without the State. Of course, most of them within. Of course, in the State they do go to Negro colleges. Tuskegee provides a lot of teachers. That is one of the finest schools in America.

Senator PROUTY. We had some discussion of voting rights in your State yesterday.

Governor WALLACE. Yes, sir.

Senator PROUTY. I remember reading in the papers, not recently but some time ago, that members of the faculty at Tuskegee were not allowed to vote, because allegedly they could not pass the literacy test or whatever the requirements were. Is that true?

Governor WALLACE. Of course, I am not aware of the facts that you are talking about, but I know they have more Negro voters in Tuskegee than they have white at this time. That is a matter of record, and that is fact.

Senator PROUTY. Do you assume that every member of the faculty at Tuskegee, or the overwhelming majority, is a voter in your State?

Governor WALLACE. Of course, I—Do I know if every member of the faculty——

Senator PROUTY. I said do you assume that that is the case?

Governor WALLACE. I would assume so, yes, sir. I just don't know. All I know is that there are more Negro voters in Tuskegee than white. That speaks for itself.

Senator PROUTY. Governor, quite a bit has been said about the effect of this bill upon the economy, upon business generally. I have a copy of the Wall Street Journal of yesterday, which has this heading: "Desegregated Concerns in the South Say Patronage Holds Up in Long Run. Some Hotels, Restaurants Do Better; Atlanta, Dallas Cite Larger Convention Market. New Rights Often Not Used."

They quote William F. Davoren, owner of the Brownie Drug Co. in Huntsville, Ala., who reported that though his business fell a bit for several weeks after lunch counters were desegregated, he picked up all the customers that he lost. He said, "I can name a dozen people who regard it as a personal affront when I started serving Negroes, but have come back as if nothing had happened."

I, of course, have no way of knowing whether this article represents the facts or not, but certainly the Wall Street Journal is not noted for its radicalism. I think it is quite an objective newspaper, generally, and I think its reporter made a serious effort to obtain the facts.

Governor WALLACE. The integration you are talking about is infinitesimal there in the area that you are talking about in Huntsville. In fact, it is almost nonexistent.

Senator PROUTY. This isn't related exclusively to Huntsville. This one operator of the store——

Governor WALLACE. Even if that be true, why force private business to integrate. Why not let them voluntarily do what they want to, those stores that you are talking about, voluntarily integrate? That is a matter for them to decide.

This bill says the Government is going to force you to integrate. I think there is a great difference in the statement that it helps your business. Maybe it does. A man owns a business, if it doesn't help in that manner he ought not to be forced into integrating a business if he doesn't want to.

The issue is liberty, freedom and individual rights and property rights, not whether or not it is going to make the man have more business or not.

Senator PROUTY. Do you have statutes on the books requiring segregation of public accommodations?

Governor WALLACE. In Alabama?

Senator PROUTY. Yes.

Governor WALLACE. Yes, I am sure we did have statutes of that sort. I don't know whether this was stricken down. I am not sure about that, Senator. We did have; yes, sir.

Senator PROUTY. If such statutes or ordinances exist, do they exist at the community level or is it a result of custom and usage which requires segregation of public accommodations? Wouldn't this violate the property owner's freedom to choose the patron?

Governor WALLACE. Custom and usage, of course, is what brings about segregation in Alabama. That question was asked me yesterday. Let me say this: That is, there are ordinances or statutes of a State, they are passed by the State. That is what we are saying, let the States handle this matter, because when the Federal Government gets a hold of it—there you can see your State senator, you can see your councilman, you can see your mayor. If you don't like the ordinances they pass, the legislation they pass, you have access to local government officials. But you turn this action over to bureaucrats here in Washington, a thousand miles from anybody, and the businessman just tears his hair. There is no way to get to them. If he gives his opposition to it, they don't pay any attention to it.

Local government is what we are talking about. That is local government. And I believe in local government.

Senator PROUTY. What about the stockholders in chainstores, for example, the majority of whom may live in States——

Governor WALLACE. They don't have a bill in chainstores in any State. They don't have to put one in Alabama.

Senator PROUTY. Assuming they do have a store in Alabama or any other State where segregation has existed, the stockholders, the owners of that particular store, may favor integration, and yet you are denying that right, are you not?

Governor WALLACE. No, sir; they can integrate. Let them go ahead and integrate. One or two have talked about integrating in Birmingham, Ala. They have had Negro boycotts, now they have white boycotts. The chains can do what they want to do in Alabama.

Senator PROUTY. I am not a lawyer, Governor, but I have a business background. It seems to me that if I advertise to solicit business from the public, that it is my responsibility to serve all people on an equal basis.

If I have a lunch counter in a store which I own, a Negro will come in and buy a suit of clothes, a pair of shoes, neckties, shirts and whatnot, and he is unable to sit down at the lunch counter in my store; I have accepted his money; I have advertised; I have tried to encourage him to come there, it seems to me that he is being denied certain rights.

Governor WALLACE. Senator, there is where we differ, of course. I feel that a man who owns private property has the right to sell to whom he pleases and when he pleases.

Senator PROUTY. I am selling to the Negro in that example.

Governor WALLACE. I think if he wants to have a segregated lunch counter, that is the matter of the ownership of the property and it is not a matter of the Government to force him to do otherwise. But, people don't have to trade there if they don't want to, if they don't like the policy of the store.

You can't force people to trade there. There may come a time when the Government will try to force people to trade at certain places because the ownership is made up maybe of Negroes.

Senator PROUTY. Does the State commit an unconstitutional act if it forbids Negroes to eat in restaurants patronized by whites?

Governor WALLACE. Does it commit an unconstitutional act, against the constitution of Alabama?

Senator PROUTY. No, the U.S. Constitution.

Governor WALLACE. I don't think—I think that an owner of a restaurant, private property, has the right to let who he wants to eat there. I don't think you violate any constitutional concept by prohibiting people from eating there that you don't want to eat there, or letting everybody eat there. No, sir; I don't think you are violating any constitution.

Senator PROUTY. What if the State assists him to discriminate?

Governor WALLACE. Because it is the public policy of the State, and public policy is usually enacted into legislation, or carried on by custom and usage. That is a policy of the people of Alabama.

Senator PROUTY. In answer to the same question, Governor Barnett answered yes, so apparently there is a difference of opinion between the two of you on that particular issue.

Governor WALLACE. Let me see now. You say he answered yes to what?

Senator PROUTY. I asked him this question: Does the State commit an unconstitutional act if it forbids Negroes to eat in restaurants patronized by whites? Governor Barnett said:

Yes, the State as such was unconstitutional according to recent Supreme Court decisions.

Governor WALLACE. I think it is sort of confusion on what the question is. Do you think you commit an unconstitutional act when you allow people to eat together?

Senator PROUTY. I am asking you. I am not a lawyer.

Governor WALLACE. I don't think it is unconstitutional to allow people to eat together; no, sir, if it is voluntary.

Senator PROUTY. There is a disagreement between you and Governor Barnett on that particular question?

Governor WALLACE. I think I am confused as to what has been asked and answered. There is not much difference between Governor Barnett and me on many questions. I am just confused as to what you asked him.

Senator PROUTY. Governor, I think you are a very good lawyer.

Governor WALLACE. You have me confused though, Senator.

Senator PROUTY. I want to congratulate myself if I can confuse you.

Thank you, Mr. Chairman. I have no further questions.

The CHAIRMAN. Governor, I don't think you want the record to say that it is constitutional to forbid people to eat together. I think what they are talking about is this question of public places. I think you want to correct that. No one is suggesting——

Governor WALLACE. Let me correct this——

The CHAIRMAN. We have some differences of opinion with different people as to what is a public place, but we are talking about this general type of activity.

Governor WALLACE. I don't think it is unconstitutional to have an act prohibiting that. Of course, maybe it helps, though. So that makes it unconstitutional. But I still say it is the right of the owner of the business to let eat whom he pleases.

The CHAIRMAN. That clears it up.

Senator PROUTY. Mr. Chairman, I have one more question.

The CHAIRMAN. All right.

Senator PROUTY. In yesterday's issue of the Washington Post, there is a poll conducted by Lewis Harris. There have been times when I disagreed with Mr. Harris for political reasons, perhaps, because he is very closely associated and has done a great deal of work for this administration. I assume he is honest——

Governor WALLACE. He works for this administration?

Senator PROUTY. He has in the past. He does give these figures which are quite interesting, if correct.

The CHAIRMAN. He works for anybody who hires him.

Governor WALLACE. Yes; I think that is what the——

Senator PROUTY. He says with respect to job opportunities, 86 percent of the American people favor it; 14 percent disapprove or have no opinion.

When you get down to the question of public accommodations, 74 percent approve; 26 percent disapprove, or have no opinion.

Mixed lunch counters, 68 percent approve; 32 percent disapprove.

Mixed housing, 52 percent approve, 48 percent disapprove or have no opinion. This is at the national level. What interests me most is the southern attitudes in these various categories.

According to Mr. Harris, 88 percent of the people living in the South approve of greater voting opportunities for the Negro; 79 percent approve of greater opportunities in the way of jobs; 54 percent believe that public accommodations should be available to Negroes; 43 percent approve that Negroes should be allowed at mixed lunch counters; 57 percent disagree. Mixing housing, 71 percent disagree; 29 percent agree. Those are figures given for the South, which I think are rather interesting.

I wonder if you have any comment to make on them?

Governor WALLACE. I remember the polls with Harry Truman for President in 1948, too. I think that is one of those type polls. I think they pull it out of the air. I have never heard of anybody taking those polls. That poll is not concerned as far as our part of the country is concerned. And, I think it is suspect in view of the fact it is the Washington Post poll, too, as far as I am concerned.

In fact, I don't much believe anything they write.

Senator PROUTY. I disagree with them both much of the time.

Governor WALLACE. I am glad you and I are together. I hope that doesn't hurt you in your State.

Senator PROUTY. Thank you, Mr. Chairman.

The CHAIRMAN. I think we ought to make the record clear. Mr. Harris is a reputable pollster.

Governor WALLACE. Yes, sir.

The CHAIRMAN. He can be employed by anyone without regard to race, color, or creed to take a poll if the staff is available for the poll. I don't think he or Mr. Gallup or the others—Rover—suggest that they are always accurate. They like to hope that they come close to

it and their law of averages is good. We in politics feel, and I know you feel the same, Governor, if the poll is in our favor, he is a good pollster; and if it is against us, why maybe he didn't poll it right.

But, they try to be objective, I hope, when they offer services to the public.

Governor WALLACE. I would say he is the best money can buy.

The CHAIRMAN. I don't suggest that. I don't know. I have never retained him. Polls are interesting things. They make interesting reading, but they are not necessarily always accurate, anymore than TV ratings are.

Governor WALLACE. Yes, sir.

The CHAIRMAN. If no one on the committee has any further questions, we will excuse the Governor. We thank you for coming. We appreciate your staying over today for further questions.

Governor WALLACE. Gentlemen, Mr. Chairman, thank you for your patience.

The CHAIRMAN. The next witness is the Honorable Bruce Bennett, attorney general of the State of Arkansas.

Before you start, Mr. Bennett, I want the record to show that although I couldn't pick them out as they came in an out, the record should show that many members of the Alabama congressional delegation have been here, and are very interested in this problem and this testimony.

All right, Mr. Bennett, we will be glad to hear from you.

STATEMENT OF BRUCE BENNETT, ATTORNEY GENERAL, STATE OF ARKANSAS

Mr. BENNETT. Mr. Chairman and gentlemen of the committee, it is a distinct pleasure for me to appear here this morning at the invitation of this committee. The people of Arkansas and the Nation are deeply interested in the provisions of Senate bill 1732.

I am sure you will recall the so-called "Little Rock Incident" which precipitated national headlines in 1957 and 1958. During those trying days for my State we were ridiculed and a bad image was created in the Nation's press. Since that time we have observed other incidents of racial unrest, without the borders of Arkansas, with more than passing interest. In the fall of 1958, 13 senators and representatives of our General Assembly of Arkansas, comprising the Special Education Committee of the Arkansas Legislative Council, conducted a 3-day hearing with the view of determining whether there was any subversion in back of the racial unrest in Arkansas in 1957 and 1958. The interrogation of witnesses was reduced to writing and is a permanent record in the secretary of state's office.

In brief, that committee found and so held and I quote:

> The committee is convinced that the racial unrest in Arkansas was deliberately planned by the Communist Party as a part of the directive handed down by Moscow in 1928. The Communist apparatus has used many organizations in our State. Some of them have been found subsersive by appropriate governmental instrumentalities; others include in their officers and directors those individuals who have been cited as aiding and supporting Communist or Communist-front organizations. We find it noteworthy that these organizations, infiltrated with Communists and pro-Communists, have actively supported racial unrest in Arkansas. They tried, and were successful, in making Little Rock a worldwide incident. From the evidence introduced at the hearings it is quite apparent,

when once perceiving the goals and operations of the Communist Party, that the Little Rock incident was certainly another link in its chain of created incidents designed for its benefit alone, which was mapped out 4 decades ago.

The committee further finds—based on credible evidence from the files of the House Un-American Activities Committee, the U.S. Attorney General's subversive list, the Senate Internal Security Subcommittee and others—that many of the top officers of the national NAACP have been cited numerous times for aiding and abetting Communist or Communist-front organizations. These top officials have sent individuals of very questionable loyalty to our Government to Arkansas as their paid employees. In turn they met with local officials of the NAACP and planned the events which culminated in the so-called Little Rock incident. We believe that the NAACP is and has been sympathetic toward Communist causes, and that the goal of the Communist is not to help the Negro as such, but merely to use him. In that desire to use the Negro, we find that the Communists have always tried to infiltrate organizations attractive to the Negro race.

In the light of those hearings it is well to ask who, where, when, how, and what brought about the present rush of demonstrations, sit-ins, riots, and other mob demonstrations which undoubtedly precipitated the introduction of the bill under consideration. In other words, I think it proper to establish the casual relationship between the proposed legislation and the racial unrest now prevailing throughout the United States.

The CHAIRMAN. Mr. Bennett, for the record: Is that a State committee?

Mr. BENNETT. Yes, 1958.

The CHAIRMAN. Was that a legislative committee?

Mr. BENNETT. Yes; 13 house and senate members.

The CHAIRMAN. Of the State legislature?

Mr. BENNETT. Yes, 8 days of hearings. All of the witnesses were accepted and put under oath, and it is a record of the secretary——

The CHAIRMAN. You will furnish for the committee, if you can, the final report and we will keep it in the file.

Mr. BENNETT. I have it here, yes.

The Honorable J. Edgar Hoover, Director of the Federal Bureau of Investigation, once stated:

To me, one of the most unbelievable and unexplainable phenomena in the fight on communism is the manner in which otherwise respectable, seemingly intelligent persons, perhaps unknowingly, aid the Communist cause more effectively than the Communists themselves. The pseudoliberal can be more destructive than the known Communist because of the esteem which his cloak of respectability invites.

It has also been said:

If a barnyard goose is lured into a flock of wild geese, he may be excused for his mistake only if he leaves the flock. But if he flies in formation with them day after day he is a wild goose at heart. Likewise, if a man is unwittingly drawn into a Communist organization, he can be excused for his gullibility only if he leaves the group and denounces its purposes. But if he "flies in formation" with them he is a Communist at heart, irrespective of his loud noise to the contrary.

All of the demonstrations, legal and illegal, are not just happen-so—someone is pulling the strings and the puppets dance. Who is the mastermind—the quarterback—in back of all of these incidents that are daily reported in the national press?

Within a few blocks from here we have a Central Intelligence Agency, the National Security Council, the Federal Bureau of Investigation, and other agencies, who are engaged in an hour-to-hour and a day-to-day struggle with an avowed enemy who has declared her

intent to divide and conquer these United States. This declaration is not something new—no, over 40 years ago Lenin laid down the pattern.

In my State in 1925 the Communists set up Commonwealth College in Mena, Ark. The school had no particular academic requirements, tuition, or qualifications for students or faculty. It was supported to a large extent by organizations with subversive backgrounds. The director, Lucien Koch, helped organize the East Arkansas Sharecroppers Union and the Workingmen's Union of the World. Some of the outriders of this school went into east Arkansas and made inflammatory speeches denouncing the landowners, the Federal Government, and the administration of the Federal Emergency Relief Administration. One Claude Williams, who has been cited dozens of times for subversive affiliations, was active with both organizations. The East Arkansas Sharecroppers Union had active in it Aubrey Williams who at my last report had been cited 38 times by the House Un-American Activities Committee for aiding and abetting Communist causes.

I noted with interest the other day when Governor Barnett appeared before this committee and introduced a picture of Martin Luther King while in attendance at the Monteagle Tennessee Highlander Folk School in 1957. This same Martin Luther King, Jr., is the quarterback of CORE (Congress on Racial Equality) and the press stated that one of the members of this committee asked that the picture be verified.

I have in my possession this morning the moving picture that was made at the meeting in 1957 in which Martin Luther King, Jr., Aubrey Williams, Claude Williams, James A. Dombrowski, Myles Horton, and other individuals have been cited for aiding and abetting Communist front organizations by the Attorney General of the United States under his authority, including Executive Order No. 10450, and by the House Un-American Activities Committee. Gentlemen, all of these people were at the 1957 meeting when Martin Luther King was there.

I will be most happy to have this film run for the benefit of the committee at the conclusion of my remarks if you think proper, and I understand the projector and screen is here this morning and available.

I might add that the Tennessee Legislature conducted hearings on the activities of the Highlander Folk School, at which time I was invited to be a witness and did so appear and showed this same film to that body. Subsequently, the Highlander Folk School was padlocked and has been closed ever since.

This same Martin Luther King, Jr., leader of CORE, breeds racial strife, demagoguery, and friction every place he goes. Yet, this same individual, Martin Luther King, Jr., appears to have the ear of many Members of this Congress. The companion organization, the NAACP, has a number of national officials who have been cited time after time by the House Un-American Activities Committee for wittingly or unwittingly aiding Communist activities. I have with me the files on some of these individuals, received from the House Un-American Activities Committee. I understand these records have already been introduced before this committee.

In my own State the former State president of the NAACP was one Daisy Bates who in 1948 was one of the 74 people who signed a

petition for a presidential candidate, to place Henry Wallace on the ballot in Arkansas as a presidential candidate for the Progressive Party. That same day she had her picture made with Henry Wallace on the steps of the Capitol along with one Ladislav Pushkarsky, who is now voluntarily behind the Iron Curtain in Poland as an active Communist. I have that picture available for the committee. Also, hand in hand in the same picture was one Leonard Farmer, a white man who was denied admission to the Arkansas bar because the chancery court of Pulaski County, Ark., had determined that he was a card-carrying Communist in a divorce proceeding, and I have a copy of that opinion, that decree stating that Farmer is a Communist. It is my understanding now that he is working for the Pepperidge people in the State of Connecticut.

The present regional director of the NAACP in the South is one Clarence Laws who was discharged from the U.S. Army as a Reserve commissioned officer "under the provisions of paragraph 6B(8), Army Regulations 140–175, which authorizes discharge for security reasons when such action is necessary in the interest of national security." The discharge was predicated upon his activity in connection with the Southern Conference Educational Fund, Southern Negro Youth Congress, and the Committee Against Jim Crow in Military Service and Training, all of which have been cited as Communist fronts. The record of this Clarence Laws as a southern leader of the NAACP is available to this committee and is in his Army files and can be secured.

Throughout all the racial trouble in America you will find the type of individuals that I have just mentioned enumerated as the driving impetus. Communism thrives on unrest, chaos, and turmoil. And it is these same people who now threaten a march of 300,000 individuals on this Congress on August 28.

In the light of this background, I now discuss with you the attitude of the people of my State in regard to Senate bill 1732.

Our two leading papers in Arkansas are the Arkansas Democrat and the Arkansas Gazette with a combined circulation of over 200,000. The Arkansas Democrat on Wednesday, June 12, 1963, editorially stated:

> President Kennedy is backing the extravagant NAACP clamor for throwing private business property wide open to anyone and everyone who wants to enter it. He is asking business to yield to this destruction of the ancient rights long recognized in antitrespass laws.
>
> The President in seeking the support of other groups to enforce this political expedient. Reportedly, he even wants a law to set up this new "right" in defiance of the deep-rooted old right of private use of private property. A law like that would be pure socialism.

The Arkansas Gazette on June 21, 1963, editorially stated, and I might add that this paper ordinarily supports the moves of the President:

President Kennedy, in his eagerness to find comprehensive solutions to the festering racial problem, has reached entirely too far in his proposed Civil Rights Acts of 1963.

He has not simply gone beyond the attainable; he has proposed, in the quest of equality, to put severe new restrictions on individual rights in an area historically considered outside the purview of the Federal Government.

Where the organic error lies in the Kennedy program, is in the proposal to put the police power of the Federal Government to work to bar discrimination in privately owned establishments—such as hotels, motels, restaurants, and theaters. The qualifications on the plan appear few and scant; there is reason to believe it would apply to the last hotdog stand and the last roominghouse for transients. Here the President proposes to put the Government to work enforcing moral principles not in the public area but in what we can only regard as the private domain.

We are conscious that it has become unfashionable in some circles to consider property rights as worth the saving. Yet, in our view, the erosion of any of the historic rights, where avoidable, embodies an unwarranted loss to the sum total of liberty.

Only last week Fidel Castro was quoted in the press as telling the American students now illegally there that "property is antisocial." If a man cannot do with his private business what he desires, so long as he does not infringe upon his neighbor's rights, then the American citizen has the same right as the merchant or cafe owner in Peiping, China, or at the corner of Lenin Boulevard and Red Square in Moscow—none whatsoever.

I know that there are some individuals for certain provisions in this bill. However, I just made a trip, by car, from Seattle down through San Francisco, Los Angeles, Phoenix, New Mexico, El Paso, Dallas, and Shreveport. I made it a point to discuss the provisions of this bill with many hundreds of citizens along my way. Without exception I have found no one that thinks it proper for the Congress to impose a mandate as to who shall be his customers in his private business.

In this Capitol Building the House and Senate Members properly have certain areas designated as "Senate Dining Room," "Senate Swimming Pool," "Senate Gymnasium," and "Senate Elevator." These facilities are highly proper and you gentlemen should certainly have some place for the conduct of your business with your constituents in private and should have other facilities to assure your proper health. No one denies this. But, under the provisions of this bill, would these facilities then become open to the public?

Every Airbase, Army and Navy installation, having dining rooms which are erected on public property but at present are restricted to base personnel and their guests. Under the provisions of this bill will not the doors be thrown open to the public? You can't have a private club on public property.

This bill strikes at the basic rights of private property. Its coercive effect will undoubtedly force many businesses, especially restaurants, to resort to the subterfuge of organizing private clubs with a result of more, rather than less, discrimination in public accommodations. I can well imagine the more successful businessman having to carry a briefcase for his private club cards in order that he might entertain and dine with his customers in a place of his choice.

Other than the usual minor travel inconveniences which we all experience, there is no basis for the enactment of this bill. There is no visible means by which the passage of this bill would aid or affect the free flow of commerce between the several States. A lodge or organization is going to have a convention somewhere. The entertainment

world is enjoying the greatest financial harvest it has ever known; industry is in a constant state of expansion and removal to other areas because of availability of natural resources, freight rate advantages, favorable labor availability and other reasons.

So, it is the view of my people that the premises on which the bill is bottomed are fallacious and will not stand in the light of economical fact.

Gentlemen, if this bill should become law you might as well get ready to just exactly double the number of Federal District Courts, U.S. attorneys and marshals, and prepare to set up a Bureau which will have more employees than the Pentagon Building can hold in order to implement this legislation.

I am informed that some 30 States already have similar legislation. Whether or not it works is unknown to me, but in reality, cutting through all of the verbiage which attempts to dress it up and make it palatable, there can be no doubt that it is just another attempt for one or both political parties to tomahawk another portion of the few rights left to the individual American citizen.

What brought all the rush to pass a "public accommodations" bill? Is it a sincere wish to alleviate a hardship or is it a vote-getter? Frankly, I think the proponents have misread the desires of the American people. In the last few days I have read of ministers declaring such and such a situation "legally" wrong, and some politicians—mostly appointed—who quite often make the mistake of believing they have been anointed rather than appointed—piously declaring something "morally" wrong.

In truth, neither is caring for the ecclesiastical or administrative duties; rather, they have invaded the political forum as misguided and inexperienced idealists with no concept of the sancity of property rights.

The press of the Nation has been carrying pictures of demonstrators, sit-ins, lay-downs, and other forms of not so passive resistance. Who are these rank and file demonstrators? Do they work? Are they on Government and State dole? How many are receiving aid-to-dependent children checks? I know of people who during this time get time to go out and demonstrate. When they get 2,000 in places like Cambridge, Md., or 3,000, I would like to know who they are in the daytime and where they get their income and livelihood.

In Arkansas we have had some sit-downers—most of them were out-of-State students attending a Negro college in Little Rock. In Pine Bluff they were led by a white man named Hanson from Cincinnati. Why he came down to my country to demonstrate, I know not. He is in Pine Bluff because someone paid him and sent him there. Who? CORE, NAACP—where do they get their money? These people are financed by whom? The cost of one Russian Mig jet fighter would finance these two organizations for 6 months. Far better that this or some other congressional committee investigate these tax-exempt, troublemaking, rabble rousing organizations than conduct hearings on a bill patently unconstitutional and which destroys private property rights in America.

These people participating and leading these demonstrations have no respect for anyone. Last week Mayor Daley, of Chicago, led their parade at the National NAACP Convention. When he arose to speak,

he was jeered and hooted from the platform by the same people he had just led in the parade. The next day James Meredith was publicly denounced and is no longer the symbol of the NAACP Youth Movement because his remarks were not inflammatory enough.

Only a few days ago several individuals unceremoniously walked in and laid down in the reception room of the office of the Governor of Maryland and announced they would stay there until the Governor issued an executive order in compliance with their demands. The same thing happened to the Mayor of Seattle only last week when I was up there. What are you going to do if on August 28 thousands of people come in and lay down in the halls and corridors of this Capitol, in your offices and throughout this building? Last Thanksgiving Day in this city you had a riot of 50,000 people at the football game. Over 400 were hospitalized. Regardless of how much assurance you have from the demonstration leaders that it will be peaceful on the 28th of next month it is not the American way—it is rank intimidation.

Need I remind you that back in the 1920's when the World War I veterans gathered here in Washington demanding a bonus, the U.S. Army, by order of the President, under the command of Gen. Douglas MacArthur and subcommand of then Lt. Col. Dwight D. Eisenhower, maintained peace. Theretofore the IWW and Coxey's Army also gathered and "demonstrated" here in the Capital City to no avail because of the utilization of the U.S. Army by the President. Those demonstrators were also demanding something.

So the precedent for maintaining the dignity of this Congress has been set. Someone in authority, whether it be the President pro tempore of the Senate, Speaker of the House, or the President of the United States should serve notice, today, that this Congress will not be intimidated and coerced by 1 or 1 million marchers.

Should it be otherwise and this Congress succumb today, tomorrow or next month to such intimidation, we will then have the same government by mob rule which now prevails in many South American countries.

This body, the National Congress, now sits in judgment as to the disposition of the freehold property of millions of Americans. The Nation sits in judgment of each individual Member of this Congress. This bill, if passed, signed into law and validated by the Supreme Court will draw the final curtain on the proud American's right to say: "This is my property."

The CHAIRMAN. I'm going to have to ask our guests here today to refrain from applause or other noise. We are glad to have you here. I hope you will refrain so that we can conduct this hearing in what I hope to be a proper atmosphere.

What the Attorney General of Arkansas was just talking about is what you just did.

I think you have a right to express yourself any time you wish, but we do have to keep some order in the committee room because there are so many people who want to be at these hearings. It is a matter of accommodations, to coin a phrase for the committee.

Mr. Bennett, I don't want to belabor this point. Whatever private rooms there may be for facilities in this Capitol for Members of the Senate, they are very, very scarce. They are not segregated in any way whatsoever and never will be.

Mr. BENNETT. No, sir; but you have to be invited to go in.

The CHAIRMAN. No, you do not have to be invited. For Members of the U.S. Senate, no matter who is a Member of the Senate, he may come in, regardless of race, color, or creed. So this analogy, of course, has no bearing at all.

Mr. BENNETT. Can the public come in there?

The CHAIRMAN. What?

Mr. BENNETT. Can the public come in there?

The CHAIRMAN. In my private office, yes.

Mr. BENNETT. I'm talking about in the new private dining rooms and swimming pool.

The CHAIRMAN. The public can come in if the Senate decreed it.

Mr. BENNETT. That's right. And that is just exactly what we are——

The CHAIRMAN. The same as your private office in Little Rock.

Mr. BENNETT. I'm talking about the Senate——

The CHAIRMAN. What is the difference?

Mr. BENNETT. I'm talking about the Senate dining room, Senator, not the office.

The CHAIRMAN. You might have a private dining room in your capitol in Little Rock. I don't know. Most capitols do. I have eaten in many of them.

Mr. BENNETT. Yes.

The CHAIRMAN. I have been invited by the Governors. It is merely for the purpose of doing public business, like this committee goes into executive session occasionally.

I just want to tell you if you think even our private offices are not open to the public——

Mr. BENNETT. I didn't say offices. I said dining room.

The CHAIRMAN (continuing). You come into my office at any given hour——

Mr. BENNETT. I didn't say the office. I said the dining room.

The CHAIRMAN. The Senate dining room is open to the public.

Mr. BENNETT. I mean the one where it says over the top, "Senators Only."

The CHAIRMAN. That is where we eat by ourselves——

Mr. BENNETT. That's right.

The CHAIRMAN (continuing). For the purpose of doing business.

Mr. BENNETT. That's right. But Tom, Dick, and Harry cannot come in there.

Yet under this bill you are asking every restaurant owner in America to let everybody in.

The CHAIRMAN. No, we don't presume that is open to the public. I don't think the House dining room or the State legislature dining room or a Governor——

Mr. BENNETT. I concur with you. It is entirely proper. All we want for the private cafe owner of America is the same privilege that the U.S. Senate enjoys.

The CHAIRMAN. Nearly every Governor I know has a small place where he might have lunch with some people he wants to invite in to discuss business.

Mr. BENNETT. Senator, here is the whole point: Joe Doe out here has his life savings in a little cafe in a small Southern town. Right

now he can be selective in his customers, just as the Senate dining room down here that you all have is selective as to who shall eat there.

The CHAIRMAN. We don't select at all. Anybody elected by the people can come in here, regardless of race, color, or creed.

Mr. BENNETT. That is right. That is what we want, is to maintain the same privilege for the little individual cafe or motel owner that the U.S. Senate enjoys in their dining room.

The CHAIRMAN. I don't think there is any comparison there at all. And I'm sure it wouldn't be in the State Capitol in Little Rock.

Mr. BENNETT. Of course ours is a——

The CHAIRMAN. As a matter of fact, I think I have been in the State Capitol in Little Rock and I think we had a little private luncheon to talk some business.

Mr. BENNETT. It might have been in the Governor's office. It wasn't in the dining room.

Senator, I have this final——

The CHAIRMAN. Wait, I'm not through.

I said the other day, and I say again this may be my own individual opinion but I don't feel very good about witnesses coming up here—we are glad to have you and you have a right to say what you wish to say—but I assure you I would not be responsible to myself and to my colleagues in the U. S. Senate if I didn't remind you that there is no intimidation of members of this body.

These matters have been before the U.S. Senate for years, long before these other things have happened. And we are trying to discuss legislation in an objective way.

This is our responsibility. And the fact that there are marches or demonstrations, which I don't think anyone in this committee or anyone else likes, does not alter the fact that people have a legal right to petition if they are orderly, and you wouldn't deny that right yourself. If they are disorderly, they don't have that right and something will be done about it if they are, I can assure you.

We are not intimidated, and this bill is not before this Congress for some of the reasons that have been ascribed to it. It has been here a long time as have many of the civil rights bills.

I introduced the first bill on poll tax legislation 26 years ago in the House of Representatives. That is how long that I, in my personal service up here, know that some of these civil rights bills have been here. And we are not being intimidated in any respect. And if you think that some demonstration is going to intimidate the conscience or the good judgment of the Members of the Senate, you just are mistaken.

Mr. BENNETT. My statement was that the intent of the marchers——

The CHAIRMAN. I can't look into the heads of everybody marching down the street as to what their intent is.

Mr. BENNETT. I'm quoting James Farmer, executive director of CORE, saying that they thought the demonstration on August 28th would be peaceful, but if there was a filibuster going on at that time, he cannot anticipate whether it would be peaceful or not.

The CHAIRMAN. I'm sure——

Mr. BENNETT. And that is in this morning's paper.

The CHAIRMAN. I don't know about that. And I don't think Members of Congress are going to be intimidated in what they con-

sider in their conscience good judgment because there is a demonstration going on some place.

If it is disorderly there is no one in this Congress who would recognize it one minute. I think we recognize responsibility on both sides of this coin.

Mr. BENNETT. I concur with you 100 percent. This is the place to decide legislation here, not by 100,000 marchers outside the Capitol.

The CHAIRMAN. I don't think it has ever been so decided.

Mr. BENNETT. It has been attempted, Senator.

The CHAIRMAN. We have had marchers. I don't know whether you were in Seattle the other day——

Mr. BENNETT. I was when they walked down there and sat down in your mayor's office.

The CHAIRMAN. I know about it.

Mr. BENNETT. And that is not the way to get an ordinance passed, to lay down on the floor.

The CHAIRMAN. I don't know whether it was or not. I read about it. But about the same week a great number of our fishermen's wives had a parade down the street, quite a large one, protesting against some features of a Japanese treaty we have on fisheries. This was a very legal right of these people to do this.

Mr. BENNETT. That's right.

The CHAIRMAN. This committee is not equipped to go into a lot of the matters that you brought up and that were brought up by Governor Barnett and by Governor Wallace, but I assure you that we will turn them over to the proper people who have the equipment and who have the facilities, the Senate Internal Securities Committee, Senator Eastland, who is the chairman, and the FBI, and others on these matters.

We are here to discuss, as calmly and as objectively as we can, some legislation. And we welcome opinions as to the effect, the merits or demerits, or even suggestions for corrections of this bill.

I want to assure you, too—you must know this from your experience in Arkansas—that I don't know of many pieces of legislation of a nature such as this that have ever ended up going through Congress and signed into law just exactly as they were written when they came in. This is the reason for hearings, to get good views and to consider these things objectively——

Mr. BENNETT. I thank you entirely——

The CHAIRMAN. And not to be taking off into tangents that may or may not have some relevancy.

Mr. BENNETT. Senator, let me ask you this, and of course, you are not on the witness stand——

The CHAIRMAN. I respect your legal opinion on this bill, and I think some of the points you made are points that have to be considered by the committee.

Mr. BENNETT. Don't you concur that this bill is probably an outgrowth of the demonstrations that have been occurring in America for the last 2 years?

The CHAIRMAN. I don't know as to that. I don't have any access to the minds of the people of the administration who suggested this bill.

Mr. BENNETT. I want you to take judicial notice of that.

The CHAIRMAN. We have judicial notice of some things, yes. But it still doesn't detract from the fact that there is a bill and it has to be considered objectively.

Mr. BENNETT. That is correct. That is correct.

But there is a causal relationship between this bill and these people who are marching up and down the streets of America in rioting and causing trouble.

The CHAIRMAN. I would think there would be for the interest in it; yes.

Mr. BENNETT. With that causal relationship established, why not determine who are leading the demonstrators and riots? Why not find out who Clarence Laws is, and who Daisy Bates is, and Mr. Farmer.

The CHAIRMAN. I think the Senate Internal Security Committee has those matters before it, and we will present to them such matters as we have.

Mr. BENNETT. Will they be brought out before this bill is on the floor of the Senate?

The CHAIRMAN. I'm sure the dedication of Senator Eastland to this matter would suggest that.

You ought to take judicial notice of that, shouldn't you?

Mr. BENNETT. Yes.

The CHAIRMAN. The Senator from Oklahoma.

Senator MONRONEY. I have sat through most of these hearings. I appreciate and agree with much that the distinguished gentleman has said from the bottom of page 8 on. But I think we are going to have to have some rules in this committee to guarantee to the colored man the same rights that we would guarantee to a white man, and that is a guarantee against attack of his loyalty or patriotism without a chance to be heard.

It seems to me that even the McCarthy committee, in the darkest days of that episode, met in executive session to consider the charges that reflected upon any witness or person charged before the committee to determine whether the FBI files or other security information lent validity to the charges reflecting on the man's loyalty to his country.

Certainly the claim that Communists have participated in these demonstrations is undoubtedly valid. The Communists wouldn't miss a chance in any case and for any reason to participate in any kind of rioting or unrest that could possibly be caused.

But I have heard the charges now by three distinguished witnesses, two Governors and now the attorney general of Arkansas, against Martin Luther King, Jr. I do not know the man; I have never seen him. The witnesses who have talked, including the distinguished attorney general, are accusing him of Communist sympathies, I would gather, based purely on guilt by association.

Mr. BENNETT. Senator——

Senator MONRONEY. This is guilt by association. No place in your statement, sir, did you allege that this man had a Communist file, that he was cited as a Communist agent or had been prosecuted or charged under any of the Communist laws that we have passed. The fact that he appeared at a Labor Day celebration at a Communist school with alleged people who have been cited for Communist activities——

Mr. BENNETT. That's right.

Senator MONRONEY (continuing). Is the charge. It seems to me that in all deference, black though the man's skin may be, he has a right to be heard before this committee, the same as white witnesses have.

Mr. BENNETT. Has he asked——

Senator MONRONEY. To allow three witnesses to testify as to his patriotism without giving him a chance to be heard, and heard under oath if he wishes to be, I think would not be demonstrating a proper procedure in this case.

I know that there are strong feelings on these issues, but I certainly feel that the threat of a Communist smear against those who lead these protests against evils and abuse which they have long complained of is not in the pattern of American jurisprudence.

All people whom you charge or prosecute, you guarantee the right to be heard in Arkansas, I am sure.

Mr. BENNETT. The FBI says there are only 8,000 to 10,000 card-carrying Communists in the United States now.

I didn't accuse Martin Luther King of being a Communist. I prefaced my remarks by saying that a man may get associated with some of them, and if he leaves them, it is all right.

I have the film here, with Martin Luther King, with James A. Dombrowski and Audrey Williams and Myles Horton and others down there at Highlander Folk School in 1957. The film is available. I will be delighted to show it to this committee.

Then, subpena Martin Luther King, Jr., or let him come in voluntarily and explain what he was doing down there with all these people who have been aiding and abetting the Communist Party which that is all I want you to do.

Senator MONRONEY. Do you charge Martin Luther King is a card-carrying Communist?

Mr. BENNETT. No, sir, I did not.

Senator MONRONEY. I did not understand you to do so either. But you are saying in a charge of guilt by association that these demonstrations are Communist inspired.

Now, if you have any evidence that Martin Luther King is a Communist——

Mr. BENNETT. I didn't say he is a Communist.

Senator MONRONEY (continuing). I think we should have it.

Otherwise, I feel that these matters are properly within the jurisdiction of the Internal Security Committee and of the FBI.

Mr. BENNETT. I didn't say he was a card-carrying Communist.

Senator MONRONEY. I know you didn't. That is what I pointed out.

Mr. BENNETT. I have here the file of the House Un-American Activities Committee on W. E. B. DuBois, the first president and organizer of the NAACP.

I don't know whether he is a Communist, card-carrying or not. But he was cited about 68 times for aiding and abetting the Communist-front activities.

He is flying in formation with a bunch of Communists. Whether he belongs to the party by card I don't know.

Senator MONRONEY. What was the name?

Mr. BENNETT. At least he ought to be questioned. On Clarence Laws, the southern leader of the NAACP, New Orleans, he had been discharged by the U.S. Army as a security risk for associating with Communist fronts that have been so cited by the Attorney General of the United States.

Why not get Clarence Laws in here and find out why he was discharged for security reasons? And if he is a proper person to tell these people that are in these demonstrations what to do for the best interests of America. That is what I am getting at.

Senator MONRONEY. Is he associated with Martin Luther King?

Mr. BENNETT. Sir, they are all interlocking.

Senator MONRONEY. We are talking about Martin Luther King at the moment. I say if he is going to be indicted three times and charged with Communist sympathies in a guilt by association, then he should have an opportunity to be heard before this committee. And in the future I think we should have at least the courtesy that was extended by the McCarthy committee under the very wide rule of John McClellan when he took it over that these matters would be screened in executive committee to determine whether there was factual evidence that the man had Communist affiliations.

Mr. BENNETT. Governor Barnett, the other day, introduced a picture of Martin Luther King——

Senator MONRONEY. That is a part of the files.

Mr. BENNETT (continuing). Of Martin Luther King with these people. There was some question in this committee's mind as to whether or not that picture was authentic. I have here the film made on the same day, at the same place, where Martin Luther King was in attendance with these people, people of questioned loyalty to the United States. If you would like to see the film, I will show it to you and point out who they are.

Senator MONRONEY. As I read the newspapers, he admitted that he had made a speech at this college, that he was invited there to speak on Labor Day. But does this make Martin Luther King subject to indictment as a Communist sympathizer? This is what I am after. I think if we are going back to guilt by association and divert this hearing on a very important series of legislative bills, then we are going to be tied up all year and we will never get down to the issues in this case.

The best source of information that I know of, and it has always proven valuable, and the greatest anti-Communist organization the world has ever known, is the FBI under J. Edgar Hoover.

Mr. BENNETT. That is right.

Senator MONRONEY The day we heard the testimony against Mr. Martin Luther King, I wrote Mr. Hoover and I am awaiting an answer as to what his files show about Martin Luther King. I think we should go to the source of this information and not make this a sounding board for those who would disparage or attempt to insinuate that these leaders, like Martin Luther King, are Communist or Communist-inspired or under the control of Communists.

Mr. BENNETT. I have the film, sir, showing his action down there. He said he made a speech there. The film shows who all was there.

Senator MONRONEY. Did you make the film, sir?

Mr. BENNETT. No, sir.

Senator MONRONEY. Where did the film come from?

Mr. BENNETT. It came from a private reporter who slipped into the meeting and made the film. As far as I know, there are only two of them in the world.

Senator THURMOND. Mr. Chairman, I think the film ought to be shown. I think the committee is entitled to see it.

Furthermore, I agree with Senator Monroney that Martin Luther King ought to be called as a witness. I think he ought to have the opportunity to come here and say anything he wants to. And I am in favor of calling him.

James Farmer's name has been mentioned. I would be in favor of calling him. This man Horton, who I understand is a self-admitted Communist, if he wants to come I think he ought to be allowed to come. I am certain he would like to hear anything that anybody has to say.

Senator YARBOROUGH. Mr. Chairman.

The CHAIRMAN. The Senator from Texas.

Senator YARBOROUGH. Mr. Chairman, I agree——

Senator THURMOND. Mr. Chairman, just a minute. I shouldn't have said that Horton is a Communist. It is another one.

Mr. BENNETT. Dombrowski.

Senator THURMOND. Dombrowski, mentioned in the Attorney General's statement, I believe he is a self-admitted Communist. If he wants to come, let him come, too.

Mr. BENNETT. James Dombrowski organized the Highlander folk group.

Senator YARBOROUGH. I agree with the distinguished Senator from Oklahoma that there should be no guilt by association.

But I want to say this, the distinguished chairman of this committee is one of the two principal sponsors of this legislation. I think it is the intent of the chairman of this committee to conduct the hearings in a fair and equitable manner. I feel, as author of the bill, that he felt, in fairness, to hear the opponents.

Certainly the distinguished Senator from Oklahoma didn't mean to infer that our very courteous, able and fair chairman intended to permit any guilt by association of charges.

The chairman of this committee has sat in many hearings; I have watched him over 6 years in very controversial matters, and I have been impressed in all of that time with his fairness and I want to say that our chairman, I think, is being very fair in giving a hearing and he did not intend to have anybody smeared with guilt by association.

Senator MONRONEY. I did not mean to infer that. The Senator knows, as we have gone along, the extent to which these matters would be brought up in trying to give the greatest latitude to our witnesses to get all the facts in this matter.

Mr. BENNETT. There is no intent on my part whatsoever to imply that anybody is a card-carrying Communist. But when you test the credibility of people who are leading——

Senator THURMOND. Speak louder. I can't hear you.

Mr. BENNETT. When you test the credibility of people who are leading a movement, you have to know their background and who their associates are. This film shows that.

I have no intent to convict anybody by association. But the committee should know who their associates are, and then draw its own conclusion.

The CHAIRMAN. You are not referring to the committee's associates.

Mr. BENNETT. No, sir; people who were mentioned in the statement, Senator.

The CHAIRMAN. Congressional committees often get off on all kinds of tangents. Legislative committees do that. If we applied the basic rules of evidence to senatorial committees, one-tenth of the time would be taken up by the committees.

There is, of course, a basic rule in these cases. We want to hear everybody. We are trying to be fair.

The Senator from South Carolina has been in charge of the witnesses who have been asked to come up here, and the chairman said that will be fine; we want to hear everybody we can.

He has asked for 3 or 4 days for witnesses, and there may be some other perfectly legitimate persons who can give us advice on this legislation that we may want to hear again.

Mr. BENNETT. Senator——

The CHAIRMAN. Just a minute.

We have to try and keep the testimony relevant to what is before us.

The point I am trying to make is that we haven't any idea about who starts demonstrations. I have no way of knowing, except what the FBI or Senator Eastland's committee might bring out in this field. They have the staff.

The Old Senate Office Building here has several people who are doing just that for the Internal Security Committee.

We are going to try and devote ourselves to the basic problems involved in this legislation. We are hopeful that we can do so, and that the witnesses, such as yourself, who have some great legal background, and who have good legal opinions as to these matters, can help us by giving us their views.

We should not be getting off on tangents that are not relevant—this could be relevant, I don't know. As of now it is very vague. But we will find out.

We are going to ask the FBI as we have told the other witnesses. We will have the Internal Security and the House committee and the Senate committee files, and the committee will meet in executive session when we get through with our regularly scheduled witnesses, whom we might be able to hear this week or the first part of next week, or even before that. We will have an executive session and determine what we will do on these particular matters. We will determine how relevant they are to the legislation that we have before us.

Mr. BENNETT. Senator—pardon me—I was invited here to give evidence, testimony. This film is part of my testimony. I don't know what the pleasure of the committee is.

The CHAIRMAN. You say in your statement that you will suggest whatever the committee thinks is proper. We don't usually have films here. Once in a while we do, but of a different nature than this.

Mr. BENNETT. It was to authenticate what Governor Barnett said.

The CHAIRMAN. We will have an executive hearing and determine—the film will be available—whether we should see it or not.

Senator PROUTY. Mr. Chairman, I expressed earlier the same sentiment which had been so ably enunciated by the distinguished Senator from Oklahoma. I feel very strongly about this question of guilt by association which has been brought into this picture during the last 2 or 3 days.

I feel that if we are going to show this film we should know the name of the person who made it, in order that he can give information with respect to the meeting which he attended. I think that is most important.

Mr. BENNETT. Gentlemen, I think the film speaks for itself. It is authenticated with pictures of the label——

Senator PROUTY. That may very well be true. I would like the name of the photographer and have him appear before the committee.

Mr. BENNETT. I don't know the name of the photographer.

Senator PROUTY. You obviously could find out.

Mr. BENNETT. Yes, sir. But it is a long way from here back to my home State. I have a little State business to attend to once in a while.

Senator PROUTY. The telephone is available to you.

There is one other question in this connection: On page 5 you say that—

*** * * the Communists set up Commonwealth College in Mena, Ark. The school had no particular academic requirements, tuition or qualifications for students or faculty. It was supported to a large extent by organizations with subversive backgrounds.**

Recognizing that truth is a good defense to libel and slander, would you name the names of these organizations? I think it is important.

Mr. BENNETT. Senator, let me say this: In 1935, I believe, or 1941 it was, the Honorable Boyd Tackett, a Member of Congress—many of you may remember him—who at that time was in the Arkansas House Legislature, had a hearing, a legislative hearing, to determine the background of the Commonwealth College. Those hearings were under oath and were reduced to writing. They were not in the office of the secretary of state of the State of Arkansas. It is quite a large volume. I think the hearings lasted about 4 days. And in there is listed the organizations which donated money to Commonwealth College.

Senator PROUTY. Could that be made available to the committee?

Mr. BENNETT. Yes, sir, I can have it photostated. It is quite bulky. I don't think there is any doubt about Commonwealth College being communistic. It was padlocked for that reason by the chancery judge.

Senator PROUTY. I know nothing about it. I never heard of it.

Mr. BENNETT. It got a lot of notoriety in my way in several government races.

Senator THURMOND. Mr. Chairman——

The CHAIRMAN. The Chair rules that these matters will be taken up in executive session. We obviously can't decide it here with only five members of the committee.

The Chair will be glad to call the committee in executive session whenever we can get them together.

The Senator from South Carolina is the next one to question.

Senator THURMOND. The time is about up now. We have to come back after the Senate adjourns this afternoon.

I want to make this statement at this time for the record: This legislation was presented by the President of the United States to the Congress primarily, in my opinion and that of many other people, because of the pressures upon him and the demonstrations throughout the country where thousands and thousands of Negroes have been involved. In many cases, there has been violence: in Maryland some people have been shot; in Lexington, N.C., a white man was shot in the back and killed; and in other places there has been other violence.

If this committee is going to stop its analysis at this point and not go to the basis of this trouble, I don't think it is going to fulfill its full obligation.

It seems to me that the American people are entitled to know what is at the bottom of these demonstrations, if that is what caused the President to present this legislation—and I think that is generally known. What is at the bottom of it; what is the basis of it; and who are the people causing it?

It seems to me that if the Attorney General has a film that bears on that point then this committee ought to see that film.

It is my hope and desire that the committee will see this film because it may be helpful to us.

There is no question in my mind that there are certain leaders in this Negro movement who are participating and have engulfed others, induced others, innocently. There are many engaged in it who are fine, loyal citizens, and perfectly sincere—but it is still inspired by subversive forces.

And there has been information brought out here about certain leaders who have participated in these movements, Martin Luther King being one of them. If he is one of the leaders here—and information has been brought out here about his connections with pro-Communist fronts—I think it is perfectly legitimate to examine this evidence, because if this bears on this matter I think the American people are entitled to know it.

I think Mr. King is entitled to come here and testify.

There is James Farmer, who has led many of these movements, and who not only says he wants equality but preference, and says he can't say whether violence will result or not if the demonstrators are here during the filibuster; I think he ought to be invited here.

And there are some others that we probably ought to invite, I think, to get at the bottom of this thing, if we are really going to present a true picture to the American people, and not just come and present a little bill to placate the President, and say, "Mr. President, here is your bill. We are going to pass it out now. You wanted it based on the interstate commerce provision of the Constitution in spite of the fact that a similar bill was declared unconstitutional in 1883. Here is your bill. We are going to present it to you."

I think there is a very serious question involved here. I think it goes to one or two serious problems that could jeopardize this whole Republic of ours.

I think it is the very thing we are going into here. It may indicate, if we go into it thoroughly and properly, that there are subversive forces in this country that are working to undermine this Government; that are working to divide our people, and eventually to overthrow this Government.

Mr. Chairman, I want to be on record as expressing the hope that we do go into it thoroughly and that we do give the American people all of the facts concerning this matter.

At this time the hour of 12 o'clock has arrived, and I make a point.

The CHAIRMAN. Undoubtedly the same type of testimony has been given before the Senate Judiciary Committee headed by the Senator from Mississippi, Senator Eastland.

That committee also has, as I pointed out before, a very, very large staff of experienced people, known as the Senate Internal Security Committee, which is in the same committee. It relates to the same thing. The bulk of the bills are in there.

I will confer also with Senator Eastland. There is an apparatus to do this immediately. We will do that.

If, as I suspect, this testimony is anywhere near relevant to what is before us, it has got to be relevant to what is before them.

Would you agree with me on that?

Mr. BENNETT. Senator, we don't have the same problem in Arkansas on the voting business as some of the other States.

The CHAIRMAN. I am not saying that. I say the testimony is there. The same testimony will be given.

Mr. BENNETT. The bill I am concerned with primarily is the one before this committee.

The CHAIRMAN. The demonstrations are there for the whole business; is that correct?

Mr. BENNETT. That is correct.

The CHAIRMAN. It wasn't just for this proposal?

Mr. BENNETT. That is correct.

The CHAIRMAN. So the two committees are going to have the same type of testimony.

The Judiciary Committee is well equipped with many, many people who have gone into some of these things already, as a matter of fact. We have access to all of their files and their reports and their conclusions. We will be glad to look at them and determine relevancy to this particular piece of legislation.

Senator THURMOND. Mr. Chairman, I believe the Senator from Oklahoma wanted proof of that picture last week. As I understand, this film is proof of that picture.

I think that is another reason that the film should be shown.

Senator MONRONEY. Let me say that I asked for proof of the picture, and we got the proof, as the best source I know, from the wire services, that Martin Luther King said "Yes," he had addressed a Labor Day meeting in 1957 at this college.

This doesn't make him Communist. There were some people there whose loyalty may, on the record, be suspect. What I am talking about is this effort to discredit a man who apparently is a minister and who apparently has been accepted as one of the leaders in this movement merely by association.

I am perfectly willing to sit here and look at the film. The man admits he was there, that he was invited to make a speech there.

I see no reason for encumbering the record or the time.

If there is any question about it, if he denies being there, then I think we should have this in rebuttal.

Mr. BENNETT. I think the best thing might be—it is not in my province—to get him, get Martin Luther King here.

The CHAIRMAN. The committee will decide what witnesses they are going to bring here.

Mr. BENNETT. I prefaced my remark by saying it was not my prerogative.

Senator THURMOND. Mr. Chairman, I was wondering about this afternoon—we have some other witnesses who have come here—if the committee could reassemble after the Senate has recessed or adjourned this afternoon, to continue.

The CHAIRMAN. Off the record.

(Discussion off the record.)

The CHAIRMAN. On the record.

The committee will recess until one-half hour after the Senate recesses this afternoon.

(Whereupon, at 12:08 p.m., the committee was recessed to reconvene as indicated.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

WEDNESDAY, JULY 17, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 9:20 a.m. in room 318 (caucus room), Old Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order.

We have several members coming. They will be here in the next 5 or 10 minutes. We have a full schedule of witnesses, so we will proceed.

The Chair has an opening statement this morning.

It is our pleasure to hear first this morning from Ford Frick, the commissioner of baseball, and then we will have Pete Rozelle, the commissioner of the National Football League, and the Honorable Joe Foss, the commissioner of the American Football League.

The committee has invited these gentlemen to appear because they represent truly national sports which have encountered, and in most cases overcome, some of the national problems we have to consider in S. 1732.

One of the major premises on which the bill rests is that discrimination in places of public accommodation and amusement is a burden on interstate commerce. These witnesses will give the committee some experiences drawn from very recent years which would indicate the nature of the burden and what has been done about it.

We are very glad to have as our first witness Mr. Frick, who is well known by name and personally to many of us, and to nearly everyone in the United States. Accompanying him is our old friend Paul Porter. We are glad to have you both here.

Do you have a statement, Mr. Frick?

Mr. FRICK. Only a brief one, Senator.

The CHAIRMAN. All right. We will be glad to hear that.

STATEMENT OF FORD FRICK, BASEBALL COMMISSIONER

Mr. FRICK. I am Ford Frick, and I am commissioner of baseball and I am appearing here today in connection with the hearings on S. 1732 at the invitation of the distinguished chairman of your committee.

I do not propose, gentlemen, to submit to the committee any prepared statement. In the interest of time, I have, however, outlined a brief preliminary observation and then I will be happy to respond to any questions which the members of the committee may have.

I do not hold myself out as an expert in the area of the vexatious legal and political problems which have been discussed in connection with this bill. I am prepared to give to this committee the experiences of baseball in meeting the problem as it applies especially to our game and to our players.

Baseball today is completely integrated insofar as play on the field is concerned. Major league baseball is integrated on the playing field, in the stands, in the hotels and restaurants which the clubs frequent while on the road, and baseball is integrated also in its scouting, its administration, and to some extent with its umpires.

This has all come about as a national process. The reason for such integration, particularly on the playing field, is to me a very simple one. Baseball is a competitive sport. The equality, the ability of play, the high standards of performance, are and must be the only criteria which baseball can recognize.

In the development and the evolution of this policy, baseball has at times of course collided with local custom and tradition in some areas. This has involved restrictions and racial discrimination of players off the playing field and not on the diamond. But by and large we have resolved successfully these problems through mutual understanding of all of the parties involved—inspired I am convinced by the very fine example of assimilation and desegregation displayed by the players themselves who are concerned only with the competence and the ability and the quality of performance of their teammates.

I can give specific examples if the committee cares to hear them of situations in which the problems have been met. Occasionally the problems have assumed—and this has been only very occasionally—have assumed such proportions as to reach the governing office of baseball. In such cases there has been no hesitancy and there has been no equivocation. Decisions have been made and have been accepted on the basic precept that in sports competition on the playing field and diamonds of this country and the world, ability is the only criterion; and race, creed, and color have no place whatever in the picture.

As far as the minor league structure is concerned, a similar pattern exists. However, there have been some exceptions concerning integration of fans in the stands and the housing of the players off the field. However, today, insofar as the players are concerned, there is in the minor leagues complete integration. That is on the field I am talking about. I am frank to admit to you that baseball has paid a price for this in the loss of certain clubs that might otherwise be fielding a team today. I am prepared to develop this in some detail if the commitee so desires.

Finally, I would like to observe as a citizen that the denial of equal opportunity through the exercise of discrimination is, as far as I see it, in conflict with American ideals as I understand it, and that certainly has been the credo of baseball. I think it should be the guiding principle in every line of human endeavor.

I will be happy, gentlemen, to respond to any questions that the committee may have.

The CHAIRMAN. Thank you, Mr. Frick.

I am sure the committee members here, and others who are on their way, will have some questions.

The Chair is going to depart a little bit this morning from its usual procedure of asking questions and I am sure the committee won't mind this at all.

Senator Hart was the vice president of the Detroit Tigers, and he is an officer and director of the Detroit Lions, so he has been very active in his community in both baseball and football. I am going to depart from the usual procedure with the questioning. We feel he is a little more knowledgeable about this than the rest of us at this time.

Senator HART. Mr. Chairman, you are very kind.

Mr. FRICK. I might say, Mr. Chairman, I also feel very much at ease because I have been questioned by Mr. Hart many times.

Senator COTTON. Senator Hart has never given any of his Republican colleagues a free pass.

Senator HART. We know that the self-reliance is there. We wouldn't want their moral fiber——

Senator COTTON. Touché.

Senator HART. This is one morning I turned up without any questions anyway.

You made the point that ability was the only criterion that could be applied to a man in a competitive sport. Wouldn't you agree that in theory that is the way it should be all across life?

Mr. FRICK. I think I made that very clear in my broad statement, Senator, that I feel that way. However, I think I should point out to you that in considering this question, baseball and competitive sports do not represent quite the problem that others do, because they very naturally tend to emphasize ability, if they are fighting for championships in competition. Yes, that should apply all the way through.

Senator HART. The only reason I underscore your very effective statement is to remind any reader of the record that that is the way he would like to be judged by his fellows, as an individual who is good or bad, not as an Irishman or a baseball player or a Negro.

Mr. FRICK. I subscribe to that thoroughly.

Senator HART. You commented that integration on the ball field has been a success because of the players themselves. I know you remember the difficult days when this question had not been resolved. And you remember all of the fears that were expressed about what would happen—what would the Alabama shortstop do with a Negro second baseman. And as I think would be true all across the line, when it happened it was discovered that these fears were groundless.

Wasn't that the experience in baseball?

Mr. FRICK. That was a very interesting thing, because when we went into this field we, like everyone else, were fearful of what might happen. You are quite true in your statement. We approached it with kid gloves, so to speak.

And I think possibly through that fear we were a little reticent to take all the steps that eventually were taken.

But the strange part of it was that once the thing was brought about we had no reaction at all. We have no trouble.

We were afraid something would happen along the field because baseball is a competitive game. It is a contest game. We were afraid

something would happen between spectators and players. We were fearful of many things.

Nothing happened.

Senator HART. I think this should be regarded as a very big aspect of the problem that we are considering here. In the past few days we listened to recitals of all the tragedies and horrors that would occur if people were permitted freely to enjoy public accommodations.

I wish those who express this concern would think again and remember the lesson of baseball, because in a restaurant nobody is going to come into you with spikes, or throw at your head. And yet in this intense competitive setting men, whose regional backgrounds were vastly different, and I suppose who were reared with the notion that they would never tolerate this kind of association, have discovered, once exposed to it, that life went on as usual.

And I know that the game is better for it.

You can in truth claim to be the American game, because all Americans, based solely on ability, are permitted to participate. And that is the way life in this country should be.

I think the baseball story is a vivid one, and you and those who brought it about certainly should be congratulated.

Mr. FRICK. Thank you.

Senator HART. Mr. Chairman, thank you very much.

I won't ask about all the horrors of trying to find hotel rooms, and restaurants, and shall we go to Arizona and leave Florida, and all of the rest of that. I think that is a story in itself.

The CHAIRMAN. Mr. Frick, the committee might be interested in some of the problems that were involved in the training camp matters as to whether the housing and the integration in public places caused——

Let's put it this way: Did it cause same baseball training camps to move?

Mr. FRICK. Senator, the problem—let me preface that by saying that I would not like to limit my problems only to training, because we had problems in our other cities, in the cities where they weren't particularly serious. But at first we had problems——

Do you want me to talk first about the training camps?

The CHAIRMAN. Yes.

Mr. FRICK. We have had serious problems at training camps, what appeared to be serious problems, in housing and feeding; nothing else. Never any question in the training camps as to the use of colored ballplayers on the field, Negro ballplayers. No question of that at all. That was accepted.

We did have some difficulties in hotels and in restaurants.

If I can mention some places I will tell you, for instance of the Philadelphia Phillies who trained at Clearwater. They stayed at a hotel where they had stayed for some years, and the hotel decided they would rather not have—it was a resort hotel—they would rather not have colored ball players in the hotel. There was nothing for the club to do. They accepted that for a little while until they could look around, and they said:

All right, we will not make a fuss about this thing, but now we have found a motel outside of Clearwater where we can go, and where they will accept our players.

Because in spring training, gentlemen—let me explain this: It is particularly important to have your players together, for reasons all of you can see; for reasons of training; for reasons of player control; and for reasons of watching diet, and all that sort of thing. It is very important.

So the Phillies moved from this one hotel to a motel.

While they were away the management of the hotel where they had been conducted a survey among the churches and the businessmen of Clearwater. Within 15 days the Phillies were invited back to the hotel, and presently are there, with all their players, without any trouble.

We have had some other places where they have moved.

The St. Louis Cardinals, I believe, I am sure, moved from a hotel in St. Petersburg to a motel on the beach where their players could be cared for.

The New York Yankees went from St. Petersburg to Fort Lauderdale. Before they went over they investigated and the atmosphere had been cleared there, so they could bring them on.

Don't misunderstand me. I don't imply that the Yankees left St. Petersburg because of this question. They left St. Petersburg where there was not integration in the hotel and they went to Fort Lauderdale where there was. They did not leave St. Petersburg because of that.

That, gentlemen, has been the story of the training camps all the way through.

The CHAIRMAN. Will you go on?

Mr. FRICK. I simply want to say that this problem of integration in the hotels and restaurants was not confined to a particular area; it was not confined to training camps, it was true on the road.

For instance in St. Louis, when we first brought colored players into the major league, the hotels in St. Louis where the ballplayers stayed said that they did not care to entertain Negro players. In that instance a colored hotel in St. Louis was located and the players stayed there. Within a very short time the hotel changed their mind and said, Yes, they had made an investigation and they said we could come in.

At that time, then, the colored players, for a little while said, No, they liked it where they were and they would stay there. They eventually came back.

Now it is a funny thing: once you know you can do a thing, go into a place, possibly you don't do it. The important thing is the knowledge that you may, if you wish.

Once they could do that, if they wished, I think it was right that they use their own judgment.

We had several instances of that in the early days, in hotels. But as of today—and I recently called, because those records, we don't keep records of this sort, but I called because I know—in these particular cities where we had some trouble, I called the Baltimore club, I called the St. Louis club, and I called the Cincinnati club, and I called the Houston club. Those are areas where we had had, not trouble, because we never had trouble, but where we had these incidents. And as all of you know, all those places are integrated as to hotels and dining facilities.

The CHAIRMAN. How many colored players are there in organized baseball? Do you have that offhand?

Mr. FRICK. Senator, I am glad you asked that question because I want you to know this: That I haven't the slightest idea, and I don't think there is any man in the world who can tell you.

We keep in my office records of ballplayers since time began. We keep their batting averages; we keep their fielding averages; we keep their age; we keep their place of birth; we keep all the changes of contract; we keep everything else. But there is not a record in baseball, to my knowledge, anywhere that indicates a man's color, his religion, anything about that.

And to make sure that I was right—I thought I might be asked that question—I wired Mr. Shaughnessy, who is the acting president of the National Association—the minor league organization—since the death of Mr. Shockman, and I have this letter from Mr. Shaughnessy:

DEAR COMMISSIONER: Answering your inquiry, since its inception 62 years ago the National Association has maintained a record of each player signed by minor league clubs. The record consists of such data as the player's name, home address, and social security number, as well as the dates and clubs with which he signed contracts, the clubs to which any assignments of his contract might have been made, etc. It contains no entries on the player's race, color, or creed. I therefore would not be in a position to furnish any information as to the religion of a particular player or players nor could I produce any data or number of minor league players who are of the black, white, or yellow races.

I do know that we have a lot of people. My guess would be that in the major leagues we have over a hundred, and this is just a guess.

The CHAIRMAN. What is the total number of players in the major leagues?

Mr. FRICK. We have 20 clubs in each league, and each club has 25 players.

The CHAIRMAN. Approximately 500, as an average?

Mr. FRICK. Yes.

The CHAIRMAN. Generally speaking, maybe 1 out of the 5 would be——

Mr. FRICK. I wouldn't guess. Some clubs have five and six. There are none of the clubs that do not have at least one or two. Some have five or six. I think the San Francisco Giants have at least eight or nine. Some other clubs have fewer.

And again, it is hard to say because these men, Mr. Chairman, are selected for one reason: Because they can play second base, or they can play the outfield, or they can pitch, or they can hit, better than anybody else. And the funny part of it is that that is accepted by participants of both sides.

A colored boy who is sent down for seasoning doesn't object if he knows that the white boy who is taking his place can play better than he can, and he can recognize that. And, vice versa, the white boy who is sent down for training while you keep the colored boy, he accepts all this.

The CHAIRMAN. What is the situation: Is the Southern Association now operating?

Mr. FRICK. No; it is not.

The CHAIRMAN. When did that fold up?

Mr. FRICK. I believe it has been closed, I think, 1 year; possibly 2. Certainly last year it was not in operation, and this year. It has been 2 years since it operated. I am not sure.

The CHAIRMAN. I am not sure about this question, either. It is only what I read from the sports pages; and some nights when I go home that is about all I read. I don't want to repeat what I listen to all day.

There was some suggestion made that they did have to fold up. There are many other things, I know, in the minor leagues, but segregation was one of the problems involved.

Do you have any comment on that?

Mr. FRICK. I think that is a fair statement on limited issues; yes. As you said, there are many other elements in the systems of a minor league club. The part where segregation played a part, if any, is simply that within two of those—I think at that time there were three; presently only two—of those States there were State laws which prevented the mixing of colored and white ballplayers on the field.

Minor league clubs today are dependent on the major leagues for support, financial support. The minor leagues are not self-sustaining. That support is given in turn for the development of ballplayers through what we call the working agreement.

All these clubs have to have working agreements in order to exist. When they would not take colored ballplayers to train, we would not give working agreements. It was that simple. Consequently the Southern Association, together with other things, did close up and stop playing.

Some of the cities are presently back in because they were straightened out. Little Rock is back again this year. The situation was solved in Arkansas. Atlanta, after being out a year, is back again. The situation was solved in Georgia.

We still have three States—I think there are three—in which they have very definite laws. And baseball is not out to test laws or to go against rules or anything of the sort.

The CHAIRMAN. And these laws, so that we will get this in perspective, were as to the mixing of players on the field?

Mr. FRICK. That I understand is true, Senator.

The CHAIRMAN. As I understand it, in the Southern Association prior to folding up, at least in recent years, there hasn't been any so-called segregation in the stands, or with the spectators, or things of that kind. But it was the law that would apply——

Mr. FRICK. Segregation in the stands would not bother us particularly. That would be a local problem. Our problem was the inability to send colored ballplayers down there for training, for development. And we are using colored ballplayers, and they are important to us. So we have to take our clubs places where they can be used.

It is just that simple.

The CHAIRMAN. How many teams were in the Southern Association, do you recall?

Mr. FRICK. There were eight.

The CHAIRMAN. Eight?

Mr. FRICK. There were eight teams. And some of them are now in existence in other leagues. Chattanooga and Nashville are pres-

ently in other leagues. Little Rock is back in. Atlanta is back in.

The clubs that did not return, have not returned—I think I can remember them all—are Shreveport, New Orleans, Birmingham, Mobile, Montgomery. Those are about the ones.

Senator PASTORE. When you say they have returned, you mean that now they permit in those localities the mixing of players?

Mr. FRICK. Oh, yes.

The CHAIRMAN. And apparently the ones that haven't returned are the States that still have the law?

Mr. FRICK. I think that is correct.

The CHAIRMAN. Maybe they wouldn't want to return.

Mr. FRICK. I don't know. I can't guarantee they would return if there was no law. I can only testify as to what has actually happened.

The CHAIRMAN. I wouldn't want to suggest that this was the only reason, and the only thing pertinent to this is the problem in accommodations in training camps. This apparently was one of the reasons. I know the minor leagues had all kinds of problems.

I remember years ago on this committee when the distinguished chairman of the committee was Ed Johnson. He was president of the Western League. Once a year we would hold a meeting with everybody to see what we could do about the minor leagues. There wasn't much we could do, but we could furnish everybody a forum in which to talk about it.

We finally did do something with the FCC on the question of broadcasting a major league game, your group, at the same time the hometown was playing. I will never forget one day they brought in five security guards who were working at the ballpark, and they had a radio room and were charging 50 cents for people who were disgusted with the home team to come down there and listen to the Yankees play.

This was the last straw. They had a place under the stands where they charged 50 cents and you could come down and listen to the big league game while the home team was playing.

So I appreciate the fact that the minor leagues have had their problems.

In the Pacific Coast League, there has never been, as I remember it—and maybe you can verify this—any problem of segregation or integration there.

Mr. FRICK. To the best of my knowledge, no. I am sure there hasn't, or I would know about it.

The CHAIRMAN. For the purpose of the record, when we talk about minor leagues, you have certain classes, don't you, Class AA——

Mr. FRICK. Triple A, Double A, and A.

The CHAIRMAN. And the Southern Association was——?

Mr. FRICK. Double A.

The CHAIRMAN. The Pacific Coast was——?

Mr. FRICK. Triple A.

The CHAIRMAN. And the International League?

Mr. FRICK. Triple A.

The CHAIRMAN. And others were——

Mr. FRICK. Other classifications.

The CHAIRMAN. Sometimes even State leagues.

Mr. FRICK. Yes.

The CHAIRMAN. Do all of the major league ball clubs have what I term, for want of more knowledge on this, farm clubs?

Mr. FRICK. Yes.

The CHAIRMAN. Without exception?

Mr. FRICK. Without exception.

The CHAIRMAN. Some of them have more than others?

Mr. FRICK. No. They used to, but now we let each of them have five. They have working agreements, one Triple A, one Double A, and three A's. So they total five.

They may have more, but they can't have less. That is the only way we can keep our minor league structure going.

The CHAIRMAN. So that the future success of major league baseball largely depends upon the continuation of the so-called farms to feed in the players to the major leagues?

Mr. FRICK. It is very important for the development of players. Your average youngster, when you sign him to contract, is not ready for major league play. He has potential. He has latent abilities. We need the minor league clubs to develop him and bring him up to the state of perfection where he can perform in the major leagues. In that way they are absolutely essential to us.

The CHAIRMAN. In your statement—you might want to elaborate on this somewhat—you said baseball has paid a price in this field. Would you elaborate?

Mr. FRICK. I mentioned that. We paid a price. We had to move out of some towns that we thought were good baseball towns in the Southern Association because we ran head-on into a law. We were not fighting the law and didn't propose to. We had a job to do, and I suppose the State had a law to enforce. So when the force met the bodies, we went out. So we lost some good talent, yes. That is the price we paid.

The CHAIRMAN. Have you had any incidents in this category in transportation of baseball teams?

Mr. FRICK. No. We don't have any transportation problems. We haven't had. We do a great deal of chartering of planes; and, of course, they can travel on planes. We use them in spring training. And we use chartered buses, because that is the best way for short hauls. We have no transportation problems.

The CHAIRMAN. Did you have, some years ago, when the so-called Jim Crow laws were existing in the South?

Mr. FRICK. I understand that there were places in spring training where they had some little difficulty in the diners. I cannot put the finger on those because I have just heard that. They couldn't have been too serious, else I would have known about it.

But I think there was some difficulty there.

When they traveled by train, the pullman was a leased pullman. In the spring it requires two or three pullmans, and those were leased, so to speak, charters, and we had no problem there because our boys could go on.

I did understand that from time to time they had a few arguments and discussions concerning service in the diners. But, as I say, they couldn't have been too serious, else it would have reached me.

The CHAIRMAN. Lately there has been none?

Mr. FRICK. Lately there has been none.

The CHAIRMAN. We have long since done a job in the field of interstate transportation, including air travel, railroads, and buses. Of course, you wouldn't run into the problem because usually you had your own chartered planes.

Mr. FRICK. We chartered planes. We had no problem.

The CHAIRMAN. The Senator from Rhode Island.

Senator PASTORE. First of all I express my regret that I wasn't here when you read your statement, Mr. Frick. If you have answered this question in your statement, I shan't pursue it.

I have only one question and it is this:

Much of the opposition to this type of legislation that we are discussing under S. 1732 emanates from an argument that this violates or is inimical to a way of life which has been accepted over the years in a region of our country.

In these localities where you have mentioned players, where originally there was resistance, has the matter adjusted itself? Have you run into any difficulty? In other words, when we begin to accept the change, what do we mean? Do we mean an accepted adjustment that works out well or do we run up against a conflict that sometimes leads to misunderstanding and regret, and to violence?

Mr. FRICK. Senator, I think I can best answer that question for you by reading a letter which I received under date of July 13, from Mr. Ray Winder, the general manager of the Arkansas Travelers Baseball Club—this is the corporate name of the Little Rock club. I want you to understand this letter was solicited.

I knew I was coming before this committee and I wanted information. I didn't know. I had heard rumors but I had no reports officially as to just what happened.

I read you now:

The Southern Association of which Little Rock was a member for many years never did integrate at any time. We did considerable groundwork and study before applying for a franchise in the International League. We were assured by the four larger hotels in the city that they would take care of all visiting Negro players in the rooms, coffee shops, and dining rooms exactly as they would provide for the white players. We selected the Hotel Marion because of its all night coffee shop.

The local NAACP field secretary requested that we integrate the park. We answered them that we would sell tickets to the general public. When the board of directors of the club met, it decided to integrate the park on opening night, April 16. No public mention of this decision was made although local TV and radio sports announcers and newspaper sportswriters were aware that the decision had been made.

The park was quietly integrated on opening night with 6,966 paid admissions—

That by the way, gentlemen, I think is the record attendance in Little Rock—

of which several hundred were Negro patrons. There was no trouble, no commotion, and no complaint, except one lone man with a sign who moved up and down in front of the park. No one paid any attention to him. He tried it again the second night for a short time and then gave up.

Negro players on the home team and visiting teams have been applauded from the start, and sometimes louder than the white players. Visiting managers report better treatment here in hotels and coffee shops than elsewhere. One visiting team has as many as six Negro players.

Our Negro players are popular with our fans. They came here in fear, but a large group of white fans met the team on their arrival here from spring training and took them on tour in private cars over the city. They are much at home now.

We sold $114,330 worth of preseason tickets early in the spring. Tickets were

sold in 90 cities and towns in Arkansas outside of Little Rock. Enthusiasm and support have been steady and general throughout the State.

Integration in Little Rock has been smooth. It came about naturally and is a normal part of Arkansas baseball now.

That should answer your question.

Senator PASTORE. It certainly does.

I didn't know you had the letter and I asked the question cold. I didn't know what your answer was going to be. But the reason I am explaining this is because I have just been passed a question by a member of the staff, and I don't want you to think I was in on any conspiracy.

The question here is:

Who threw out the first ball at that game? Do you know?

Mr. FRICK. Yes, I know. Governor Faubus.

The CHAIRMAN. What year was that?

Mr. FRICK. This past year. You see, Little Rock was out of baseball and got back in just this last year, in the International League. This was the opening game.

Senator PASTORE. That is all that I have to ask.

The CHAIRMAN. Senator Monroney?

Senator MONRONEY. I have no questions. I appreciate very much having the baseball commissioner here to tell us some of these problems and successes that occurred in baseball.

The CHAIRMAN. Senator Morton?

Senator MORTON. If a fellow wanted to make a little bet, is there any way a fellow can beat the Yankees?

Mr. FRICK. Mr. Giles will tell you the National League clubs.

Senator MORTON. That is all, Mr. Chairman.

The CHAIRMAN. The Senator from South Carolina.

Senator THURMOND. We are glad to have you with us, Mr. Frick.

Mr. FRICK. Thank you, Senator.

Senator THURMOND. This desegregating was done on a voluntary basis, was it not?.

Mr. FRICK. Oh, yes.

Senator THURMOND. In other words, it was not forced desegregation but on a voluntary basis.

Mr. FRICK. The only compulsion was our inability to furnish working agreements to clubs in these areas unless there was—let's say we were desegregated because we had ball players to train, and we couldn't send them there. So, there was pressure to that extent. It was one of those "I will give you this if you give us that" deals.

Senator THURMOND. In other words, there was no law that brought it about?

Mr. FRICK. No.

Senator THURMOND. Purely voluntarily. The players agreed to it and they were satisfied. When things come voluntarily in the hearts of the people then it is lasting, isn't it?

Mr. FRICK. I think that is generally true.

Senator THURMOND. If it is forced by law, it creates tensions; if you force people to do what they don't want to do, that does create tensions, doesn't it?

Mr. FRICK. Was that a question or statement?

Senator THURMOND. Do you want me to repeat it?

Mr. FRICK. No. I said, did you ask that as a question or did you make that as a statement?

Senator THURMOND. I asked that as a question. If you want to force people—it is just like the 18th amendment. People rebelled against it, public sentiment rose against it, and it resulted in repeal, did it not?

Mr. FRICK. I think you have a tougher job if you have to force people to do something; though once in a while you have to.

Senator THURMOND. In our State, I believe Frank Robinson and Joe Gaines both were Negro players who played on the Columbia team. I don't know whether you remember.

Mr. FRICK. I remember very well. We have colored players in our State; we have baseball clubs in our State.

Senator THURMOND. They have all gotten along fine as far as you know?

Mr. FRICK. To my knowledge.

Senator THURMOND. There have been no complaints?

Mr. FRICK. No, sir.

Senator THURMOND. Speaking of equality, I presume you believe in equality of sports, too. Would you favor equality of sports by putting baseball under the antitrust laws the same as football?

Mr. FRICK. That is a loaded question, Senator.

The CHAIRMAN. Do you want to confer with your counsel on that?

Mr. FRICK. I don't think it is necessary. I have the same answer for that.

The reason I laughed, Senator, is not because you embarrassed me, but we have always had in baseball one pet phrase that we use. We fold our arms and stand back and raise our heads and say, "We rely on the *Toolson* case." The *Toolson* case is the one which kept us out of the sport.

Senator THURMOND. Do you favor going under the antitrust laws?

Mr. FRICK. No, sir.

Senator THURMOND. You do not?

Mr. FRICK. No, sir.

Senator THURMOND. Then, you do not believe in equality of the sports, do you?

Mr. FRICK. No, I don't think we are subject to it. I don't think we are subject to the antitrust laws. We have asked, if everybody is brought under the antitrust laws, yes. But we think we are a sport rather than a business. And we think we do not affect the economy of the country.

We have had long arguments with Senator Hart and a lot of other people on that one. It is a long record on that.

Senator THURMOND. Sometimes it depends on whose ox is being gored, doesn't it?

Mr. FRICK. I suppose it would influence your thinking a little bit. [Laughter.]

On your antitrust laws, what we have advocated, Senator, is not that we go under the antitrust laws, but that the commissioner of baseball has advocated and has appeared before both the Senate and House committees and advocated that football be given the same thing we have, not that we be carried with football, but the football point came along after we did.

The CHAIRMAN. Baseball players have always said they wanted football and baseball to be equal.

Mr. FRICK. We want football and baseball to be given the same treatment. However, I am not on the committee.

Senator THURMOND. At any rate, you don't want to be put under the antitrust laws like football do you?

Mr. FRICK. No, sir. I want football to be——

Senator THURMOND. That is all, Mr. Chairman. Thank you.

The CHAIRMAN. The Senator from Alaska.

Senator BARTLETT. Thank you.

There will be no questions from me, Mr. Frick. Obviously your appearance here has been very helpful to the committee.

I do want to say though, Mr. Chairman, that your revelation that the Senator from Michigan is involved in the world of athletics is as surprising to me as if you had said that I am Lou Diston's manager.

The CHAIRMAN. Any further questions?

Senator HART. As you can tell from my build, I was responsible only for their legal status, not their playing caliber.

Mr. FRICK. Mr. Chairman, I have read to you two communications. Do you want them for the record? Should I leave them?

The CHAIRMAN. We would like to have them.

Mr. FRICK. You are quite welcome to them.

Senator HART. Mr. Chairman, as long as the opportunity was given me again, it is repetitious——

The CHAIRMAN. You are getting special treatment this morning because of your status.

Senator HART. I should keep quiet.

The CHAIRMAN. There is a little discrimination going on here.

Senator HART. You would assume that I understood this game. But it is a serious point. As you leave, commissioner, I would like to make it again. Today there are some very great Negro stars. Some of the outstanding players of baseball are Negroes. For a long time the game had a color line, and we are not kidding anybody. During all that period of time potentially great stars were never seen, the game suffered, the fans suffered, because there was that loss of skill. And then the game came to adopt that one criteria that you mentioned in your statement: the man's individual ability, and we found these great stars.

I just want to make a point, that that is true all across life; that to the extent that there is a color line, America loses great stars, whether it is in science, medicine, the arts, business, or industry. And America suffers, just as the game lost something because of so many years Willie Mays couldn't get into the park. And, I think this is a point that the committee should take very seriously.

Mr. FRICK. And I must say, Senator, that as an individual, I agree with that 100 percent. I think that people are given opportunity. I don't mean that the are given the privilege or license, but if an American citizen is given every opportunity to progress as rapidly and as far as his abilities will permit, and at the same time is permitted the training, offered the training and the education and the other things that are required to meet that goal, that we haven't any problems.

Thank you.

Senator PASTORE. I think the Senator from Michigan ought to add a short rejoinder to that. I agree with him a hundred percent. But the record does show that once we did remove the color line, we didn't run into the controversies that are being predicted here today, and we didn't have people going around screaming that they were being deprived of property without due process of law under the 14th amendment.

The minute we began to recognize that people were people, regardless of color, and that they had a contribution to make the grandeur, the glory, and to the development of America, the minute we began to recognize that, all this irritation began to settle and people began to find a new way of life that was a real way of life and the true American way of life.

Senator HART. And another rejoinder: we didn't poll the ballplayers to determine whether they wanted to do this or not.

The CHAIRMAN. The Cleveland Indians have shown up.

The Senator from Ohio.

Senator LAUSCHE. Mr. Frick, you are the baseball commissioner; I am the Senator. Would you change positions?

Mr. FRICK. No, sir. [Laughter.]

Senator LAUSCHE. You remember that I was your competitor for the post which you now hold when you were appointed?

Mr. FRICK. I believe it was 1951, Senator. I remember very well that your candidacy had been suggested. I was going to say you were a candidate. I don't believe you were at all, but your name had been suggested.

Senator LAUSCHE. I tell you now that I met in New York with Stoneman, O'Malley; and Topping was not there——

Mr. FRICK. Webb, I think, was there?

Senator LAUSCHE. Webb was there.

Mr. FRICK. I know about that meeting.

Senator LAUSCHE. I got to the meeting a half hour before time. Ohioans didn't know that I was in New York.

I walked around the block but was afraid that somebody would identify me, and I went into a Presbyterian Church that had the door opening saying, "Come in—Welcome."

The organ was playing hymns. I went in and sat down and no one was there. I picked up a hymn book and it said "Flee not from thy responsibility; fulfill thy duties; stay at thy post." And, I had then come to me the thought, "Shall I quit the governorship and flee from that job and take this assignment if it is available to me?"

We had the meeting, and I went back to Columbus and issued a statement that "I don't believe the job is available, but even if it is, I will not take it."

Did you know that?

Mr. FRICK. Yes; I know that. I didn't know about your going into the church. [Laughter.]

I didn't know about the power of prayer, Senator, but I know all the rest of it.

Senator LAUSCHE. I don't know whether I made a mistake or not. But when you tell me that you would not change posts, I think I made a mistake.

Mr. FRICK. I think Senator—and this goes for all of you—I would rather have the problems, this great problem that you face—I would rather handle it for baseball than sit in your positions and try to handle it.

Senator LAUSCHE. You have a higher task, I know.

Tell me this: In the bill before us there is no provision operating against labor unions in making it obligatory upon them to accept as members persons regardless of race, creed, or religion. Would you want to express an opinion whether it is proper to have the bill embrace all other activities and not embrace labor unions?

Mr. FRICK. Senator, I do not think it would be becoming to the commissioner of baseball to try to advise the Senate any more than I want the Senate to advise me about my business of baseball.

Senator LAUSCHE. Good enough. I will not press that.

Thank you very much. I am glad that you are happy in your post. [Laughter.]

I might say to you that I was told that I had 12 votes——

Mr. FRICK. That was enough.

Senator LAUSCHE. And I needed one more.

Senator PASTORE. I think the Senator——

Senator LAUSCHE. Be careful what you are going to say, Senator Pastore. [Laughter.]

Senator PASTORE. We of this committee are absolutely grateful that you made the decision that you did make, because otherwise we would have been denied your talents to meet with this very, very serious problem.

Senator LAUSCHE. All right.

Senator THURMOND. Mr. Chairman, I want to say that I wish we had more Lausches in the Senate.

Senator LAUSCHE. That is all that I have.

The CHAIRMAN. Mr. Frick said he didn't want to give us advice, but I want to assure you, every Senator knows how baseball should be run. We all are players—or we think we are.

Senator Lausche, in answer to your last question, one of the witnesses tomorrow will be Secretary of Labor, Mr. Wirtz, so we will have a chance to go into that question.

Are there any further questions of the commissioner? If not, we thank you very much for coming.

Mr. Frick, we are glad to have seen you again.

We will now hear from Mr. Rozelle and Joe Foss, the commissioners of the National Football League and the American Football League.

We are glad to have you both with us.

I think by listening to the statement of Mr. Frick and some of the questions by the committee, you probably have a basic idea of what we are talking about.

Do you have anything to add to this, or give us other examples in the field of football?

I call on Mr. Rozelle first, because I understand you have no prepared statement; do you?

Mr. ROZELLE. Very brief, Mr. Chairman.

The CHAIRMAN. I didn't see it in front of you.

Mr. ROZELLE. I don't have a prepared statement. I have a few preliminary remarks.

The CHAIRMAN. We will be glad to hear from you on this matter. You have a rough idea of what we are talking about, and can tell us how this might apply to football.

We will be glad to hear from you.

STATEMENT OF PETE ROZELLE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE

Mr. ROZELLE. Mr. Chairman, and members of the committee:

Negroes perform on all 14 teams in the National Football League. The only prejudice I am aware of on the part of the 14 clubs is finding the finest 37 players that they can to represent them on the field.

During the course of the season some 600 players would compete in our league. I do not know how many of them are Negroes. I do, however, because of a recent inquiry made of our public relations office, know that in our professional star game played in Los Angeles last January, where 66 of our finest players compete, in the last January game 19 were Negro.

We have no problem relative to seating in any of our 14 cities.

I would say that the only problems encountered in the National Football League might lie in the area of preseason games played in certain southern cities, and I believe that this situation has improved greatly in recent years. This would be in the area of accommodations for the team, and also in seating in the stands.

However this has, as I say, improved considerably in recent years. This would be during our training season.

As for training camps, no problems exist there. The 14 teams train normally on small college campuses throughout the country.

The CHAIRMAN. And they are usually geographically not in the southern area?

Mr. ROZELLE. For the most part that is correct.

The CHAIRMAN. Could you tell us briefly what problems there might have existed in these preseason games, and in what areas?

Mr. ROZELLE. It would largely lie in housing the team together. In the past it has been necessary for some of the teams to have the Negro players, when they spend normally just a day, or 2 days at the most, in one of these preseason cities, accommodating the Negro players separately from the rest of the squad.

And the other problem has been in integrated seating at the games.

The CHAIRMAN. Are there some places that still have segregated seating?

Mr. ROZELLE. Most teams explore this rather carefully before they agree, before they contract for a preseason game in a city. But problems have developed. There have been times in the past where they felt the situation was clear, and then perhaps a week or two before the game the situation had to be clarified.

The CHAIRMAN. In those cases I suppose that there would be some advance people go down to see what they could work out in the particular city or town where the game was to be played?

Mr. ROZELLE. That has been done; yes.

The CHAIRMAN. How many of those preseason games, generally speaking, are played in the areas where this might occur?

Mr. ROZELLE. It has become quite limited. I would think that this year, and I am merely estimating, there may be 5 or 6 games of the 37 or 38 that we will play.

The CHAIRMAN. What about eating facilities? Has that been one of the problems?

Mr. ROZELLE. They normally eat together in the hotels where they are staying.

The CHAIRMAN. Suppose they had to stay at another hotel?

Mr. ROZELLE. Then they would not eat with the squad normally except for pregame meals when normally arrangements are made for them to eat together at the hotel where the main body of the team is staying.

The CHAIRMAN. But it would normally be, as I understand it, in a private dining room rather than in the public dining room?

Mr. ROZELLE. That is correct.

Of course that is the case elsewhere, too. The teams normally——

The CHAIRMAN. You keep them all together and get a private room and they eat there?

Mr. ROZELLE. Yes.

The CHAIRMAN. I have no further questions of Mr. Rozelle.

Senator Pastore?

Senator PASTORE. I have no questions.

The CHAIRMAN. Senator Morton?

Senator MORTON. No questions.

The CHAIRMAN. Senator Monroney?

Senator MONRONEY. You mentioned the segregated seating. Is that the rule of both leagues, that they do not have segregated seating at their games?

Mr. ROZELLE. We do not have it in any of our 14 cities.

Senator MONRONEY. When you play an exhibition game, a preseason game, you insist on the same desegregation; is that correct?

Mr. ROZELLE. That is correct. Problems have developed.

Senator MONRONEY. Players are of both races and they are not segregated on the field; therefore there is no sense in segregating in the stands?

Mr. ROZELLE. Yes.

Senator MONRONEY. There has been no difficulty in transportation of any kind?

Mr. ROZELLE. Normally it is by chartered plane. There has been no problem to my knowledge.

Senator MONRONEY. When you handle it through local transportation, from the airport in, you have your own transportation?

Mr. ROZELLE. Chartered bus, normally.

Senator MONRONEY. So your problems racially are rather minor——

Mr. ROZELLE. That is correct.

Senator MONRONEY (continuing). In all areas.

The players are treated exactly the same, are they not? In other words, the white player and colored player are given the same salary, prerogatives, and——

Mr. ROZELLE. Depending upon their ability, yes.

Senator MONRONEY. That is all that I have.

Senator PASTORE. May I follow that up?

The CHAIRMAN. Go right ahead.

Senator PASTORE. The problem is a minor one because you make it a policy——

Mr. ROZELLE. That may contribute to the fact that our problems are minor.

Senator PASTORE. I am not trying to make an issue of this. But to get the record straight, you avoid situations by refusing to go to those places which would develop into some offensiveness to some of your Negro players who are stars and are considered, so to speak, members of the family?

Mr. ROZELLE. That has been the policy of all 14 clubs who are responsible for scheduling their own preseason games as against the commissioner drawing up the schedule for the regular season; yes.

The CHAIRMAN. You may be loaded now with 14 clubs; but was there any time that you recall, or do you know of any such instance where a franchise was applied for from an area where you might have these problems, where it was granted?

Mr. ROZELLE. Where the franchise was granted?

The CHAIRMAN. Yes.

Mr. ROZELLE. I am not aware of any problems of this sort arising in the awarding of franchises.

The CHAIRMAN. Suppose there is one of these places where the law requires segregation who have a city or urban center where they thought they might be able to support a pro football team. You would have the problem then, wouldn't you?

Mr. ROZELLE. I don't believe it would be a problem, because we would not grant the franchise.

The CHAIRMAN. That is what I wanted to know.

Mr. Foss, do you have anything to add to this?

Mr. Foss. Mr. Chairman, members of the committee, I have a real short statement here, a two-page one, that I will run through.

The CHAIRMAN. I think we should clear the record.

That would mean, Mr. Rozelle—and I don't know that there has been any such application—if a place that had segregation could support a pro football team and made application, you could not grant it for this reason?

Mr. ROZELLE. In my opinion the members of the league would not approve of a franchise for such a city.

The CHAIRMAN. This would deprive those people who wanted to see pro football of that team, would it not?

Mr. ROZELLE. That is correct. If all other factors were equal and we would be willing to grant a franchise for such a city, yes.

The CHAIRMAN. I understand.

But this would be one problem that would be involved if there were other factors in which the franchise looked like it might be desirable?

Mr. ROZELLE. That would be a decided negative for such a city.

Senator LAUSCHE. Mr. Chairman, may I ask a question?

The CHAIRMAN. Yes.

Senator LAUSCHE. Do you hire as football players all men, regardless of color, whom you feel will improve the strength of your team?

Mr. ROZELLE. Without question.

Senator LAUSCHE. That is all.

The CHAIRMAN. All right, Mr. Foss.

STATEMENT OF JOE FOSS, COMMISSIONER, AMERICAN FOOTBALL LEAGUE

Mr. Foss. The American Football League came into being in 1960 as an integrated sports body. It, therefore, follows that our problems, if such is the proper word, on this question have been minimal.

The only question asked of an athlete by our coaches is: "Can you do your particular job better than anyone else we have?"

The percentage of Negroes on individual teams has run as high as one-third of the total 33-man roster. Such was the case with the Buffalo Bills last year. The percentage was even slightly higher with the Oakland Raiders the year before.

At no time since the league's inception has there been a team without Negro representation. This was not by design. But the opportunity was given and the individual player earned the job.

A large percentage of the most publicized players in our league are Negroes. Players such as Abner Haynes and Curtis McClinton, of Kansas City; "Cookie" Gilchrist, Ernie Warlick and Elbert Dubenion, of Buffalo; Ron Burton, of Boston; Paul Lowe, of San Diego, and Art Powell, of Oakland, to mention a few.

Negroes have, in fact, received a majority of the Player-of-the Year and Rookie-of-the-Year honors voted these last 3 years. Haynes, although only a rookie himself, was designated Player of the Year in 1960. In 1961 Earl Faison, of the San Diego Chargers was named Rookie of the Year and this past season the same award was voted by the league's players to McClinton.

As to our stadiums, we play in completely integrated parks. The only home stadium which presented any problem was city-owned Jeppessen Stadium in Houston. This situation was rectified last year and seating restrictions no longer exist there, either.

While we have a general policy against revealing the salaries of players, you would only have to take a 2-minute peek into our contract file to be assured that all players—regardless of color—are rewarded according to their contributions to their individual clubs.

In closing, I'd like to make a couple of observations which I feel are germane to the hearing.

At no time in our short history have we suffered adversely because of being an integrated sports entity. We've found the color of the player's uniform, not his skin, is what is important to the fan in the stands or viewer at a television screen.

To the credit of the Negro players as a body, they've done their part by their conduct both on and off the field to merit the respect they've gained as American Football Leaguers.

The CHAIRMAN. Did you find the same thing with players themselves in this real tough competition for position as between Negroes and whites that Mr. Frick mentioned? You haven't run into any resentment that the white player may get the job over a Negro, or visa versa, because they take it very well, do they not?

Mr. Foss. Yes; they don't pretend to suggest that because he was colored, he didn't have it.

I spend a lot of time with the individual players. I try to hit, and I know Pete does, just as many games as is humanly possible. We play not only on Sunday but sometimes on Friday night, or Saturday.

So I also, after the game, go into the dressing room of both the winners and the losers and visit around with the boys.

And I spend time during their camp sessions. And I have yet to come onto anyone who was griping or growling that they had been beaten out.

In pro football they are interested in one thing, and that is the best man regardless of his color.

The CHAIRMAN. They know that, and——

Mr. Foss. Yes.

The CHAIRMAN. As Senator Pastore pointed out, they know of dire things that happen.

With one exception, when you first went into Houston, you had some problems, did you not?

Mr. Foss. Yes. When we first went into Houston. There was one part of the stadium that we did not own—of course the club was leasing the stadium—and that part was segregated. I think that involved 12,000 seats. The balance of them Mr. Adams put up and they were integrated. And so I contacted them and said we will have to do something about this.

Of course, it was rectified last year, so that now anyone can buy a seat anyplace in the house. I think probably the thing just worked itself out because no one lost their sense of humor on the thing.

In the meantime we went over and played at New Orleans, and some folks advised against it, and said "you will get into nothing but trouble over there." But we just told both sides that were aggravating at the time, "just take it low and slow here, and I think things will work themselves out." And they did.

We had an overflow crowd over there and there was not one single incident. We played in Mobile, we played every year since their inception, and we had no difficulty there at all.

We played in Atlanta, Shreveport, a number of other Southern cities. As of the moment, I have not had a single report of even one incident.

The CHAIRMAN. These games have taken place comparatively recently in those areas?

Mr. Foss. Since 1960.

The CHAIRMAN. The last 2 years, actually.

As you point out, there was no dire problem. All the fears about agitation weren't founded at all.

Mr. Foss. No, sir.

The CHAIRMAN. Problems didn't happen in the stands or on the field?

Mr. Foss. No, sir.

When a man goes down that old field, the fan, you find, doesn't pay any attention. He will just cheer. If the man puts on a good performance, that is what he is interested in. They cheer him just as much, whether he is red, white, or black.

The CHAIRMAN. Mr. Rozelle, when was the last National League team integrated? What date?

Let me ask you this first, for the record: Are there Negro players on all your teams now?

Mr. ROZELLE. That is correct.

The CHAIRMAN. When was the last one integrated?

Mr. ROZELLE. Washington Redskins.
The CHAIRMAN. What date was that?
Mr. ROZELLE. 1962.
The CHAIRMAN. Just last year?
Mr. ROZELLE. That is correct.
The CHAIRMAN. Prior to that—as I recall, all the other teams were integrated?
Mr. ROZELLE. Yes.
The CHAIRMAN. Even since the beginning?
Mr. ROZELLE. For a great many years.
The CHAIRMAN. It goes back quite a bit?
Mr. ROZELLE. Yes.
The CHAIRMAN. Mr. Frick mentioned about records. Do you people keep the same kind of records in your commissioners' offices that Mr. Frick mentioned? I asked the question, how many colored ballplayers are in the two leagues, the professional leagues. He said he might know generally, but he couldn't tell me offhand from the record. Is that the same kind of records you keep?
Mr. ROZELLE. We have no official records that we give of persons.
The CHAIRMAN. Do you have a record of the man's name and where he was born and statistical data, but you don't have whether he is black, white or oriental, do you?
Mr. ROZELLE. That is correct. None of our official records.
The CHAIRMAN. Or whether he is a Lutheran, Holy-Roller, or Catholic?
Mr. ROZELLE. That is correct.
The CHAIRMAN. And are yours the same, Mr. Foss?
Mr. FOSS. Mr. Chairman, we don't pay any attention as far as records are concerned.
The CHAIRMAN. I would like a few Lutherans on it.
Mr. FOSS. Yes, sir, a few Norwegians.
The CHAIRMAN. They don't make very good football players for some reason.
Mr. FOSS. Just prior to my coming down here we did check just to see how many we had last year as regulars. It turned out that out of the 264 players in the league, 54 were Negro. So, we don't have any records.
The CHAIRMAN. You just made an inquiry?
Mr. FOSS. We went back into the book on the program thing to collect it.
The CHAIRMAN. Do you have any questions?
Senator HART. No, Mr. Chairman. I think the point should be made that football players and baseball players also are from the whole strata of society. The explanation is being made to the committee that it is possible, even with highly competitive adversaries, for Negro and white to compete against each other and with each other, and these are men who come from farms and cities, from families of material means and from families who are poor.
In the case of football, virtually all are college men. In baseball, this is less true today, I think. But you gentlemen have described an intensely competitive arena where what we claim about American tradition actually is true—that a man is judged on his ability, and the house has not come down around our ears.

Instead, everyone, even the "grandstand managers," agree that the quality of both games has improved.

The CHAIRMAN. Mr. Foss, the only team, however, that you have that might be considered in the South, say south of the Mason-Dixon line, is Houston, is that correct?

Mr. FOSS. Yes, sir. Since we moved Dallas up to Kansas City. That just gives us Houston down south. We are having a number of preseason games down there. The present preseason schedule——

The CHAIRMAN. You have a terrific number of top players that come from the South.

Mr. FOSS. Yes, sir.

The CHAIRMAN. In both leagues?

Mr. FOSS. Yes, sir.

The CHAIRMAN. I suspect that there is a little method in your scheduling that gives the southern people the only opportunity they get to see their college heroes in action in pro football by a preseason game. Is that why you do it?

Mr. FOSS. That is correct. And also there is great interest developed in our teams through television. I think that some of our largest television ratings are derived from southern cities.

The CHAIRMAN. You get a big star on your team and if he came from some Southern State, even with segregation by law, you might if you could work it out have a game in a big town in that area so that the people there could see their home State star. That is why a lot of them are scheduled, I imagine.

Mr. FOSS. The way I look upon it is that pro sports has done more, as far as integration is concerned, than any other one thing that has come on the scene. Whether it is in baseball or football or what it is, you are looking for the best performer. And I think everyone comes to realize that the color has no bearing on the situation.

The CHAIRMAN. Mr. Frick was telling me that there are two professional teams who are thinking seriously, if they can get them, of signing two Japanese players who are, as you fellows know, terrific baseball players.

But, anyway, none of these dire things happened when you did hire colored ballplayers.

Senator HART. Mr. Chairman, you raised a point that I am sure there is great curiosity about. And I ask Commissioner Rozelle: Did the league participate in the persuasive efforts spearheaded by Mr. Udall with respect to the Redskins?

Mr. ROZELLE. I had meetings with Mr. Udall, and subsequent discussions with the Redskins.

Senator HART. Can you comfortably describe any of these? I am sure we would be interested.

Mr. ROZELLE. I feel that the Redskins came to the realization that more intensive and a broader scouting system might be done for the football team. That was done and was partially demonstrated in the record of last season.

Senator HART. Did the economic impact on the Redskins in the box office reflect that this change in policy harmed the company?

Mr. ROZELLE. I think they were quite pleased with the results of your fine stadium here.

Senator HART. And their record on the field improved also?

Mr. ROZELLE. Yes; it did. They had a very fine football team.

Senator HART. When we hear about Thanksgiving Day riots, we are not talking about the Redskins?

Mr. ROZELLE. We certainly are not.

The CHAIRMAN. In that case, too, when the Redskins were not integrated, they played most of their preseason games in the southern areas.

Mr. ROZELLE. They have for a number of years played many games.

Senator HART. The great bulk of them, because they weren't integrated, but they have been able to do it since they have, as you pointed out.

Mr. ROZELLE. Yes, sir.

The CHAIRMAN. And there were no dire problems there.

Thank you both very much for coming. You have contributed a great deal to the problem we have before us.

Senator THURMOND. Mr. Chairman, could I say a word?

The CHAIRMAN. Yes.

Senator THURMOND. I just want to say that down South we have produced a lot of very fine football players, and I presume that a good many of these are now in the league and I hope you are well pleased with them.

Mr. FOSS. Yes, sir. I can say that we have some mighty fine boys from down your way.

Senator THURMOND. We are glad to have you with us.

Mr. ROZELLE. Thank you.

Mr. FOSS. Thank you.

The CHAIRMAN. Thank you very much, gentlemen. We appreciate your coming and giving us your advice.

The committee was to have two witnesses this morning. As a matter of fact, we were going to have the hearing continue yesterday, after the adjournment of Congress, but the session went on quite late, and the Senator from South Carolina and I decided we would try to get these witnesses in today. We were hopeful they could be here by 11.

Apparently they are on their way and may not get here in time. So, we will recess until 2:30 in room 5110, the regular Commerce Committee room.

We will hear two or three or as many of the witnesses that we did not hear yesterday as we can.

The committee stands in recess until 2:30.

(Whereupon, at 10:40 a.m., the committee was recessed to reconvene at 2:30 p.m.)

AFTERNOON SESSION

(Senator Monroney presiding.)

Senator MONRONEY. The Committee on Commerce will resume its hearings on the bill S. 1732.

We regretted yesterday the committee session had to be adjourned because of the meeting of the Senate at noon. It may have inconvenienced two other witnesses who were scheduled to appear here.

The first witness, carried over from yesterday, is Mr. C. Maurice Weidemeyer, delegate to the Maryland General Assembly.

Mr. Weidemeyer, we are happy to have you as a witness. Do you have anyone who is testifying along with you?

Mr. WEIDEMEYER. Some other men from Maryland who were testifying. Mr. Setta, I believe, who is not on the program, but probably mentioned with others.

Senator MONRONEY. We have only your testimony as accompanied by others.

Mr. WEIDEMEYER. Mr. Setta came over and was here yesterday. I understood he was here and had his own statement.

Senator MONRONEY. We don't have him scheduled. I thought you may have had a delegation here.

If you care to introduce them, if they are here, we would be happy to have them.

Mr. WEIDEMEYER. We have quite a few people here from Maryland, Mr. Chairman, and most of them are opposed to the public accommodation law.

I might ask some of the Maryland people here, who are in business and who are opposed to the public accommodation law, to please stand and let the committee see who they are. We do have other business people here.

Senator MONRONEY. Would you care to state their names?

Mr. PURCELL. George Purcell.

Senator MONRONEY. What type of business?

Mr. PURCELL. Restaurant.

Senator MONRONEY. And address?

Mr. PURCELL. Popes Creek, Md.

Senator MONRONEY. And the other gentleman?

Mr. MCKAY. Clem McKay, Millersville, Md., motel and restaurant.

Senator MONRONEY. Thank you very much. You may proceed in your own way.

Who is the other gentleman you said wished to testify?

Mr. WEIDEMEYER. Mr. Setta, who has a motel in Easton, Md.

Senator MONRONEY. Is he here?

Mr. WEIDEMEYER. He was here yesterday. He passed me on the road this morning. I understand he is on his way over.

Senator MONRONEY. You may go forward.

The Chair will consider Mr. Setta's statement when he arrives.

Mr. WEIDEMEYER. I might say I am sorry to have to bring you back this afternoon. When I left yesterday, I thought I was to come back Friday, and then late last night I got word to be here at noon today, and I was here about 11:30 and found out that your other witnesses had concluded earlier. So that you had to come back this afternoon.

Senator MONRONEY. We would have been here in the building anyway, so it is no great inconvenience.

Mr. WEIDEMEYER. Mr. Chairman and members of the committee——

Senator MONRONEY. I am sorry Senator Magnuson cannot be here. He has to preside over his Appropriations Subcommittee, hearing evidence on the appropriations of the Veterans' Administration.

STATEMENT OF C. MAURICE WEIDEMEYER, DELEGATE TO THE MARYLAND GENERAL ASSEMBLY (ACCOMPANIED BY OTHERS)

Mr. WEIDEMEYER. My name is C. Maurice Wiedemeyer. I am a lawyer of Annapolis, Md., a member of the Maryland House of Delegates from Anne Arundel County.

I might state, Mr. Chairman, that some years ago I spent some very pleasant days out in your State of Oklahoma when I was then associate counsel for the Creek and Seminole Nations, battling for the people in your State.

I went on some of those cases to the Supreme Court of the United States from the Court of Claims and tried to get some money out of the Federal Government to put justly, I thought, in the hands of those people in your State. And I did have the honor and distinction at that time of having won two cases in the Supreme Court of the United States on one single day.

My associate and I argued the two cases the month before, and won them the following month, which was quite an achievement I thought.

I might say that some of the attorneys that I was associated with were out in Oldenville, Newalla, and Newfalla, I think probably knew you, and at that time spoke very highly of you.

Senator MONRONEY. Thank you very much. It is quite unusual to win a doubleheader in the Supreme Court.

Mr. WEIDEMEYER. I wish to state that I am unalterably opposed to the passage of Senate bill 1732, and I am also opposed to passage of any public accommodations law whether by county, municipality, State or Federal Government. The so-called public accommodations laws do not accommodate the public generally. They accommodate only a small minority of the public. The vast majority of the public, in my opinion, have their own desires and their own likes and dislikes and wish to choose their associates, i.e., the persons with whom they socialize and the persons with whom they wish to associate in the conducting of business.

In my opinion, it has always been an inherent, basic, and fundamental right of all free men in a free society to associate themselves, socially and commercially with persons of their own choosing.

It has often been said by proponents of measures like this that public accommodations bills are bills to guarantee freedom. I think that the approach is wrong. They should be called freedom-depriving bills. The bills give an unwarranted freedom to a small minority while denying to the vast majority of our citizens and businessmen a very basic freedom, namely, that of associating and doing business with persons of his own choosing. The argument that because a State or Government authority has licensed a person to do business, that they should be able to regulate every facet of his thinking and conduct is something foreign to the American system of government and cannot help but lead to eventual socialism, dictatorship, and complete control by the Government of every act, thought, and deed of every individual citizen. The privileges and accommodations which the proponents of this measure contend are denied to Negro citizens are not denied to them at all, because they have the same opportunity to go into business and to conduct a hotel or restaurant or other types of businesses, just as much as any other citizens who have previously done so.

I have said many times, and I say it to you sincerely, that if the NAACP, the CORE, and the other ultraliberal organizations, who are daily harassing and pestering the American people, would spend their money and effort on promoting the welfare of the colored race

by assisting them into getting into business where they could cater to their own people, they would be accomplishing something. For years, the NAACP and CORE and others have been collecting $1 and $2 dues from people all over the United States and spending the money principally in agitation of the white race which neither gained respect nor promoted the Negro economically. I would suggest to them that if they wanted to organize a hotel corporation or any other business corporation, and if they could not sell stock at $25 or $100 a share, that they sell more shares at $1 or $2 per share and spend their money to better use than by giving it to the NAACP and CORE and other organizations.

The idea that people are helping themselves and promoting themselves by demanding that others furnish them and give them that which they could obtain for themselves is a false idea of promotion of that individual. Rights and privileges of association are obtained only through accomplishment and mutual respect.

Certainly, nothing is furthered or improved by an insistent demand that people be taken in and accepted under circumstances where they have not as yet earned that respect, and no law, whether of the Federal, State, county, or municipal government, attempting to force association of people, can be successful under such forced conditions. Certainly someone and some group in the process are bound to wind up with receiving more contempt and ill feeling than with respect.

I disagree also with those persons who would attempt to portray the present disturbances in this country as spontaneous outbreaks. I cannot be led to believe that the colored people of Cambridge would conduct themselves in the vicious manner in which they have, if they had not been engineered, guided, and inspired and financed by outside influences and capital. It would seem to me that it would be the wiser thing for this committee to consider the traveling and interstate commerce of persons like Martin Luther King and others whose sole purpose in going from State to State is to create dissension, confusion, and unrest, and deliberately going in areas where the colored people have been very well satisfied and whipping them up into a fervid heat of passion and hate for the white race.

I say to this committee, quite sincerely, that if the purpose of this committee is to promote the welfare of the colored race, that it is going about it in the wrong way. Certainly, the attempt to promote the Negro race of less than 20 million people in the United States against the will and wishes of the majority of the remaining 160 million cannot do anything more than swell in the breats of the vast majority of the American people a deep feeling of resentment and contempt and it is obvious upon reflection that such a condition in this United States has not improved race relations.

It has often, and falsely I think, been said that it is necessary that we pass public accommodations laws in the United States so as to impress foreign nations, and naturally the question arises to me: what nations are we trying to impress? Are they the nations that we have been continually financing and do we have to ruin our whole civilization and our mode of living in order to try to create an impression? I believe that a careful look at and a survey of many of the nations whom we think we have to impress, would only serve to convince us of the utter futility of such an attempt. Those nations, many

of them, have century-old customs, prejudices, and feelings, which would never be changed even though the United States did a somersault and acrobated itself into ruination and oblivion.

There was a time when the Communist conspiracy talked in terms of worldwide revolution. That attitude on the part of some Communist nations has now changed to a policy of slowly degrading and demoralizing the United States as one of the main capitalist nations and with further attempts to harass and ruin us economically. I believe, with other great and prominent men, that the Communist conspiracy to wreck the United States is certainly being overjoyed at the almost fanatical attempts being made by many organizations to ruin this great country and that the Communists are well up in many of these movements of agitation for public accommodations.

As a Democrat, I sincerely regret the actions and statements of the President and his brother, the Attorney General, because I realize that if they continue and persist in their course of conduct to promote the Negro population without regard to the wishes of the vast majority of white citizenry in this country, that neither have they promoted themselves politically nor have they advanced the well-being of the United States as a whole.

It may well be that my remarks here today will go unheeded and that men in high places cognizant of the voting power of certain groups, will continue in this false move until confronted at the polls by an overwrought voting populace, who will be so angry and disturbed that many of the present-day office holders will be defeated at the polls. In conclusion, let me say that I hope that the U.S. Senate will not approve any public accommodations law and will not attempt to hamstring the American businessmen and cram such a bill down the throats of the American people. It would be the wiser and safer thing to do to have the people of the United States express themselves at the polls in matters of this nature.

Senator MONRONEY. Thank you very much for your statement, Mr. Weidemeyer.

You are, as your statement indicates, a member of the assembly of the house of delegates.

Mr. WEIDEMEYER. Yes, sir.

Senator MONRONEY. Representing Anne Arundel County?

Mr. WEIDEMEYER. Yes, sir.

Senator MONRONEY. Am I correct or not in the fact that Maryland, just this last legislative session, did pass a law requiring desegregation, or at least admission of other races in your public accommodations in that State?

Mr. WEIDEMEYER. The legislature did pass this, and it was limited to hotels, motels, inns and restaurants, and exempted those places that sold alcoholic beverages.

I think the way the wording of the exemption was phrased was "Those premises or portions of premises used primarily for the sale of alcoholic beverages."

I will say this: That I vigorously opposed that bill as a member of the house. I don't know that I was the leader of the movement, but I did vigorously oppose it. The paper said I vigorously opposed it. We got a substantial vote, I think 34 votes, against it, and many counties abstained.

I want to say this: The reason that many delegates abstained is because 11 of the 23 counties of Maryland were exempted through the bill under a local option provision of our law.

I want to say this: that——

Senator MONRONEY. If I may interrupt right there: As I understand it, under Maryland law if a county does not wish to be included, it is a matter of what we would call senatorial courtesy, and I guess you would call it legislative courtesy, that the legislature does not bind those counties to abide by that law.

Mr. WEIDEMEYER. That's right.

Senator MONRONEY. In other words, it applies only to those counties wishing to be bound; is that correct?

Mr. WEIDEMEYER. Yes.

Now we have another provision in our State law that Carroll County had a special referendum provision. So if the Carroll County people—and I am sure they will vote against it—vote not to accept the law, then 12 of the counties of the State will be exempted from the provisions of that law.

Senator MONRONEY. How many now? Eleven you say are now exempt?

Mr. WEIDEMEYER. There are 23 counties; 11 are exempted; which leaves 12 in it. And one of the counties included will not be included if the people vote against it; and there is a special provision for referendum provided in Carroll County.

Senator MONRONEY. Is there a State referendum also out against the law?

Mr. WEIDEMEYER. Yes. I noticed the paper this morning said that I was, again, the leader. I was one of the attorneys, and one of the persons interested in it. But I wasn't the leader of the movement. I did help to get some signatures, and I talked to people about it. But I wasn't a leader of it; probably one of the inspiring influences, maybe.

But the paper said that it was an unsuccessful attempt, Mr. Chairman. The paper said an unsuccessful attempt. And it looked to me like maybe either misinformation or maybe an attempt to degrade our efforts. But I think we were successful.

Our law requires that we have 23,000 signatures. We produced nearly 30,000 signatures. And we produced it the first time. We got half our signatures without publicity. We went very quietly. On the second half of our signatures we produced them when the newspapers were saying the law was in effect. A lot of our people thought it was just a dead issue. When it came time to collect the signatures I could have gotten several hundred signatures, but we thought it was useless, so we didn't do it.

I am sure of this: from the way I saw and the way the people of Maryland felt, that if we had gotten the proper publicity on it, we would have gotten 50,00 or 100,000 signatures with no more effort than we put forth.

Senator MONRONEY. Is the law subject to suspension or to submission on a referendum to the people as a result of these signatures?

Mr. WEIDEMEYER. Yes. Under our constitution of the State. And the court of appeals held last year in the *Savings and Loan* case decided June 1962, that by the constitution of Maryland the public ac-

commodations law, or any law, is suspended upon the filing of signatures. Here is where the hitch comes.

The secretary of state said that apparently a certain number were invalid, and therefore the law wouldn't go into effect. But the court of appeals held last year in that case that the attorney general's opinion is advisory only and does not serve to terminate the suspension which the constitution gives.

So it is my contention that the public accommodations law in Maryland is now suspended. And the court of appeals there said that no one can determine to put that law into effect except the people when they vote on the referendum, or if, in the meantime, the courts get hold of the matter and they decide.

And so far as I know, the matter hasn't been decided by the courts.

Senator MONRONEY. So it is still waiting judicial action as to whether the law becomes effective now, or whether it is suspended until it is voted on by the people, if the courts so decide?

Mr. WEIDEMEYER. Yes, sir.

The newspapers keep saying it, and I say, the law is suspended, and I refer them to this case which is the *Savings and Loan* case in 183 Atlantic 2d at page 347.

Senator MONRONEY. You said there are 84 votes against it. How many votes were for it?

Mr. WEIDEMEYER. They had to have a constitutional majority of 72.

But now I want to point out this——

Senator MONRONEY. What was the total count? Don't you remember?

Mr. WEIDEMEYER. No, I don't have the figure now. I know they had to have more than 72 in order to get the constitutional majority.

But now we had 11 counties exempted, so that the delegates from those counties sat quietly by, most of them, and either passed or said nothing in opposition to it. So really, by exempting the counties, we of the opposition were hampered because we didn't have their active support.

But I am sure that the delegates who voted for it did not represent the wishes of the majority of the people of Maryland.

Senator MONRONEY. Maybe we don't represent the people of the country sometimes when we vote on these things. We think we do.

Mr. WEIDEMEYER. They usually tell you about it if you don't.

Senator MONRONEY. At election time we hear from them particularly.

There was a constitutional majority of 72 for the desegregation legislation, and 84 against it; is that correct?

Mr. WEIDEMEYER. That's right.

I want to point out this: My county is included in it. When the bill went through the house my county was taken out. But they elected a Republican senator from my county for the first time in 60 years, and he had pledged for the public accommodation law. So he put Anne Arundel County back in it. I want to point out that he did that. I ran on the ticket, and every speech I made I spoke against public accommodations, and I said it would be a current issue in the legislature, and it would be important to back men who were opposed to it. And I led the Democratic ticket and it was the first time in my

life that I had ever run for office as a Democrat. They had known me as an ardent Republican for years.

So the Democrats accepted me and gave me top votes. So I take from that that the people in my county certainly didn't want it.

Senator MONRONEY. Maybe they wanted a Republican voting on the Democratic side.

Mr. WEIDEMEYER. In the Democratic Party—the Democrats have to vote for Democrats. But even the Democrats gave me top votes in the Democratic primary, and in the general election I was near the top where I had the Democrats and Republicans voting for me.

Senator MONRONEY. In your statement, Mr. Weidemeyer, you make an argument on behalf of yourself in support of the right to segregate and insinuate that it is wrong to require any public accommodations genuinely to be public—that is to keep their doors open and not discriminate because of race or color.

Nondiscrimination, however, is a practice in 32 of our 50 States, as you well know, is it not, where they have laws or regulations that require the acceptance of people regardless of race or color, requiring service in restaurants, motels, hotels, or public accommodations of that nature?

Mr. WEIDEMEYER. I understand 32 States are having it.

Senator MONRONEY. The point I was trying to make is this: You say that they should raise the money and finance the building and construction of motels and hotels to take care of colored people as they travel. This would be senseless. There is a good deal less than half of the States that deny accommodations.

Would it not be expecting the unusual for minority races to be required to finance their own motels, since in 32 States there is no effort made to segregate?

Mr. WEIDEMEYER. When the people of the United States—and I guess I am referring to the white race—built their own motels and hotels, they built them with their own money and industry. I say to these colored people, and I have said it in the Maryland Legislature when I have been there many times to oppose them, that I thought they were going at it in the wrong way. They were collecting $1 and $2 for the NAACP. They were using it in a lot of agitation which only worried and aggravated us. And they weren't getting very far. But I suggested to them to take the same money and organize corporations; instead of giving the $2 dues to the NAACP, to buy a $2 share of stock, and sell that stock, and promote their own industry, and thereby they would be doing something for their people, and they would really be getting ahead, and they would be gaining the respect of all the people of the United States by doing that.

Senator MONRONEY. I think we have only about 18 out of the 50 States that they could operate in, because the other States show no line of discrimination.

This would be rather futile to expect them to go around and raise money, in order to have separate motels for colored people traveling in these 18 States and needing accommodations for the night for their wives or their children financed by people of that same race.

In the other States these are considered to be general accommodations.

Mr. WEIDEMEYER. On the other hand, Senator, it has been my observation that many fellows—and some of them in high places—do a

lot of talking about accommodations of the Negro, and all that, but I don't see any of them spending their money and their effort in going into business to put up something like that. They always say, "Let the other fellow who has done the work, has put his money in his own private business, get out and furnish that."

I would like to see some of these fellows who got so much money and do all this talking get out there and put their own money and effort into some business and then integrate that and see how it affects them economically.

Some of them could well take the tax loss; and would probably be glad to get it.

Senator MONRONEY. I believe you mentioned in your statement that you felt that this committee should show some interest in prohibiting travel in interstate areas.

It would seem to me that it would be the wiser thing for this committee to consider traveling in interstate commerce of persons like Martin Luther King and others whose sole purpose in going from State to State is to create dissension, confusion, and unrest, and deliberately going in areas where the colored people have been very well satisfied and whipping them up into a fervid heat of passion and hate for the white race.

Would you want that rule to apply to our good friends in the Congress, or to other citizens who feel strongly in favor of segregation; that we should not allow our colleagues to travel in interstate areas to advocate their point of view?

Mr. WEIDEMEYER. I don't think it is wrong for them to go to interstate commerce and advocate their views as long as they don't whip people up into demonstrations and create a lot of commotion.

But it is disgusting to me to hear fellows like Martin Luther King say that, "I am engaged in a nonviolent thing," and every time they go into a place they wind up with violence.

So I am inclined to believe, and I can only draw one conclusion: That his sole purpose is drawing and creating disruption and confusion.

The colored people of Cambridge are fine people. A lot of them are hard working. Some of them loaf around. But they are good people. And they wouldn't be doing all this if it weren't for fellows like Martin Luther King and outside money coming in there to stir them up.

I don't know how true it is, but here, just 2 or 3 weeks ago, one of my clients came into my office and told me, to said, "You know that they have two buses out at Parole." And Parole is a colored area right outside of Annapolis. And good people are there. Some of them are my clients. I see them every day, talk to them, and shake hands with them. He said, "They have a couple of buses out there and the talk is that they are trying to get two busloads from Annapolis to go over and demonstrate at Cambridge."

That's outside money, and it is outside money even coming into Annapolis, upsetting us.

And we don't like it.

I think Martin Luther King, if he preached the Gospel and stuck to that, he would probably do the people a whole lot more good than going around and stirring them up the way he has been.

Senator MONRONEY. You haven't mentioned in here——

Mr. WEIDEMEYER. I am a little in error on that statement. I said the committee, and the committee, I realize, couldn't consider it unless they had a bill before them. So, I might say that maybe some of the individual Senators could give some thought to prohibiting these agitators from going in just for the sole purpose of agitating and stirring up demonstrations and trouble.

Senator MONRONEY. Would you want the other side to oppose segregation——

Mr. WEIDEMEYER. I suppose if we got that bad they ought to legislate against us, too. We haven't done that.

Senator MONRONEY. You wouldn't want to be detained and confined to Anne Arundel County. We are glad to hear your testimony here. We believe in freedom of speech. I thought that was one of the prime clauses of the Constitution. You haven't mentioned the commerce clause, an item of interest that I am strongly concerned with, as the constitutional basis for this legislation.

Do you have any statement to make on that?

Mr. WEIDEMEYER. I will say this: that it seems to me in the last 20 years that the Supreme Court has stretched the commerce clause and the 14th amendment just like a rubber band, and I suppose that we can pass laws and stretch it in our imagination that the commerce clause should apply.

But I say this, that if we stretch the commerce clause so as to apply to every facet of a man's activities in his daily life, where it deprives him of the right to say that I can go into the kind of business that I want and it is my property, I should do business with those that I want and if we get more of that kind, then I say we have stretched the commerce clause pretty far, and I don't think the commerce clause was ever intended by the framers of the Constitution to be stretched to the point that we are now stretching it or attempting to stretch it.

I think that we may be considered unconstitutional as a deprivation of personal, private, and individual rights, and a deprivation of private property rights. Certainly the Constitution recognizes that all throughout——

Senator MONRONEY. Your feeling doesn't only project, as I understand your statement, against Federal action in this field, but you are against it on the State basis, too. And therefore, you would not favor paragraph (d) on page 8 of the bill, that instructs the Attorney General on any complaint received for violation, within the jurisdiction where State and local laws or regulations appear to him to forbid the act or practice of refusing service to minority races, states that he should first notify the State and local officers. This is an effort made for the States that enact or have laws of their own to throw this back into the local policing powers of the State.

Mr. WEIDEMEYER. I am glad of that; I am glad of that for this reason: I think that there has been in the past few years entirely too much attempt on the part of the Federal Government to involve, to invade, and take over the rights of the States.

I am a great States righter, and I think there has been too much tendency. I am glad that this bill recognizes that there are States and that they can do some things. For instance, I introduced a resolution in the last house of delegates. It fell short of passage by

six votes. But that resolution called for the Federal Government to curtail its taxation and allow the States to tax in those areas of taxation, because I think in many of those areas the State can handle the situation a lot better than the Federal Government because it is closer to its people; it knows their wishes and desires and it is closer to the tax dollar and keeps a closer watch on it.

Senator MONRONEY. Thank you very much for your statement. I am sure some of the other members might have a few questions to ask you.

Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Weidemeyer, I want to take this opportunity to congratulate you upon a very fine statement.

Mr. WEIDEMEYER. Thank you, Senator.

Senator THURMOND. I think your statement reflects the thinking of the American people. I think it reflects the thinking of the forefathers who wrote the Constitution, the forefathers who provided that no person could be deprived of life, liberty, or property without due process of law.

As I understand it, it is your opinion that if you were to try to direct a man how to handle his own private property that that would be a violation of the Constiution.

Mr. WEIDEMEYER. That is right.

Senator THURMOND. Of the 5th and 14th amendments?

Mr. WEIDEMEYER. That is right.

Senator THURMOND. It would be a violation of the Constitution, the constitutional provision that provides that property cannot be taken without just compensation. If a man is directed how to use his property and control his property, isn't that equivalent to a taking of his property without just compensation?

Mr. WEIDEMEYER. I think it would be.

Senator THURMOND. Especially if he had a business there and if his business lost money as was brought out here, I believe, by the Governor of Mississippi, a lady who is operating a restaurant——

Mr. WEIDEMEYER. That brings to mind a thing that I had in mind when Maryland passed its law. I had in mind, and I knew it wouldn't pass it, I had in mind just to give them something to to think about, to offer an amendment of a certain amount of taxes to be spent, to be put in a special fund to compensate all the men who would lose money by the operation of the business in accordance with the public accommodations law.

There is no provision like that in the Federal law. If we drive men out of business, and I think a lot of them will be driven out of business and some of them may fold up, I don't know who is going to compensate them. Their property is being taken away from them, maybe by an indirect method.

Senator THURMOND. As I understand you are not advocating anything to hurt Negro people?

Mr. WEIDEMEYER. I never have.

Senator THURMOND. You simply say that the one suggestion should be followed?

Mr. WEIDEMEYER. That is right.

Senator THURMOND. And a man should be allowed to use his own business as he deems advisable?

Mr. WEIDEMEYER. That is correct. I said many times during the last campaign that if I opened a business and I wanted to cater to Chinese in high silk hats and swallowtail coats and no one else, and I lost my shirt doing it, I thought that ought to be my privilege. And if I wanted to open it to white and colored, I thought that ought to be my privilege.

Senator THURMOND. If you want to serve white and Negro, or Negro only, or white only, isn't that an American right as exists today?

Mr. WEIDEMEYER. That is to me an inherent fundamental American right.

Senator THURMOND. And isn't that a right that was upheld by the Supreme Court decision of 1883 which has not been overruled to date?

Mr. WEIDEMEYER. That is as I understand it. That should be the stare decisis.

Senator THURMOND. Mr. Weidemeyer, I notice you said that this bill should be called the "freedom-depriving bill." I understand you say that because you feel it does deprive a man of freedom of making a choice?

Mr. WEIDEMEYER. That is right.

Senator THURMOND. You are not advocating a bill here to prevent serving Negroes or any other group or race of people, as I understand it?

Mr. WEIDEMEYER. We have never had a bill like that in Maryland.

Senator THURMOND. Do you favor anyone serving anybody he wants to?

Mr. WEIDEMEYER. That is right.

Senator THURMOND. You simply don't want to force anybody to serve anybody he doesn't want to?

Mr. WEIDEMEYER. Exactly.

Senator THURMOND. You make the point here that—

It has been an inherent basic and fundamental right of all freemen in a free society to associate themselves socially and commercially with persons of their own choosing.

Mr. WEIDEMEYER. That is right.

Senator THURMOND. Why shouldn't they be allowed to do that? Are we going to build up here in this country such a centralized form of government that our forefathers tried to avoid when they came over here to establish this country, that it is going to bring tyranny to our people, deprive us of our freedom and go back to the type of government from which they fled? Isn't this the type of legislation that is calculated to do that?

Mr. WEIDEMEYER. I think this legislation would take us back 300 years.

Senator THURMOND. I notice on page 1 of your statement you mention this point:

That the privileges and accommodations which the proponents of this measure contend are denied to Negro citizens are not denied to them at all because they have the same opportunity to go into business and to conduct a hotel or restaurant or other type of business just as much as any other persons who have previously done so.

Is there any attempt on your part or those who oppose this bill to prevent a Negro or a person of any other race from following any business they want to?

Mr. WEIDEMEYER. Nothing; under the present law, they can do it.

Senator THURMOND. Is there any attempt on your part, or those who oppose this bill, to prevent anyone from serving a Negro or anybody they want to?

Mr. WEIDEMEYER. No. If they want to do it, I think that is their business.

Senator THURMOND. How long have you been in the Legislature of Maryland?

Mr. WEIDEMEYER. I was just elected in 1962. I am serving my first term.

Senator THURMOND. In talking with your constituents in your county, whom you represent and who elected you to public office, what is the sentiment of the people? Do they want this type of legislation?

Mr. WEIDEMEYER. My people——

Senator THURMOND. Or do they want to leave it to the local people to do what they want to do with their own property on a voluntary basis?

Mr. WEIDEMEYER. They want to leave it to their own people to do what they want to do with their own property on a voluntary basis. And most of our people think that if we ever had a law like this that it ought to be put to a referendum to let the people themselves let the Congress of the United States and let the legislature know, by their own vote, how the people feel. And really, we as legislators, Federal or State, should not go against the will of our people.

We hear loud cries from our minorities, but it is the silent people, the people who have to suffer under those laws day after day, those are the ones, Senator, that should be heard.

And I really believe that the people of Maryland, if they got a chance to vote on this law, or the State law, would vote overwhelmingly—I would say about 70 percent or more of them would vote against the public accommodations law, because they like the freedom of action. They don't like any man in business being told that he has to serve a certain group, or he doesn't have to. They like him to have that freedom of choice to exercise as God gave to him.

Senator THURMOND. The question was brought out that the State of Maryland, your own State, has passed such a law, and that by such action that might indicate that the people of Maryland favor such a law.

But as I understand, from what you said a few moments ago, in Maryland the passage of that law merely meant and intended local option, so to speak, because any county that did not wish such a law exempted itself and did not come under the provisions of such a law. Is that correct?

Mr. WEIDEMEYER. That's right.

Senator THURMOND. So the people of Maryland have not passed a force or compulsory law in the counties where the people did not want it, as represented by their representatives in the legislature?

Mr. WEIDEMEYER. Eleven of our countries are all exempted. Another one, the State senator and the members, put it on a referendum.

Our county, as I say, it went through our house. Our county was exempted. When it went over to the senate our State representative, State senator, put Anne Arundel back in the bill, so that we didn't have a majority in our seven from Anne Arundel County when it came back to change it. And so we had to suffer with it. And we took it out on the referendum, and we got nearly——

Senator THURMOND. You took it out on a referendum of people?

Mr. WEIDEMEYER. Yes. We got signatures to take it out.

Senator THURMOND. In other words, you got enough signatures to take that county out from provisions of the law?

Mr. WEIDEMEYER. No. You see, it becomes a statewide law even with those 11 counties out. But when it comes on a statewide law, then it goes on a statewide referendum where the exempted counties, as well as those taken in under the law, all vote. And so we got signatures.

Even though in 11 counties where there was a lot of lethargy, because they were exempted and felt it didn't affect them, we got, on the first batch of signatures, 2,600 signatures from the first group of counties alone, and quite a few more on the second go-round.

So that even those people who exempted themselves did not feel it was the right thing for the other counties and it was setting a bad precedent.

I say this: if we had gotten proper newspaper coverage on it, or proper cooperation from the newspapers, instead of getting nearly 30,000 signatures I think we would have gotten 75,000 to 100,000 signatures, with no more effort; because our people wanted to vote on that thing, and they think this is wrong.

Senator THURMOND. How long have you practiced law?

Mr. WEIDEMEYER. I practiced law since 1936. That is 27 years.

I might say this, Senator: that I argued cases in the Supreme Court of the United States before I became a buck private in the Army in 1943. Some other men are in high places as attorneys before they have ever argued cases in court. I was in the Supreme Court of the United States before I became a buck private in the Army.

I was just telling the Senator from Oklahoma, before you came in, that I represented the Creek and Seminole Nations as associate counsel. Those were downtrodden people. They had been given a scalping in the South and sent out to Oklahoma. They were given all sorts of scalping—legislative, judicial, and otherwise. But I was representing them.

For years I worked as a Republican and I tried to represent the colored and help them to see that in their community they got just as good roads and schools and everything else. And I think in the State of Maryland, especially in my county, they got just as good schools, and probably better.

I think most of our colored people are very happy and they get along fine with us, unless some outsider comes in there and tells them, "You don't have this, and you ought to have that."

Of course, when they give them money and work them up and they go to church and get into a religious fervor, then things happen. And they get hurt by it, and we get hurt by it, too.

Senator THURMOND. As a lawyer, with long experience, is it your opinion that the Federal Government, a State government, or a mu-

nicipality has the right to pass such a law as this and deprive people of their rights provided them in the U.S. Constitution?

Mr. WEIDEMEYER. I don't think they do, because I think our Constitution was formulated to get away from those troubles of Europe; and we got away from them; and to give people individual liberty, and rights of property. And it is what the Communists call us, a capitalistic nation. We are a capitalistic nation. We are proud of those free individual rights. We are proud of our accomplishments. And we look forward to the future, to being able to go forward with freedom.

And if we pass laws like this, we are hampering our individual citizens. And we are putting in those people a distrust of government, I think, if we pass them and hamstring them like that.

Senator THURMOND. If the matter is not to be left to a voluntary basis for action, then would it not be better, if there is to be such a law, for it to be left to the people of each local community?

Mr. WEIDEMEYER. I think much better. If we have to have it, it ought to be up to the local communities.

Senator THURMOND. I am opposed to it, and you are, too.

Mr. WEIDEMEYER. Yes, sir.

Senator THURMOND. If we have to have it, wouldn't it be better to be left to the people of each community?

Mr. WEIDEMEYER. I think so, too.

Senator THURMOND. And, if you go beyond that, certainly limit it to the people of the State.

Mr. WEIDEMEYER. That's right.

Senator THURMOND. And not force upon all the people of all the 50 States of a Nation a law which they do not want and which violates the Constitution of the United States.

Mr. WEIDMEYER. Yes. And I am afraid, as I mentioned in my statement, I am afraid for the Democratic Party if we pass this law, that when the next election comes that the people will express themselves by sending back home a lot of our good Democrats.

Senator THURMOND. You think if this law passes that there is going to be repercussions upon the Democratic Party whose leaders are now trying to force it on the people of this Nation?

Mr. WEIDEMEYER. I think so. I think we are just heading for trouble if we do it, because I think the people will tell them about it.

Senator THURMOND. You are a Democrat?

Mr. WEIDEMEYER. I am a Democrat. When I was a Republican I was a good one. Now that I am a Democrat I try to be a good one, too. I am not proud of all the things that all the men do, but I am proud of it as a party.

Senator THURMOND. I understand you are speaking today, of course, as a citizen of Maryland, and a citizen of America, and you are giving us the benefit of your opinion as to what is best for the people of the Nation, and not from a partisan standpoint.

Mr. WEIDEMEYER. That's right.

Senator THURMOND. Thank you, Mr. Chairman.

Senator MONRONEY. Thank you.

Senator Yarborough?

Senator YARBOROUGH. No questions, Mr. Chairman.

Senator MONRONEY. Senator Hart?

Senator HART. Sir, I apologize for being late; further, for my failure to get to a completed reading of your statement.

My question goes to just that portion of it that I heard you discuss with Senator Thurmond. You are urging a referendum, so to speak?

Mr. WEIDEMEYER. If we have to have it, in municipal, State, or Federal. If we are determined to pass it, for goodness sake let the people vote on it, and see how they feel about it.

Senator HART. As a lawyer, wouldn't you agree that if there is a burden on the flow of interstate commerce it will result in discriminatory practice that no referendum——

Mr. WEIDEMEYER. I don't agree with that statement.

Senator HART. I know you don't. But if in fact there is a finding that this discriminatory treatment burdens the flow of interstate commerce, then Congress can't wash its hands by turning it over to the people as such.

Would it not be our obligation to remove the burden on the flow of commerce, whatever the referendum says?

Mr. WEIDEMEYER. I think if Congress feels it is such a burden--and I don't agree with it—if it feels it is such a burden and feels it is their duty to act, then, for goodness' sake let the people pass on it, whether you have considered correctly or not.

We in the State legislatures represent the people. A lot of them have good brains. We elect a lot of good men to the U.S. Senate and Congress. But they cannot possibly know how their people feel in all instances.

I say that when you come to times like these, and on problems like these, if you feel that you have got to have this law—and I don't think we have—if you feel you have to, I say for goodness sake let our American people express themselves as to whether or not they want it.

It may be that it might be a burden on interstate commerce, as you say. But it may not be that our people want to remove that burden.

Senator HART. And if in fact the right that is sought to be obtained by this bill in fact is a right guaranteed by the 14th amendment—and I know there is great controversy on this——

Mr. WEIDEMEYER. Indeed there is.

Senator HART. No referendum could wash our hands of that either, could it?

Mr. WEIDEMEYER. Well, it might be that there are certain rights that maybe they could pass under the Constitution, or pass statutes under the Constitution, claiming it, by stretching it one way or the other. But on things like these I say again that our people would love to have the right to vote on it, and they would love to express themselves.

I am afraid that a lot of our men in office, who take it upon themselves to act, are going to be acted upon by the people who subsequently vote on them and kind of approve or disapprove of their actions.

Senator HART. And you express concern that the effort that the administration and some of us are making here to enact this civil rights bill will hurt us politically; that the Democratic Party would be hurt.

Mr. WEIDEMEYER. I think it would hurt me if I went out. I wouldn't dare do it in my State.

Senator HART. I think for an American man, woman, or child, to be turned away from a public place for no reason other than the color of his skin is an intolerable thing. I take that position whatever happens at the polls. I trust the good judgment of the American people.

Thank you, Mr. Chairman.

Mr. WEIDEMEYER. I want to say this, Senator: That that might be in your mind an intolerable thing; but on the other hand it might also be an intolerable situation if we pass a law requiring this man, or some other man, to take them in and serve them, in order to get away from that condition, and deprive that man of something that he has worked awfully hard for by causing him, maybe, a tremendous loss.

We have to consider it from that angle, too.

Senator HART. I understand that.

I just want to make very clear my position. To the extent that I can do it I want to make sure that a Michigan serviceman on duty in the South doesn't have to explain to his children that they can't go to that restaurant.

This to my mind is just inexcusable.

Senator MONRONEY. Thank you, Senator Hart.

Senator Engle, do you have any questions?

Senator ENGLE. Mr. Chairman, I regret that meetings of other committees—the Armed Services this morning and yesterday—prevented my being here.

I have looked over the statement before us at the present time. I would like to ask only one question.

We have a public accommodations law of one kind or another in 30 States. We have the same law, or a similar law, in six major cities outside of those 30 States. The State of California, which I represent, is one of those States.

The Attorney General said that our law was better than what he is proposing; and we have had no trouble living with that law; it hasn't created havoc in the business community. What makes you think that the passage of this act would, in the light of those facts, be as devastating as you, and some others like Governor Wallace, have indicated?

Mr. WEIDEMEYER. What makes me dissent? The people I talked to in the State of Maryland, and the people that I talked to—the few people that I have talked to from States where they do have it. They might not come grumbling to you; but I hear a lot of grumbling. I hear a lot of the people from my own State say, "Before they tell me that I have got to serve everyone that comes along and I can't choose and discriminate, I am just going to go out of business."

I know that the businessmen tell me that their clientele wouldn't want it. So if their clientele that they serve and cater to would not want it, and, for instance, if they didn't want to go to the restaurant because it was integrated, and stayed home and ate in order to get the privacy of their own home, I think that man is losing business every time that family stays away from his restaurant.

Senator ENGLE. I can understand that happening where you have one place desegregated and the other not. And this, I understand, has been the trouble many times, when on a community basis they try to get these restaurants and motels to desegregate.

A delegation was in from Salisbury, Md. They told us about their experience. Their problem was that if everybody didn't desegregate, the fellow who held out might benefit by holding out; whereas if they could all get together, and they all integrated at once, they felt fairly comfortable about it.

That is why I think that this law may make a difference; that is, everybody will be desegregated, as they are in California.

We simply haven't had any problems with it, as far as public accommodations are concerned. We have had some what you might call de facto segregation in housing and in employment, and in education. But on public accommodations we haven't had that difficulty because everybody is desegregated.

If the whole works are desegregated, as this committee told us that came in from Salisbury, then it seems to me that you don't face the proposition of people going out of business. Do you?

Mr. WEIDEMEYER. I think then that they all suffer. I think if the truth were known, if the truth were known in your State, or in Salisbury, or any other place, I think that there are a certain number of people; and probably a lot more people than what they pick up by integrating; I think a lot more of them stay home and eat as far as the restaurants go.

As far as swimming pools go, I think a vast number will stay out.

There are many other things. Moving pictures I think have suffered since integration.

I haven't been to a motion picture for 5 or 6 years, and that is one of the reasons. In many places you go they don't integrate. I prefer my own company. I prefer to choose my own company. And I know a lot of colored prefer to choose their own. A lot of white people don't express themselves on it, and we probably don't have statistics; but I know from the businessmen in my county, how they express themselves.

They know that before this goes in, if they all integrate they are all going to lose. And if some of them integrate and some of them keep it separate, the ones who integrate, probably, will take a heavier loss.

You are not distributing that loss by making them all integrate. I think you are creating a loss and hamstringing them all.

And it isn't a case where the colored cannot get these facilities. They just haven't gone out in enough instances to provide the facilities for themselves. I know that if the colored had good restaurants in colored areas, the colored ought to patronize them. If there is a demand on the part of colored to have good restaurants and colored people went in and operated good restaurants, they certainly ought to pick up that business.

Senator ENGLE. You come from Maryland. Are you familiar with the experience in Salisbury?

Mr. WEIDEMEYER. I heard some of the fellows talk there. I haven't been over to talk to the merchants of Salisbury.

I am as certain as I can be from the attitude of the people on the Eastern Shore that there are a lot of people over there who will never go into one of these restaurants as long as they are integrated. They will suffer it out and make their wives do the cooking at home. I know. I have heard a lot of those women say, "I love to go out and eat. I love to get a night off when I don't have to stand behind the stove

and cook dinner for my husband and family. But before I go out and tolerate conditions that I do not like, my husband will be fed at home, even it if kills me."

Senator ENGLE. I just can't—and this is my last observation—I just can't believe that it is going to wreck Maryland when it hasn't wrecked California and 29 other States and 6 major cities outside of those States. I think that is too big a piece of country. If the economic impact of desegregation is what you and some of the others say it will be, we would certainly have some evidence of it by now, in 30 States and 6 major cities outside of those 30 States where they have public accommodation laws of one kind or another.

There is no use of our arguing it because I am not going to change your mind and you are not going to change mine. But I would like to look for what I call some solid evidence that this bill would have the disastrous effect on business that has been asserted here by you, by Governor Barnett, and by Governor Wallace and others.

I just can't find the evidence, that is all.

Mr. WEIDEMEYER. I say this, even if we didn't have the evidence—I believe it is there if you look for it—if you get the statistics maybe you will find in the State of California—I don't know—I would guess in the State of California if you look for the evidence you will find probably a difference, if you talk to a lot of the individual merchants you will find their attitudes and the attitudes of their customers. And that is the main thing. A man's business has to cater to his customers.

Notwithstanding that, even if you didn't find the evidence, the thing is wrong in this respect: that you are forcing the large, vast majority of these people to cater just to the wishes of the small minority. And when you get into that kind of government, you are almost like the Russians. They say in Russia the Communist Party is a small minority, yet they control millions and millions of people, and millions and millions of people in that vast country have to acquiesce in the wishes of that small minority controlling them.

If it isn't a minority right at the top, if the minority gets its legislation through for its special benefit; that certainly is not a true democracy. I think it is all wrong.

Senator ENGLE. What do you think about putting a man in uniform and then telling him that he can't walk into a restaurant or into any other public accommodation?

Mr. WEIDEMEYER. I have heard that argument before, and I think when we get right down to it, in some of the conditions we could really find, if we want to be emotional about it, find a lot of things in this country and in this world that we could really shed tears about.

But I say this, that the basic foundation upon which this country was made is the freedom of the individual, respect for private property, respect for the private individual's rights guaranteed by the Constitution, and it was the reason for breaking away from Europe and breaking away from England. And we went through all the Revolutionary War, we went through all the experience of the horrors of Europe in order to formulate this country. As I express myself, I think in answer to Senator Thurmond, if we get now I think we are turning back the clock 300 years. We are giving to a minority some-

thing, a special privilege to them to go everywhere and to violate something that we fought for in the Revolution. And something on which our Constitution was founded.

To me, as I said very clearly, it has always been an inherent basic right, of every man, every freeman in a free society, to conduct himself in business and associate with persons of his own choosing. That fundamental right this law would violate. And once you violate it, nothing is going to bring it back except a repeal of the law.

Senator ENGLE. I would agree with that except when you hold yourself open to do business with the public you ought to do business with the public.

Mr. WEIDEMEYER. No, I don't think you are holding yourself open to do business with the public when you say I am limiting my clients to a certain clientele.

You are not holding to the general public. You are opening to a limited number. I think it is a fallacy to say that a man who opens it up limitedly is opening it up to the general public. There is where we get off on something that misleads us all.

Senator ENGLE. That is all, Mr. Chairman. Thank you.

Senator MONRONEY. Are there any biracial committees in your county which are working on a voluntary basis to solve the problems of segregation?

Mr. WEIDEMEYER. Not in the county. We have a State interracial commission, passed under the—we call it the committee on interracial problems and relations. That was passed several years ago and is still functioning.

Senator MONRONEY. Did you support this statewide commission?

Mr. WEIDEMEYER. No; I didn't. No; I am opposed.

Senator MONRONEY. You are against any voluntary action, and you are against any local laws, and you are against any Federal action in this field; is that right?

Mr. WEIDEMEYER. I will tell you why I am opposed to it: because I found out that this commission was pressuring people when it had no authority of law to do so.

I know Maryland County, they wanted to appoint a committee on human relations out there. When I look at the list, what do I see? I see some of the most ardent integrationists of the State of Maryland. How are they going to decide anything in an unbiased way? Before a man goes up there he is convicted. It is just like the old saying, "we will give him a fair trial before we hang him."

Senator MONRONEY. You were not here. I believe, when the mayor and the chairman of the biracial committee and a minister from Salisbury appeared. They are from your home State. They represent a southern part of your State. And yet they have found that by voluntary means the integration has gone smoothly, although they are within only a very few miles of Cambridge where all the troubles occurred. Apparently they have had good luck in voluntary efforts on their own part, and good will among races in order to achieve this desegregation. As I gather from your testimony, you are against voluntary action to achieve desegregation.

Mr. WEIDEMEYER. I am opposed to these commissions which are not unbiased. I am opposed to these commissions when the makeup of them, as has been demonstrated, is biased right from the start. And

the Maryland Commission on Interracial Problems and Relations is loaded not with people of different minds, where they can have a chance to mediate and get together, but they are all pretty near of one mind. So that you don't get it.

This Commission on Human Relations, Baltimore County, as I just pointed out, looks to me like a bunch of most ardent integrationists you could pick out in Baltimore County. How can a businessman or group get together and arrive at something sensible or something that satisfies or really hits a good medium.

Senator MONRONEY. Apparently in Salisbury they managed to do it.

Mr. WEIDEMEYER. They might think they have. But I think they will run into a lot more grief than they think is in store for them. They haven't seen it. They are just talking big over there because they have started something and they think they have gotten something new. But I think they will find the errors and sins of it will be their own undoing.

Senator MONRONEY. You would not wish to take part or be any part of any attempt to secure integration on a voluntary basis?

Mr. WEIDEMEYER. I would be glad to talk to them as I talk to them every day. Talk to them every day. I talk to colored people who come to my office and talk about these problems. That is a form of mediation. They know I have my views and some of them have theirs. But at least we are of different minds and we can reach something sensible. But where you go before a commission that is all one way, to begin with, you can't do good.

Senator MONRONEY. What is "something sensible" that you seek in this problem then?

Mr. WEIDEMEYER. I seek freedom for every individual that is in business.

Senator MONRONEY. This is on a voluntary basis we are talking about. You say you seek something sensible. Give us your solution.

Mr. WEIDEMEYER. My solution is this: that every businessman in the State of Maryland—say every State ought to handle these matters themselves. I say it is a good policy for no State to restrict a man in business and say that he has got to segregate or that he has got to integrate. But leave it up to that individual man.

Senator MONRONEY. We are talking about voluntary action.

Mr. WEIDEMEYER. Yes, I believe in voluntary action.

Senator MONRONEY. This is an effort made by community leaders of both races to try to effect an orderly, peaceful, and voluntary effort to open up a maximum number of public accommodations to all races. Are you in favor of that or are you against that?

Mr. WEIDEMEYER. I am in favor—as I expressed myself before—of every man in business deciding that for himself and not hamstring him.

Senator MONRONEY. Just leave it as it is in Cambridge; is that right?

Mr. WEIDEMEYER. In Cambridge it was all right until these outside agitators came in. Just because these outside agitators come in and stir up something and give you something that looks like trouble doesn't mean we have trouble there in Cambridge.

Senator MONRONEY. There weren't any outside agitators stirring up desegregation in Salisbury, and yet it apparently worked.

Mr. WEIDEMEYER. They worked there. If they want to do it, that is all right with me.

Senator MONRONEY. You just don't think it is the right thing to do. You believe that every man ought not to be even urged by a community movement or good will among races to see if an agreement can be reached in a community to desegregate; is that correct?

Mr. WEIDEMEYER. I don't like the desegregation laws. That is what their object is, to get desegregation laws.

Senator MONRONEY. Senator Hart?

Senator HART. Mr. Chairman, perhaps this was developed before I came in. I realize now that you practice in the city of Annapolis.

Mr. WEIDEMEYER. Yes. I used to practice in Washington, too.

Senator HART. What is the custom in the city of Annapolis itself with respect to restaurants?

Mr. WEIDEMEYER. We have no trouble there. Although businesses are left to do what they want. There are several of the restaurants that are desegregated, and some of them that are segregated. But we have no problem there. Unless the agitators come in we will get along fine. Maybe eventually all of them will become desegregated.

Senator HART. So that——

Mr. WEIDEMEYER. Annapolis people get along fine.

Senator HART. So that a Negro can get into some restaurants?

Mr. WEIDEMEYER. Oh, yes.

Senator HART. And cannot in others?

Mr. WEIDEMEYER. There are colored restaurants and they are integrated restaurants that they can go into. And they go into hotels even. I have seen them in the halls of the Maryland Treadway Inn, all those places they go in.

There is no hard and fast policy.

Senator HART. My concern, of course, relates to the U.S. Naval Academy. What if a man was appointed to the Naval Academy and was a Negro, and he came from a background that encouraged him to think that he was as good as the next fellow, and had every right to go into any restaurant that invited the public in, and kicked up a fuss when the door was slammed; would he be an outside agitator?

Mr. WEIDEMEYER. I don't think you would have that problem in Annapolis. Here the Frontier Club went into Carvel Hall and they had several hundred colored in there in Carvel Hall. It might be, and I heard a lot of whites say, they left that night and gave him a free door. But they were there, and they could go into any of the restaurants there. I know that they go into the theaters.

Senator HART. They couldn't go into any of the restaurants if there are some that won't admit them, as you described.

Mr. WEIDEMEYER. There are a few that won't admit them.

Senator HART. Let's suppose my appointee showed up at one of those restaurants. I would expect that he would be admitted, and I would go down and agitate if he wasn't. I wouldn't judge myself out of order at all.

Mr. WEIDEMEYER. They might down there.

Senator HART. I wouldn't doubt that.

I think what you need is more inside agitators if you want to get rid of outside agitators. I just don't buy the notion that we really ought to operate a Naval Academy in a place where this kind of embarrassment can occur.

Mr. WEIDEMEYER. Do you know of any embarrassment occurring, Senator?

Senator HART. No, I don't, but by George, if something like that would happen, I would think that there would be some Members of this Senate who would question the prudence of operating such an establishment in that setting, because indeed there are some of us who wonder why some of our people are exposed to what they are when they go to some of the military camps further south. Certainly, in the case of an appointee to the U.S. Naval Academy, I would find it very difficult to——

Mr. WEIDEMEYER. I would think if they had any hard and fast rule that they would probably make exceptions in certain cases. But I don't know of any instance like that happening down there. Until it does, I am not worried about it. I don't think anybody else ought to be.

Senator HART. What about a sensitive Negro who sought admission to the Academy, would he be foolish to worry about it?

Mr. WEIDEMEYER. I don't think he would, because I think he would find plenty of places in Annapolis where he could be adequately accommodated.

Senator HART. Could I assure him that he would go anyplace that the Naval——

Mr. WEIDEMEYER. I wouldn't say that he could go anyplace. But I would say that he would find adequate places and good places without going out of his way about it. And that is all anyone in this world can be. If we can find adequate means of earning a living, adequate means of satisfying our wants, if we ought not to be able to go everywhere—I don't go to all the millionaires' clubs; I wouldn't dare go. I wouldn't dare be admitted. I know they wouldn't appreciate me. And when they didn't appreciate me, I would feel unhappy.

Senator HART. I think the reason that Senator Engle and I and others use these, what you describe as emotional examples, is to try and jar the conscience of communities into a realization of what happens to an equally decent Negro family who don't wear the uniform but have the same feelings and instincts as you and I have.

Mr. WEIDEMEYER. There are a lot of places that will admit certain Negroes and won't admit others. There are a lot of places that won't admit any Negroes, and will not admit a lot of whites, and they have their reason for it. The way the whole thing has gone, I think there is a fear on a lot of businessmen that if they excluded a drunken bum, white, they would be all right; if they excluded a Negro on the same basis, they would be up before some commission, harassed because he was a Negro.

One of the leading fellows—I am not going to mention any names—a leader in the Negro movement, I understand, was arrested and hardly could walk when the policeman got him outside of his car. They had all sorts of calls from the NAACP. The policeman didn't tell me; I got it from good authority.

But the same thing could happen with the interracial commissions, with the NAACP and everything else. Just because a man might not be excluded because he was a Negro, because he was a Negro or a person not fit to come in, and they have been harassed, and said it was because of racial things, that is what a lot of our men are afraid of in business.

Senator MONRONEY. Thank you very much.

Senator THURMOND. Mr. Chairman, could I ask a question?

Senator MONRONEY. Senator Thurmond.

Senator THURMOND. Mr. Weidemeyer, I am a little stunned here by the line of questioning, expressing the opinion about progress being made or about the goal being accomplished, when that goal is integration. Is that the goal, integration? Is that what this committee wants to force on everybody, integration?

Is the goal freedom or is it integration? I am surprised. It seems that if we are going to make progress it means integration. If you favor the Constitution, I think it means freedom. What do you think about it?

Mr. WEIDEMEYER. I think it means freedom and a lot of us are very apprehensive, and we are afraid, Senator, that the goal of all of this is not to give freedom to individuals, but to force integration. For that reason, that is one of the reasons why I am violently opposed to it, because I feel that all, or a lot of these movements are not to gain certain freedoms. Those are the things that disguise the real motive.

I think the real motive is to promote integration in this country. I do not think this country can survive integrated. Many great nations that started out with the same foundation of resources and the same human beings, with the same capabilities, have not progressed to that extent. Why? Because they started about the same time as this Nation, and they fostered integration.

Senator THURMOND. That is all.

Thank you, Mr. Chairman.

Senator MONRONEY. Thank you for your testimony.

We have agreed, although his name was not on the witness list, to hear Mr. Samuel J. Setta, motel owner of the Eastern Shore, Maryland. You may proceed with your statement.

STATEMENT OF SAMUEL J. SETTA, CHAIRMAN, REFERENDUM COMMITTEE OF MARYLAND, EASTON, MD.

Mr. SETTA. Mr. Chairman, members of the committee, I am Samuel J. Setta, a motel owner and operator on the Eastern Shore of Maryland, and it is a typical "Mom and Pop" operation. I am "Pop."

This type of motel accounts for 85 percent of the motels in this country. This is a very—it is a much more intimate operation than probably a lot of you gentlemen visualize. Our homes are right in the heart of our motels. When a man steps into our office, into our lobby, he is within two paces of our home, our living room, our kitchen. And maybe a lot of you are not familiar with that intimate detail.

I see in the past where Mrs. Murphy's roominghouse was brought up in here, but I don't believe that "Mom and Pop's" motel was brought up. And this is every bit as intimate as Mrs. Murphy's roominghouse.

This is just one aspect of the motel business. In the industry they are known as "Mom and Pop" operations.

I am also a prime mover in the drive to place the Maryland accommodations law on the ballot in 1964. We went over the top in Maryland, and in conjunction with the Maryland Petition Commit-

tee we had many, many more signatures than we needed to put it on the ballot. At present that law is in suspension.

I have also advised the Cambridge Petition Committee on their petition, and with demonstrations in the streets and violence they have gone over with many more names than they needed in less than a week.

So people do want to vote on these measures that affect their lives.

Senator MONRONEY. In order to help the committee, Mr. Setta, will you identify eastern Maryland by highways and general location?

Mr. SETTA. By highway?

Senator MONRONEY. Yes.

Mr. SETTA. Sixteen miles from Cambridge, and it is on Route 50, on the road to Ocean City.

Senator MONRONEY. On the Eastern Shore?

Mr. SETTA. Yes, sir.

Senator MONRONEY. Below Cambridge?

Mr. SETTA. No, before you get to Cambridge; 16 miles before you get to Cambridge. If you are ever by there, you will pass right by my motel.

Senator MONRONEY. Motel?

Mr. SETTA. Motel.

I come before you an adamant opponent of forced integration of businesses and I am sure I speak the sentiments of a majority of the people in America when I express myself.

First, I question the wording of the title to S. 1732: "A bill to eliminate discrimination in public accommodations affecting interstate commerce." The word "public" as used in this title conveys the idea that the objects of this legislation are owned and controlled by the public in the same manner as public lands, public works, public funds, et cetera.

In my opinion, the title should read: "A bill to eliminate discrimination in privately owned accommodations catering to the public," or more appropriately: "A bill to eliminate private enterprise."

You are listening to a voice from the grassroots. Here I might say I am not a big public figure. I am just a citizen of Maryland with a small business, so my words probably won't carry too much weight. But they might carry a lot of significance.

Our voices haven't been too loud but don't be deceived by noise being made by the Negroes and do-gooders who are trying to force you to act on this legislation. The ominous silence from the congregations who disapprove of their clergymen, union members who don't agree with their leaders, and citizens everywhere who have seen near anarchy develop in this country will have the expression necessary to meet the occasion when the voting begins in 1964.

I have opposed this public accommodations law at every level of government for the last 3 years because it is aimed at businesses which are strictly private enterprise. The fact that I can open and close my doors at my pleasure certainly makes it private. Many businessmen, myself included, earn a living and also make their homes with their businesses and their social life should not be regimented by more than the private citizen who does not have a business.

Not one member of this committee of the Senate would venture into a Negro neighborhood alone and neither would you permit your wives

to go alone; yet the legislation this committee is considering would force businessmen and their wives to take these people into their businesses and homes.

And I might add, Senator Monroney, that your wife was quoted in the press as being fearful of going either a block or two blocks from her home alone.

We are not guilty of anything more than catering to the wants of our customers. Everyone, except the proponents of this law, knows that in any business the customer is the boss. If you gentlemen shop anywhere you call the tune, not the proprietor.

In my motel if my customers want TV, I provide TV. If my customers want room phones, I provide room phones. And if they prefer a segregated motel, I provide a segregated motel.

Now if it were feasible to write this law to read that customers must stop discriminating and continue to patronize businesses you might solve the economic aspects of this dilemma, but that would be impossible. So, to get at the buying public who are the discriminators and beyond reach, the administration is trying to get laws and penalties fastened onto the businessman to force customers to integrate.

The proponents say that integration involves no loss of business. I never cease to be amazed at how many brilliant business analysts are among the proponents, none of whom have ever owned or operated a restaurant or motel. It's equally amazing how great their enthusiasm is for a law that doesn't touch them in the slightest degree.

Also, it's very easy for a family which is high in government to build homes on mountaintops and exclusive areas, and enroll their children in exclusive segregated schools to tell the peasants of the country that they should integrate every phase of their lives.

And that great champion of integration, Senator Humphrey, helped his nephew graduate from a private school recently in Baltimore.

The attempt to "keep up with the Joneses," to gain social rights at the expense of the civil rights of private enterprise, if successful, is certain to undermine one of the pillars upon which this great country was built. The one big difference between communism and capitalism is private enterprise. The administration itself is admitting that this law will infringe on our civil rights when they seek this law under the commerce clause of the Federal Constitution, rather than the equal rights 14th amendment.

The theory evolved by the Department of Justice is that because a business concern deals with the public, it may be subject to complete regulation or possible extermination by the Federal Government. This alleged authority is derived from the clause of the Constitution which gives Congress the power to regulate interstate commerce, and Mr. Robert Kennedy cited various laws passed by Congress in this field.

Not a single one of these statutes, however, covers the selection of customers of a business. They deal with employees, or the practices of the employer in his relations with his own workers, or the practices of business owners in relation to other businesses or in shipping goods to another State or other countries.

Never in the history of the United States has the commerce clause of the Constitution been invoked to regulate the customer relationship of a business owner and individual citizens.

No court has ever held that sleeping in a privately owned motel is a civil right. No court has ever held that munching a sandwich in a privately owned restaurant is a civil right. England rejected this very law by a 2-to-1 vote in 1962 and it was labeled "undemocratic" and "unworkable" by leading clergymen and civic leaders.

The dictator countries, oppressive as they are, don't even have this law on the books. What value is there to a business or a high position or profession without the rights to operate freely as we have since this country was founded?

We all know of countries where people have all of these occupations in good measure but they don't have rights. The result is they burrow under the Berlin wall. They swim canals. They crash barbed wire fences, they risk their lives daily to escape. This is a king-size step in that direction. Deprive us of a right now and next year another and another and before you know it we will be in the same position.

This law is definitely class legislation. Under this law we may turn a white man away because he is uncouth or undesirable and he must leave, but if a Negro is turned away for the same reasons, we may face charges of discrimination.

When you write the word "color" into this law, the white customer is not equal before the law. When you force hotels and motels to eliminate discrimination and exclude segregated church suppers, segregated church dinners, and boardinghouses which are catering to the same public, and indeed are strong competitors, we are not equal before the law.

The Attorney General stresses the immorality of discrimination but ignores the fact that it is just as immoral to enact laws which will legislate a man into bankruptcy or into a business relationship which will make his life a daily ordeal. It should be obvious by now that there are many people who don't want the Negro socially. I have seen strong men break up under the strain of the demonstrations and harassment sanctioned by this administration.

Women in business have become terrified at the prospect of facing unruly mobs with the knowledge that they are being encouraged by this administration. The responsibility for the violence in demonstrations by Negroes can be laid squarely at the door of the White House. I have a very good cross section of citizens from the North, South, East, and West patronizing my motel.

Let me digress a minute. There were some polls introduced here, I think it was yesterday, some figures about polls by the Harris organization, showing how many people favored this law. Where those polls were taken, I don't know. It could have been Harlem, for all I know. But at any rate, this poll they have here is unsolicited; it comes from people that patronize me in my motel.

They are the people who put the money on the counter to keep us people in business. And I think it is very authentic. And when they come from Pennsylvania and Jersey and the West and New York and all of these States, they are just as emphatic in discussing a segregated motel as they are when they come from the South.

This issue is discussed daily so that I may keep abreast of my customers' thinking. I say to you that this administration will pay the price in the 196[illegible] for its handling of this situation. This

Nation cannot afford the luxury of a President who serves 10 percent of the people at the expense of the other 90 percent.

All businessmen have a different financial situation.

In my particular case my two immediate competitors are millionaires. My resources consist of a $23,000 mortgage and a going concern. Certainly they can approach this problem with a greater degree of aplomb than I can.

I meet a mortgage payment every month, plus numerous other bills. What do you think the reaction of my banker would be if I came to him and said, "Mr. Banker, a couple of months ago Congress passed a law which took the control of business policy out of my hands because the administration said it was immoral, and business has declined so that now instead of $245 for this month's payment, I have to give you 245 morals?" I'll tell you what his reaction would be. I would be slapped with a big fat foreclosure in very short order. This is classified as "economic growth."

I refuse to gamble the welfare of my family and our pursuit of happiness on the business judgment of an administration which is loaded with theorists who have never operated a successful business or met a payroll and have never balanced a budget. If they can't run this Nation without brink of bankruptcy, am I to accept their business judgment?

The Attorney General has testified that at present white prostitutes, dope addicts, and moral degenerates could come into our motels and hotels but Negro citizens in high positions could not. I don't know what kind of places the Attorney General frequents because he vehemently denied any pleasure in having hearsay presented to him right here in this hearing.

But this statement he made is certainly an insult to every motel and hotel operator in the country. But let's look at this law again. This law would reverse this contention and would not only enable black prostitutes, black dope addicts and black moral degenerates to come into our places but also a people with a poor hygiene, high incidence of venereal disease and vandalism, plus the element of force to make us accept them; because here again I can reject the white person but not the black person. Is this the Attorney General's idea of an improvement? I hope I don't have to face many more like that one.

Gentlemen, there's a labor angle to this situation also. When a labor contract is negotiated there is one clause that is nonnegotiable: the right to strike. When we are paid rental for a room, part of that money is overhead and part of it is wages. Since the customer is the boss, this law would force us to work without the right to strike. These very labor leaders who advocate this law would violently rebel if any attempt was made to eliminate their right to strike.

The administration says the Negro is rejected because of his color. This is wrong and completely untrue. We don't care if he is blue, pink, or red. The Negro is rejected because he is an economic liability to our businesses. I have rejected Negroes who were practically white. I would be less than honest or helpful if I didn't include the reasons why the Negro is a liability, since the proponents won't.

The two races are absolutely proven to be incompatible. The two races can coexist harmoniously but there will never be true integration. No other minority in this country has a feeling of inferiority

because they live among their own people. Why should these people have that inferiority? No one is trying to sprinkle the Chinese, Indians, or Japanese among the whites so why this massive effort to integrate the Negroes?

If the administration and the Negro leaders and other proponents would take the time they are spending on demonstrations and pressure tactics and point out to the Negro people that law or no law, acceptance will never come until they stop a disproportionate contribution to the high crime rate, illegitimacy, production of slums, and making careers of unemployment compensation and welfare programs.

The Negro people will gain acceptance when they meet certain standards of morality and living conditions. No law can accomplish this. This is the one objective the Negro will have to work for and earn himself. There is nothing wrong with individuals having to meet standards. It is done every day. Churches demand standards, schools demand standards, you gentlemen in the Senate require standards, and whether we like it or not, all people have standards for their social equals to meet.

The 30 States that have had these laws are just as segregated as the 20 that don't. It is just a little more subtle. I predict now that attention has been focused on these laws there will be a rash of suits testing their constitutionality. When the Attorney General said Senator Lausche enforced such a law as Governor of Ohio, he should have realized Senator Lausche was just tolerating it like the Kennedys tolerate the Taft-Hartley Act. These laws do not accomplish the goal of integration. Proof of this is the agitation and demonstrations all over the country and the existence of Harlems in very major city in the country. In the North the Negro groups have even invented a word to cover this situation. They call it "Resegregation."

These laws could subject the Negroes to more humiliation than any voluntary agreement would. All of us have had poorly prepared meals in restaurants when the owner was trying. What do you think the result would be if he wasn't trying?

The people who favor this law are largely executive boards of church groups but not the congregations; executive committees of labor unions but not the rank and file; business executives but not the employees. In short, gentlemen, a great number of generals but few soldiers.

Today we are witnessing one of the strangest paradoxes of all time. Churchmen with segregated churches, labor leaders with segregated labor unions, news media with segregated work forces, and politicians and civic leaders who lead completely segregated lives trying to force a segment of private enterprise to integrate.

Christianity has not been able to integrate in 2,000 years and Judaism for longer than that, and yet these very religious leaders expect Americans to do it in less than 200, and if we don't, they want to shove it down our throats and gag us in the process, and all this on the false accusation that we are discriminators.

You are bucking a law which was never enacted by any legislature when you pass a law like this, the law of nature. God himself was the greatest segregationist of all time as is evident when he placed the Caucasians in Europe, the black people in Africa, the yellow people in the Orient and so forth, and if God didn't see fit to mix people who are we to try it?

Christ himself never lived an integrated life, and although He knew His life on earth would be a model for all mankind, when he chose His close associates, they were all white. This doesn't mean that He didn't love all His creatures, but it does indicate that He didn't think we had to have all this togetherness in order to go to heaven.

Gentlemen, we should give a lot of serious thought to these final remarks of mine and not try to outdo God in the makeup of the world.

Senator MONRONEY. Senator Cotton.

Mr. SETTA. There is one more thing I might mention here before I subject myself to this questioning. In the Maryland law there was a provision in it that we, the opponents, were able to persuade the legislature to adopt—although we were opposed to the law completely, we were able to get this amendment in.

This amendment calls for equal punishment for accuser and accused. In other words, if a man comes in and accuses a man of discrimination under this law, and it is false, or malicious, he is subject to the same penalties as the accused would be if he were guilty.

Senator MONRONEY. Senator Cotton.

Senator COTTON. Mr. Chairman, I have no questions that I desire to ask this witness.

Senator MONRONEY. Senator Thurmond.

Senator THURMOND. Mr. Setta, I want to compliment you on a very practical statement. I notice you state that you have a mortgage of $23,000.

As I understand, you have deep concern if this bill should pass and you are forced to take customers that you do not wish to and who would hurt your business, that that would put you in trouble and might bring about a foreclosure of your business; is that correct?

Mr. SETTA. Yes, sir. That is one reason.

Senator THURMOND. You feel that that would be typical of the other businesses throughout the State of Maryland as a whole?

Mr. SETTA. I think that is one apprehension they all have in mind, yes.

Senator THURMOND. From your contact with people who have discussed this matter, are there masses of people for such legislation as this, or are they opposed to it?

Mr. SETTA. They are overwhelmingly opposed to it, sir, from all parts of the Union that stop at my place.

Senator THURMOND. People stop at your motel from the various States of the Union?

Mr. SETTA. Yes.

Senator THURMOND. And you heard them express themselves on legislation of this kind?

Mr. SETTA. I make it a specific point to ask them what their opinion is, yes, because I want——

Senator THURMOND. Just what has been the reaction to the questions you have asked them about legislation of this kind?

Mr. SETTA. That they do not want an integrated motel. If they have a preference they prefer a segregated motel when they are in an area. I do the same thing, if I travel out to Chicago to take my son to college, Northwestern. When I go out there and have to stay at a motel and it is integrated, I will not sleep there, go in and pa-

tronize that motel. Where there is an area where they can get segregated motels, they prefer a segregated motel.

Senator THURMOND. And that has been the expression of the customers who have patronized your business?

Mr. SETTA. Yes.

Senator THURMOND. And you feel that your business would be greatly hurt if this law passes?

Mr. SETTA. Yes. I would feel it would.

Senator THURMOND. Don't the people want more Federal intervention in their affairs, as exemplified by this bill or other bills of any such nature?

Mr. SETTA. Senator, Representative Morton, who is a brother of Senator Morton who is on this committee, represents the Eastern Shore of Maryland. His name is Rogers Morton. He has just sent out a questionnaire asking the people of his district what they thought of the five main points of this civil rights program. These people are now in the process of answering that, the people of our area.

Most of them are answering it, the ones that have consulted with me, are refusing it on the one basic principle, that the Federal Government should not be allowed to come in and take over a function of the State in this area.

Senator THURMOND. If there is a function on this line, or an obligation or responsibility on this line, as I construe from what you said the people feel, it is not that of the Federal Government but that of the State or maybe still preferably, the local community?

Mr. SETTA. Absolutely. That is the way they feel about it, as expressed, I think, by the referendum of the farmers. I think they are getting tired of the Federal Government moving into every facet of everybody's life.

Senator THURMOND. Do you think that the people in the State of Maryland would prefer force at any level of government, or would they wish to leave it to the owner of each business to run his own business as he feels would be wiser for him?

Mr. SETTA. They would prefer the voluntary approach to this problem, and I prefer that, too.

Senator THURMOND. By voluntary approach do you mean to set up a commission to go out here and try to pressure people to do it voluntarily, or do you mean leaving it to each individual owner to decide whom he wishes to sell to, and whom he wishes to serve?

Mr. SETTA. They don't favor pressure from any source, whether it be demonstrations, commissions, or anything. They want the individual to operate his business as he sees fit.

Senator THURMOND. In other words, they believe in freedom to handle their own private business as they desire?

Mr. SETTA. Absolutely.

Senator THURMOND. Thank you, Mr. Chairman. That is all.

Senator MONRONEY. Senator Hart?

Senator HART. What sort of night did you spend at the motel when you took your son to Northwestern?

Mr. SETTA. I did the best I could.

Senator HART. Specifically what was your problem?

Mr. SETTA. What was my problem? I had no problem, sir. I have a philosophy that when I'm in Rome, I live as the Romans do.

Senator HART. Did you find any custom in Chicago that offended you?

Mr. SETTA. I didn't have too much time. I took my son out to Northwestern and I was right busy with that. I didn't actually indulge in any cultural pursuits in Chicago.

Senator HART. But you checked into a motel and you checked out, and there was a period of time intervening. Now tell me exactly what offended you?

Mr. SETTA. I didn't see any Negroes there. For all I know, maybe they haven't even catered to any. You know there are a lot of places that claim they cater to the integrated trade, but they don't. I will give you an example about this Salisbury thing that you were just mentioning a little while back.

They have several ways of saying, "We are integrated," but some of them put little reserve signs on tables, you know, and some of them are busy, and some of them don't have time. These are the little devious ways that they use to beat down true integration of a business.

Senator HART. Then as far as you know, you have never spent a night in an integrated establishment?

Mr. SETTA. I didn't see any Negroes in this motel that I stayed at. There might have been. I just didn't see any. I would say to you that I didn't stop going in there because I had to have a night's sleep somewhere. When I'm in Rome I do as the Romans do.

I imagine if you come on the Eastern Shore to go to Ocean City possibly for a little recreation, and you happen to stop at my motel, I don't imagine you would want it segregated, would you?

Senator HART. What was the question? I'm sorry.

Mr. SETTA. I say to reverse that, if you were traveling, and you went into a segregated area, I don't believe you would walk away because the motel was segregated?

Senator HART. I have walked away from the door of a restaurant where I had happened to stop because a sign said something like this: "Because of limitations of space, white people only."

What I'm trying to find out from you is the depth of your experience with respect to a night in an integrated motel.

Mr. SETTA. That is the depth of it, just about it.

Senator HART. Is it fair for me to then say that you have never, so far as you know, experienced life in an integrated motel?

Mr. SETTA. I would say that is correct, yes.

I have something else for you——

Senator HART. There are some pretty vivid and hair-raising descriptions contained in this. I was wondering how much of it was your own knowledge.

Thank you very much, Mr. Chairman.

Mr. SETTA. May I ask you something?

Senator HART. Certainly.

Mr. SETTA. I have something here from Detroit, from the heart of your State. Apparently 44,000 people out there don't agree with your views.

Senator HART. I'm sure there are many more than that. I think there are about a million against me. [Laughter.]

Mr. SETTA. May I read it to you? Would you like to read it here?

Senator HART. I'm sure I know about it. But feel perfectly free to read it. In summary it is 44,000 people who are petitioning the City Council of the City of Detroit to, I think, prevent the city ordinances providing licensed brokers to sell on a nondiscriminatory basis.

Mr. SETTA. You call that hair raising, my testimony?

Senator HART. Yes, some of the descriptions. If I could settle——

Mr. SETTA. Don't you think it is true?

Senator HART. I have never experienced it, and neither have you.

Mr. SETTA. Don't you know the crime rate there?

Senator HART. Yes, I know the crime rate across the country.

Mr. SETTA. Don't you know the crime rate is true, that I mentioned, of the Negro people? Don't you know in Maryland they attribute 64 percent of the jail elements to 10 percent of the population?

Senator HART. Do you think that that results from some act of God that makes them instinctively worse than another human being?

Mr. SETTA. I think it comes from their nature, from the way they are.

Senator HART. I think the answer is "Yes."

No, I don't agree with that.

Thank you very much, Mr. Chairman.

Senator MONRONEY. Do you use——

Senator HART. I wish I could settle for only 44,000 in Michigan against me.

Mr. SETTA. I think there are a lot more.

Senator MONRONEY. The staff and ourselves don't recall this case of the British voting 2 to 1 against a so-called integration law. I wish you would help us out on that.

Mr. SETTA. Last year, if you consult any of the press people, they can give you the issues of last July. The Parliament, in London, had this very same law under consideration. It might not have been verbatim, of course, but the basic thing they wanted to accomplish was integration of public accommodations, and it was voted down 2 to 1.

I think any of the press can verify it. I don't have a big research organization. All I do is read newspapers.

Senator MONRONEY. So far as I know, there is very little segregation in England.

Mr. SETTA. Birmingham—they have had a Birmingham there, too.

Senator MONRONEY. I don't recall this. It was a parliamentary vote?

Mr. SETTA. It is the truth. I don't think I would want to lie to you.

Senator MONRONEY. You referred to anarchy as a result of desegregation. Do you think——

Mr. SETTA. They are anarchy.

Senator MONRONEY. Do you think there is a near anarchic condition in 32 States or in hundreds of our cities which have passed ordinances against racial bias or the many more hundreds who have done it voluntarily?

Mr. SETTA. I said all over the country. I didn't say 32 States.

Senator MONRONEY. Have you heard of any conditions of anarchy in these 32 States?

Mr. SETTA. Yes, indeed.

Senator MONRONEY. You have?

Mr. SETTA. Yes. Chicago had a race riot and New Yorkers had riots. Yes, sir.

Senator MONRONEY. Cambridge had riots.

Mr. SETTA. Yes, they had riots.

Senator MONRONEY. They had no desegregation.

Mr. SETTA. They just locked up 42 yesterday I think on a construction project up there.

Senator MONRONEY. Do you use any colored help?

Mr. SETTA. Yes, sir. A hundred percent.

Senator MONRONEY. A hundred percent?

Mr. SETTA. Yes.

Senator MONRONEY. In your kitchen and all?

Mr. SETTA. Yes, sir.

Senator MONRONEY. Then, do you believe, I am sure you don't, that the colored race is as inferior as you say here, that they had a disproportionate contribution to the high crime rate, illegitimacy, production of slums, making careers of unemployment compensation and welfare programs, the large amount of venereal diseases which you mention, and all?

Mr. SETTA. Those are facts.

Senator MONRONEY. It is an indictment of an entire race.

Mr. SETTA. These are all facts.

Senator MONRONEY. I am sure you don't mean that.

Mr. SETTA. These are all facts, yes, sir.

Senator MONRONEY. And you use a hundred percent of these people in your operation, you say, in your employment?

Mr. SETTA. But, I select them.

Senator MONRONEY. Then, is it not possible, if you run a type of restaurant, a motel, that you would select the decent people——

Mr. SETTA. Not under this law.

Senator MONRONEY (continuing). And deny the indecent. All of the people, simply because of the color of their skin, do not take on all of these horrendous characteristics. There are many distinguished ministers, many distinguished public servants, college professors, doctors and all who are not the same color as we are. But if you were a man who had struggled up against terrific odds to improve your condition, to become educated against the difficulties of admission to colleges—there used to be only one medical school in the country that would accept colored students, and this was Howard University, later the Meharey Medical College in Nashville. But it was almost impossible for a man to get an education in medicine and these other things.

If you had gone to that great trouble to try to lift yourself up by the sheer strength of perseverance to be of greater service to your race and to humanity, would you want the door slammed in your face because there are other members of your race who are dope addicts or thieves or crooks.

Fortunately, all the white people are not thieves or crooks; neither are the colored all thieves or crooks. I don't think we should have mass indictment.

Mr. SETTA. Senator Monroney, that is the weakness of this law. You are offering me a package deal. I have got to take——

Senator MONRONEY. I am not offering you anything. I am trying to give you the facts in this case.

Mr. SETTA. I have got to take every citizen of the colored race. I can't just say you are a college professor, I will wait on you; you are a bum, and no good, I can't wait on you. And another thing, sir, I am a member of the minority. I am an Italian. I can remember in my youth when we were very much maligned. It wasn't very unusual for me to have to scrap in the streets and the alleys to defend myself against the appellations that we were subjected to, like wop, giner, and so forth. I have been through all this. But I didn't go out seeking a law to improve myself.

We weathered the storm and we fought forward. And today you have Italians in high places. You have a Cabinet member, Mr. Celebrezze. He is a Cabinet member. You have judges, you have people high in industry, but they didn't do it with a law.

Senator MONRONEY. Were you ever denied accommodations in a hotel, or a dining room, because you were an Italian?

Mr. SETTA. I was denied accommodations in a swimming pool, and I couldn't afford to eat in a restaurant or stay in a motel. The son of an immigrant don't have that kind of money.

Senator MONRONEY. You weren't denied?

Mr. SETTA. I was denied a swimming pool, which I could have afforded.

Senator MONRONEY. You were not denied the right of accommodations in a hotel?

Mr. SETTA. I didn't have that kind of money, sir.

Senator MONRONEY. It was simply a case that you were not identifiable as a member of a race that formerly was brought over here in condition of slavery. Certainly the same analogy and difficulty of immigrants fighting up from a lower status applies to the Irish in Boston.

Mr. SETTA. Right.

Senator MONRONEY. Yet, today we have a President in the United States, and an Attorney General, who came from that background, and this racial background has produced many of our great people, and I quite agree with you.

Mr. SETTA. But not by law, sir.

Senator MONRONEY. I deplore discrimination which allows a man, no matter how distinguished, no matter how fine a record he may have created in science or anything else, to be told: "We cannot let you stay all night in my motel," or "You can't have a hamburger sitting down inside—You can pick it up at the counter and run out with it, but you can't sit down and eat the hamburger and have a cup of coffee. We will give it to you in a paper cup." You have told us your real reason, and I think probably there is some cogency to the opinion in this regard, that many motel operators and cafe owners have, where you say, on page 3, at the bottom of the page, "The Negro is rejected because he is an economic liability to our business."

Mr. SETTA. Right.

Senator MONRONEY. This is probably the keystone of the argument, is it not?

Mr. SETTA. Right. I will explain how he is an economic liability. You say these prominent people, Negro citizens who are high in government and high in the educational world and so forth—to me if they came to my desk, they would be just that—they would be distinguished citizens.

But, when they are sitting on my porch, and my clientele sees them sitting on that porch, to them they are Negroes. And this is what governs our business.

If you could write into this law that all I had to accept was top-quality Negroes, then possibly you would be justified in your argument there. But in your law you are writing in there that I have to accept 100 percent, regardless of what the position of the Negro, or what his morals are, or anything.

Senator MONRONEY. We do not say that. We say it would be illegal in the law—I don't say it; I am not a coauthor of the bill, and I have certain reservations on constitutional grounds on this bill, but none on the social or ethical side. But certainly you would not have to receive colored clients any more than you would have to receive white clients who did not meet the standards of your enterprise.

A drunk white man is just as bad as a drunk colored man.

Mr. SETTA. Exactly, and we reject them.

Senator MONRONEY. And a diseased white man is just as bad as a diseased colored man.

Mr. SETTA. Exactly. The incidence is lower, that is all.

Senator MONRONEY. What?

Mr. SETTA. I say the incidence is lower among white people than it is among Negroes.

Senator MONRONEY. This may be true, and it may not. I don't have the statistics. I do know that in most of the places in the South that run fine eating housing and fine tables; the cooking in the kitchen, and the service in the dining room, is generally performed by members of the colored race.

Mr. SETTA. Many of them.

Senator MONRONEY. As it is in your motel?

Mr. SETTA. Yes.

Senator MONRONEY. I just don't believe if your remarks were generally true of the colored race that you operators of these motels would be engaging this kind of help.

Mr. SETTA. In my motel it is a lot more intimate for a man to jump in bed with his clothes off and sleep in it than it is for that maid to pick up those sheets and lay them on there.

Senator MONRONEY. I don't get that. [Laughter.]

Mr. SETTA. I think you get it.

Senator MONRONEY. It may be important to you. There is no discrimination in Maryland against the Chinese, the Indians, or the Japanese, is there?

Mr. SETTA. I am not qualified to say on that whether there is or not.

Senator MONRONEY. Do you take Chinese or Indians? Would you?

Mr. SETTA. I don't say that I take them completely, no, I judge them——

Senator MONRONEY. If they were clean and driving a Cadillac or an MG——

Mr. SETTA. I would look at it from an economic standpoint, whether they would be resented by my clientele.

Senator MONRONEY. You wouldn't do as much for an American citizen who was colored?

Mr. SETTA. I can't help what my clientele resents. This is their right, and their privilege. And they control me.

Senator MONRONEY. OK, we get back to this basic statement then. The Negro, you feel, is rejected because he is an economic liability to your business?

Mr. SETTA. Yes, sir.

Senator MONRONEY. And you or some of the people who oppose this vigorously, oppose it on economic grounds and are not willing to take an economic gamble which is being taken daily in hundreds of communities that go to a desegregated basis simply because they feel that bias against an American citizen is not right.

We are all, of course, citizens, unless for some reason of our own we are not acceptable on other grounds than our race or our skin. You are not willing to take this gamble of leadership to try to work with your people voluntarily, which I have advocated and which has been done in most of my home cities in Oklahoma, to bring about desegregation without law.

As I understand it, you are not in favor of even voluntary efforts even.

Mr. SETTA. You shouldn't ask me to take a chance on going broke.

Senator MONRONEY. These other people are taking a chance on eliminating bias and are not going broke.

Mr. SETTA. I don't owe that much to anyone to take a chance on going broke.

Senator MONRONEY. You are quoting not the Scripture, but you are speaking of Christianity. I think probably the basis of Christianity might be found in trying to create a little stronger and better and more charitable relationship between all races. But, I don't care to get into——

Mr. SETTA. I am not nasty to them. I am very charitable to them. One owes me money now that I will never get.

Senator MONRONEY. Do you have some further questions?

Senator THURMOND. Yes.

Mr. Setta, do you feel it is bias if you prefer not to take someone in your business who you think will hurt your business?

Mr. SETTA. No, I don't think it is bias. This is my prerogative to operate my business as the Constitution of this country permits me to. I set up my business with that in mind. When I dug the foundation, that is what I had in mind. Now that I have it built, I don't see where I should be forced into something that I feel is going to hurt my business or that I don't prefer to live with.

Senator THURMOND. I am sure you agree that there are many fine Negroes—preachers, schoolteachers, lawyers, doctors, other professional men, and businessmen, and carpenters, painters, truckdrivers, and ordinary workers. There are many fine Negroes. I know a great many. I am sure you do.

Mr. SETTA. I certainly do.

Senator THURMOND. That is not the question here, is it?

Mr. SETTA. No, sir.

Senator THURMOND. It is simply a question here of whether we are going to pass a law to force you, Mr. Setta, in Maryland, to say you

have got to handle your business in a way that you don't want to handle it, and in a way that you feel is not best to promote your business.

Isn't that the issue?

Mr. SETTA. Absolutely right.

Senator THURMOND. That is all, Mr. Chairman. Thank you.

Senator MONRONEY. Senator Hart, do you have anything further?

Senator HART. Thank you, no.

Senator MONRONEY. Thank you, Mr. Setta, for your appearance here.

Mr. SETTA. Thank you.

Senator MONRONEY. We have as the closing witness, Mr. Edgar S. Kalb, manager of Triton and Beverly Beaches, in Maryland.

The hour is growing late. We hope you will expedite as much as possible your testimony. I see you have a statement that is some six pages long. We would be very happy to include it in full in the record, if you would care to highlight the statement as you go on.

STATEMENT OF EDGAR S. KALB

Mr. KALB. Mr. Chairman, gentlemen of the committee; I will do whatever I can to expedite the matter for you.

I come, Mr. Chairman and members of the committee, in a sense as a special pleader. In making a plea for a particular segment of private business I do not wish it to be construed in any sense that I favor the principles laid down in this bill. I think they are un-American, I think they are unconstitutional. I think they are detrimental to the welfare of the country as a whole.

However, it is not my purpose to go into that particular phase.

The scope and purpose of this statement is to present to the committee evidence to show that the provisions of S. 1732 should not be made applicable to the operation of privately owned and privately operated bathing beaches, which beaches are located in States in which the State, Federal Government, or any county or municipal corporation, or other public tax-supported body, operates or maintains any beach or beaches, which are open to the use of all persons.

I propose to submit to the committee amendments to effectuate this, and also certain amendments designed to eliminate what to me are certain injustices from the act.

So the committee will know clearly what I am discussing, I cite certain examples of the type of beaches for which exemption is asked as follows:

There are approximately 21 privately owned and privately operated bathing beaches located on the western shore of the Chesapeake Bay and its tributaries in Maryland.

Of these 21 beaches, 14 are located in and around Anne Arundel County, south of Baltimore, 4 are located in Baltimore County, north of Baltimore City, and 3 are located in Calvert County, within approximately 25 to 35 miles of the District of Columbia. Approximately 3 of these privately owned beaches are fully "integrated."

Generally speaking, these 21 beaches, with a few exceptions, are "family owned and operated," and have been so owned and operated for several generations.

Most of these small bathing beaches are located adjacent to small residential communities, and in a certain sense are practically part of these residential communities.

Based on personal experience and personal observation it is estimated that the total gross annual business done by these 21 beaches will be less than $5 million.

The State of Maryland operates two very beautiful public bathing beaches on the western shore of the Chesapeake Bay within easy access from Baltimore City, Washington, D.C., and the adjacent metropolitan areas; namely, Elk Neck State Park and Beach, north of Baltimore City, and Sandy Point State Park and Beach, south of Baltimore City (within Anne Arundel County). Both are within easy access to both Baltimore and Washington by excellent roads. (Sandy Point State Park and Beach is located in Anne Arundel County and annually has more than 300,000 visitors).

Baltimore City owns and operates a beautiful bathing beach, located in Anne Arundel County, south of Baltimore, and within about 35 miles of Washington, D.C. This beach is known as Fort Smallwood Beach.

Furthermore, according to newspaper reports, the Federal Government has recently devised a beautiful waterfront property located in Anne Arundel County, within 25 miles of Washington, D.C., and within about 36 miles of Baltimore City, consisting of approximately 265 acres of land with more than a mile of waterfront. This property could with little expense be converted into an additional waterfront park and beach by the Federal Government for the use of all of the public.

It is estimated that the total acreage and miles of waterfront available to the public in publicly owned beaches on the western shore of the Chesapeake Bay in Maryland, is in excess of the total acreage and the total miles of waterfront operated as private beaches in Maryland by private ownership.

In no instance does it appear that the patronage of these publicly owned and operated beaches has reached anything near their maximum potential patronage, and there is absolutely no present lack of sufficient bathing facilities available to the general public, in the immediate vicinity of Baltimore and Washington.

In addition, the many miles of beach front on the Atlantic Ocean at Ocean City, Md., are owned by Worcester County and are available to all persons.

Furthermore, the State of Maryland is presently acquiring an extensive expanse of Asseateague Island for use as a public beach.

Based on a need for additional bathing beach facilities, the public needs are more than adequately provided for, and there is no justification for requiring the privately owned and privately operated bathing beaches to accept undesired patronage.

The "findings" as set forth in section 2 of S. 1732 fail to establish any valid facts sufficient to justify the inclusion of privately owned and operated bathing beaches within the classification of businesses to which the provisions of S. 1732 are applicable. As indicated by the following analysis of the "findings."

Section 2(a) of the "findings" sets forth no basis for such inclusion, as bathing beaches are abundantly available to all persons in Maryland at publicly owned and operated bathing beaches, and in addition in at least three privately owned and operated beaches, which three beaches are fully integrated.

Section 2(b) of the "findings" sets forth no valid basis for such inclusion as none of the 21 privately owned and operated beaches, insofar as known, offer overnight accommodations (all being within commuting distance of Washington and Baltimore, and all catering to daily transient business only).

Section 2(d) of the "findings" sets forth no valid basis for such inclusion as the movement of "goods, services and persons" applicable to the operation of bathing beaches, with but minor exceptions, does not "move" in interstate commerce, and, strictly defined, bathing beaches are not places of amusement as used in section 2(d) but rather are "places of participating recreational activities," as distinguished from places of "amusement."

Comment. The "findings" as stated in section 2(d) would appear to be mere expressions of opinion—entirely unsupported with any factual basis in support of such opinions.

Section 2(e) of the "findings" would not appear to be applicable to bathing beaches, generally speaking, as they would not appear to fall into the classification of "retail establishments" as used in this subsection.

Section 2(f) of the "findings" sets forth no basis for the inclusion of bathing beaches in S. 1732, as these beaches are not located in any city, they have no facilities for holding conventions and generally speaking offer no accommodations for overnight visitors.

Section 2(g) of the "Findings" sets forth no basis for the inclusion of bathing beaches in S. 1732, as in no instance are there any business organizations seeking services in any area affected by the operation of these beaches. All of these beaches are located in remote rural areas where their presence contributes extensively to the local economy, and which economy would be seriously injured as a result of these beaches being forced by law to accept all persons. This would result in a certain loss of business and a resultant loss of employment opportunity by the residents of these rural beach areas.

Section 2(h) of the "Findings" set forth no applicable principle or basis for the inclusion of privately operated beaches in the provisions of S. 1732. In the case of these privately operated beaches, no discriminatory practice is "encouraged, fostered, or tolerated" in any degree by the governmental authorities of the State in which they are located, or by the "activities of their executive or judicial officers."

Comment. As applied to the operation of privately owned and operated bathing beaches in Maryland, section 2(h) is a statement of opinion unsupported by any factual evidence.

Section 2(i) of the "Findings." The conclusions set forth in this subsection are not applicable to privately owned and privately operated bathing beaches in Maryland, as these beaches neither "burden or obstruct commerce," and the use of the Commerce Clause of the Federal Constitution for the purpose of imposing integration on these privately owned and operated beaches is a perversion of the Commerce Clause, for the purpose of effectuating a highly dubious

purpose, concerning which purpose there are wide differences of opinion and which principle is not generally accepted by large segments of the population.

It is not the proper function of Government to legislate for moral purposes. Nor is it a proper function of Government to deprive any segment of the people of their inherent right of self-determination of their associations for the sole purpose of appeasing the demands of another segment of the people in their desire to satisfy their social ambitions.

Insofar as I can determine, none of the "Findings" are applicable to private bathing beaches. Despite that, however, the provisions of section 3 of the act are sufficiently broadly drawn that they do include bathing beaches, privately operated bathing beaches, and that I do wish to discuss.

Senator MONRONEY. I might advise the witness that the Attorney General, when he was testifying, admitted that section 2 was merely a preamble and has no force and effect.

Mr. KALB. That's correct, I recognize that, that that has no force of law. On the other hand, though, it is indicative and has been cited here this afternoon as one of the factors to be taken into consideration. Legally speaking, my understanding, it is not a part of the bill. It is merely a preamble and not a part.

Senator MONRONEY. That is correct.

Mr. KALB. Despite the fact that the "Findings" set forth not a single valid basis for the inclusion of privately owned and operated bathing beaches in the provisions of S. 1732, nevertheless section 3 of the act is so broadly drafted that some, if not all, of these privately owned and operated beaches would be included.

The provisions of section 3(a)(3)(i) and section 3(a)(3)(ii) apparently would be applicable to any privately owned and privately operated bathing beach which fell within the stipulations of these two sections. These two sections are germane to the bill.

Considering subsection (ii) of section 3(a)(3) first, the language used in this subsection which states that if a "substantial portion of any goods held out to the public for sale, use, rent or hire, has moved in interstate commerce," makes it almost impossible for any bathing beach operator to determine whether or not his operation comes within the purview of this act.

There is not a beach operator alive who could know for a certainty that a "substantial" portion of the goods sold at his beach had not moved in interstate commerce because there is no standard set forth in the act to guide anyone in determining what constitutes a "substantial" portion of goods held out for sale, rent, or hire.

To determine what constitutes a "substantial" portion of goods in any case will require a court determination. It well may be that there will be as many different decisions as to what does constitute a "substantial" portion of goods as there are district courts and courts of appeals in the United States.

It would appear that even the Supreme Court would be unable to lay down a hard-and-fast rule as to what constituted a "substantial" portion of goods, which rule could be applied to all cases.

The inclusion of the word "substantial" in the act does not appear to be a loose use of terminology, but rather it appears to be a careful

and well-studied use of this word, for the purpose of making the act uncertain and unclear, with the object in view to force the operators of small businesses into compliance with this act, because they would be unable to stand the expense and difficulties involved in litigating the question; the result being that the inclusion of the word "substantial" in the act without a prior determined standard as to what does or does not constitute a "substantial" portion of goods makes this act legislative duress—the operator of a place of business must either yield to the dictates of those empowered to institute legal proceedings against him on a charge of noncompliance with the act, or else entail expensive litigation.

The same lack of clearness and uncertainty as to what is intended manifests itself in the use of the words "moved in interstate commerce" in the same subsection.

There is, of course, no difficulty in determining that if goods are transported in interstate commerce directly to the operator of any place of business, then clearly such goods have moved in interstate commerce and are covered by the act.

But what about goods which moved in interstate commerce in the normal course of trade, and have come to rest within a State, and are in the hands of a dealer in such goods for resale in intrastate commerce? If the operator of a privately operated bathing beach were to purchase such goods from a dealer in intrastate commerce after such goods had previously been transported in interstate commerce, would the prior interstate transportation imprint follow these goods into the hands of the beach operator who had purchased them in intrastate commerce? I don't know. I don't know if anybody can determine that unless we go to court.

How could a beach operator who had purchased such goods be certain under the language used in this act that he would not or could not be charged with offering "goods which had moved in interstate commerce" and thereby be subjected to litagation or threats of litigation for being in violation of the provisions of this act?

Unless the words "moved in interstate commerce" are clearly defined and limited in the act by proper standards, the use of such undefined words will enable those authorized to institute litigation under the act to use the act as a form of legislative duress—to compel the operators of small businesses and others who cannot afford the costs of expensive litigation to either yield to the dictates of those empowered to institute litigation under the act, or become involved in expensive litigation which they may be unable to afford.

The inclusion of the words "substantial portion of goods" and the use of the words "moved in interstate commerce" as used in the act, give those empowered to institute enforcement litigation the powers of autocratic dictators.

Furthermore, the inclusion of the words with no limiting or defining standards in the act permits the act to be used by persons with ulterior motives as a vehicle for legalized blackmail against the operators of private business.

For the Congresss to place such an unrestrained power to institute or threaten to institute enforcement litigation in the hands of the public would be a betrayal of the American people.

The provisions of section 3(a)(3)(i) would appear to bring the operators of privately operated bathing beaches within the act, if

"goods, services, facilities, privileges, or advantages or accommodations * * * are provided to a substantial degree to interstate travelers."

The same uncertainty and requirements for a determination by the courts, as previously discussed by me, would likewise face every operator of a private bathing beach to determine what was, or what was not, a "substantial degree of interstate travelers," as used in this subsection and the operators of private bathing beaches would again be at the mercy of those empowered to institute enforcement litigation, and would be subjected to duress and threats to instigate enforcement litigation with its resultant burden of heavy costs, or else surrender and comply with the provisions of the act.

As to the 21 private bathing beaches cited in (2) of this statement, the application of this particular provision of the act would be chaotic and unequal, as between the several private beaches, for the following reasons:

(*a*) As to the beaches enumerated, which beaches are located to the north of Baltimore City, it is probable that less than 1 percent of the patronage of these beaches is from other than residents of Maryland.

(*b*) As to the private beaches which are located in Anne Arundel County to the south of Baltimore and which beaches are not more than 20 miles distant from Baltimore, a similar condition probably exists.

(*c*) As to the private beaches which are south of the Severn River in Anne Arundel County, the proportion of out-of-State patrons may rise to as much as 30 to 40 percent. That is due to the proximity of Washington.

(*d*) As to the beaches which are located in Calvert County, the percentage of non-Maryland patrons may rise to as much as 60 to 70 percent.

The result being that out of the 21 beaches cited in this statement, possibly 11 would not have more than 1 percent of out-of-State patrons, while the other 10 private beaches would possibly have from 30 to 70 percent of out-of-State patrons.

Under this situation it is possible that 11 of these local private beaches would not have to integrate and could continue to operate on a segregated basis, while the remaining 10 beaches would have to be integrated, under the act, merely because their particular locations were more accessible to out-of-State visitors.

Any such result would be unfair and inequitable.

This possibility in itself is sufficient to justify and to require the exclusion of these privately operated beaches from the provisions of S. 1732.

The same lack of definiteness and clearness and lack of standards is present in section 3(b) of the bill (pp. 6–7 of the bill). This subsection provides for the exclusion of "bona fide private clubs or other establishments not open to the public."

What is a bona fide club? Are so-called key clubs bona fide clubs as used in the act?

I don't know. The act doesn't tell me. If in the operation of our private bathing beach, we limit admission to persons who have ap-

plied for and have been given a guest membership card entitling them to admission, with nonholders of such cards being excluded, does that constitute a bona fide club or other establishment not open to the public?

Under our present operation, we have a sign at our entrance which reads that no invitation is extended either expressly or implied to visit our beach, and that admission is by invitation of the management only. Is this type of operation covered by the exclusion as to "other establishments not open to the public" as used in the act?

The answer to these questions does not appear in the language of the act itself. How are we and other beach operators to determine whether our operations qualify for exclusion under this subsection?

What standards are set forth in the act to guide us in our determination of these questions?

What standards are set forth in the act to enable the courts to determine what are bona fide clubs and what are other establishments not open to the public?

Under these conditions we, as beach operators, will be at the mercy of persons empowered to instigate enforcement litigation.

We would have to either submit to their dictates and abandon our right to operate under what we construe to be the law, or else be subjected to expensive litigation.

This makes it possible for those empowered to instigate enforcement litigation to exercise duress upon the operators of these private beaches in an effort to compel them to integrate their properties.

Justification of the right of the privately owned and privately operated beaches to operate on a segregated basis:

(*a*) The "Findings" as set forth in section 2 of the act set forth no factual basis for including privately owned and operated bathing beaches under the provisions of the act.

(*b*) There is no lack of available publicly owned and publicly operated beaches in the Maryland area, and persons who for personal reasons may not desire to patronize these public beaches should not be denied the right to have available to them for their patronage, privately owned and privately operated beaches, whose patronage is compatible to those persons who do not desire integrated bathing.

(*c*) Privately operated beaches should not be denied the right to offer segregated services for the use of such persons.

ANALOGY

The operation of these privately owned and operated bathing beaches—and this, Mr. Chairman, to me is the meat of my argument—the operation of these privately owned and operated bathing beaches falls into the same category as does the operation of private schools.

The State operates public schools, paid for by the taxpayers, for the use of all persons.

Persons who for personal reasons do not desire their children to attend public schools should not be denied the right to send their children to private schools whose enrollment may be segregated, and such private schools should not be prohibited by law from operating.

It is inconceivable to me, Mr. Chairman, to think that this committee or any other committee would deny anybody the right to have a private school.

Likewise, the State of Maryland, the city of Baltimore, and certain counties operate public bathing beaches, paid for and maintained by the taxpayers.

Persons who do not desire to bathe with the persons who patronize these public beaches should not be denied by law from having available to them private beaches, whose patrons are compatible to their customary associations.

The Federal Government has available waterfront property in Anne Arundel County for use as a federally operated public bathing beach.

Possibly the most repugnant and un-American provisions of this entire act are the provisions of section 5 (pp. 7, 8, and 9 of the act), which section empowers private citizens to instigate enforcement of the act.

This opens the door to harassment and worse by vindictive persons and also opens the door to extortion through threats of instigating unfounded enforcement litigation, and creates by law, as previously stated, a vehicle which could be used by unscrupulous persons as the basis for legalized blackmail.

It is suggested that section 5 be stricken from the act in its entirety, and that in lieu thereof that criminal penalties be written into the act, to be enforced by the Attorney General, the duly constituted legal authority of our Government.

The additional effect of striking from the act the present provisions relating to so-called Civil Action for Preventive Relief, and substituting therefor criminal penalties, is that with criminal penalties inserted in the act, the language of the act will have to be clear and definite so as to meet the constitutional requirements relating to criminal laws.

I have the appendix to that, which is not in the prepared statement, which I would like to bring to the attention of the committee, because to my mind section 5 is the most vicious part of the entire act.

Section 5 of S. 1732 authorizes any person who is aggrieved by any person who has engaged in, or there are reasonable grounds to believe that he is about to engage in any act or practice prohibited by section 4, to institute an action for injunctive or restraining relief in any district court of the United States.

(NOTE.—Such right to institute such proceedings apparently is not limited to citizens of the United States but apparently any person who believes that he has been aggrieved, may institute such proceedings. This possibly permits persons who are not American citizens to institute such proceedings.)

The act permits any person who merely believes that he has been aggrieved by the actions of the operator of a private business to institute such action, despite that the person bringing any such action may be motivated by revenge, hatred, or desire to destroy another's business, or motivated by other ulterior motives.

The person who institutes such action alone, in his own mind, and pursuant to his own will, determines what are "reasonable" grounds for instituting such action.

There is nothing in the act to prevent or to restrain any group of persons from conspiring to bring a series of entirely separate and unfounded actions against an innocent businessman for the purpose of destroying his business.

For example, Mr. A may institute proceedings, entirely unfounded, if the operator of the private business prevails in court then Mr. B.

can institute a similar proceeding—if the businessman again prevails then Mr. C can institute similar proceedings, and so on and on ad infinitum—until the private business operator is driven to the wall or else surrenders to what in the act is called "compliance with voluntary proceedings" (see lines 11–12 of page 9 of the act).

And on that portion of the act dealing with voluntary proceedings, I noticed in one of the Baltimore papers a statement by the Attorney General testifying on the House version of this bill, title 2, of House resolution 1752, the Attorney General, if I recall correctly his testimony, said that he hoped that the act would have the effect of inducing voluntary compliance. I don't know what the Attorney General's idea of voluntary compliance is, but if I see this act, the word, voluntary, as used there would be this: that if a gunman stuck his gun to your head, you would surrender your wallet voluntarily. That is about all the voluntary necessity there is in this entire proceeding. Such practices as I have just enumerated, of a series of proceedings, such practices may be directed by organized "hate" groups or worse. The same tactics could be used by unscrupulous persons or racketeers to "shake down" the operators of private places of business by offering to secure a termination of such proceedings for a sizable "fee."

In fact the act provides that there need not even be an alleged violation of section 4 to permit the institution of proceedings for injunctive or preventive relief.

All that is required under the act to authorize the institution of such a proceeding, is that when there are reasonable grounds to believe that a person is about to engage in any act or practice prohibited by section 4, that upon such mere suspicion an alleged aggrieved person may institute such a proceeding. All that the act requires is a mere suspicion by a person, no matter how deceitfully motivated that person may be, or how revengefully or otherwise motivated, to institute such a proceeding.

Could there possibly be a more un-American proposal than this?

In *Henry* v. *United States*, 361 U.S. 101, the Supreme Court of the United States said:

> Arrest on mere suspicion collides violently with the basic human right of liberty.

It is true that section 5 does not provide for an "arrest" upon mere suspicion, but the provisions of this section are actually more drastic and more severe than an "arrest."

Institution of proceedings under this act places in jeopardy a person's entire business, his means of making a livelihood, the very existence of support for himself and his family, and takes away from him his inherent right or self-determination of his associations.

In a criminal prosecution a man may be presented or indicted by a grand jury—he has the right of trial by jury—he must be charged under a law which meets the constitutional requirements of clarity and definiteness.

Under this act he is not presented or indicted by a grand jury, he is not charged with the violation of the law by duly constituted authority, but merely by a person who feels that he is aggrieved, he is not tried by a jury of his peers, in fact the act does not even make provision for the determination of facts by a jury, the complainant is not required as a prerequisite to instituting the proceedings, to secure

authority from any duly constituted authority, but merely upon suspicion, based on the complainant's own view of what constitutes aggrievement he may proceed against the operator of a place of private business.

Upon being charged under proceedings so instituted the operator of a private place of business may be tried under a law which is not clearly defined, and which law contains no controlling standards upon which the Court may base its findings, and which proceedings may be repeated endlessly by person after person to grind the operator of a private place of business into the ground, and any decision handed down by the Court, of necessity, must be based on judicial fiat only.

I propose, Mr. Chairman, on the questions of exclusion of the bathing beaches, some amendments.

SUGGESTED AMENDMENT NO. 1

After the end of line 3 on page 7 of the act, insert a new subsection to read as follows:

(c) The provisions of this Act shall not apply to a privately owned and privately operated bathing beach nor to any facility contained within the boundaries of any such privately owned and privately operated bathing beach, which beach is located within any State, or in any county or any State, in which State or county the State, county, any municipal corporation, the Government of the United States or any department or agency thereof, or any other public authority maintains, operates, or makes available to the general public without discrimination as to race, color or creed, the facilities, services, privileges, advantages or accommodations of such publicly operated or publicly owned bathing beach.

SUGGESTED AMENDMENT NO. 2

In pages 7, 8, and 9 of the act strike out all of section 5 and insert in lieu thereof criminal penalties.

SUGGESTED AMENDMENT NO. 3

On page 9 of the act amend section 6 by eliminating all reference to institution of remedies by other than the Attorney General of the United States.

Senator MONRONEY. Senator Thurmond?

Senator THURMOND. I want to ask you this question. Do you feel that this would be an encroachment upon an individual's rights—if this bill is passed—in the operation of his business?

Mr. KALB. Unquestionably, sir.

Senator THURMOND. You have more or less confined it to beaches. You are just giving that as an example because this would affect you.

Mr. KALB. That is correct.

Senator THURMOND. In a way it would affect you individually as a citizen of Maryland and of these United States?

Mr. KALB. That is correct.

Senator THURMOND. You feel this would be a Federal encroachment upon your rights as a citizen under the Constitution?

Mr. KALB. No question at all. I feel like, Senator, if there is to be such a proposal as this, the attempt should not be made to write it into the statutes by distorting the present constitutional provisions. If you want this, if it is desired, the way to get this is by constitutional amendment, not by statute.

Senator THURMOND. There are two ways to amend the Constitution. You feel that if the American people desire that the purposes of this bill be accomplished, that the Constitution should be amended to give Congress the power to act in this field, which as I understand you feel now they cannot do under the present Constitution?

Mr. KALB. I cannot see how they possibly, without distorting article 14—certainly it is a gross distortion of the Commerce Clause.

Senator THURMOND. Under the 5th or 14th amendments you feel they could not act?

Mr. KALB. I do not think so; no, sir. Certainly not under the historic decisions under the 14th amendment.

Senator THURMOND. I want to ask you this question: You come in contact, I judge, with a lot of people, do you not?

Mr. KALB. I come into contact with thousands daily, sir.

Senator THURMOND. Have you had occasion to talk to these people about this particular provision of this civil rights package that was recommended by the President, the so-called public accommodations bill? I think the wrong verbiage was used there by saying "public" accommodations." At any rate, I refer to the bill under consideration. Have you had any opportunity to talk to people about it?

Mr. KALB. I have had more than an opportunity, Senator. There has been a small feud——

Senator THURMOND. Tell us how they feel about it.

Mr. KALB. There has been a small feud running between one of the local papers and myself on this particular question. And the particular local paper printed an editorial naming me and criticizing the very policies I enunciate down there. I replied to the editorial. The paper did me the courtesy of printing and gave me full coverage on my answer.

I have been overwhelmed by people expressing their feelings of commendation at the views I have expressed in there.

Senator THURMOND. Are the people generally in favor of this bill now under consideration or opposed to it?

Mr. KALB. Bitterly opposed to it.

Senator, may I say that maybe I get somewhat of a little biased view. I am from Anne Arundel County. And Anne Arundel County is one of the southern counties of Maryland. I am from the southern part of Anne Arundel County, sir. We are about as much a part of the Deep South as I suppose it is possible to be. Our colored people even speak in a dialect that I can scarcely understand in many instances. So I assure you there is no question in my mind what the feelings of the people in my section are.

Senator THURMOND. Having heard those around Charleston, S.C., talking, I know of what you are speaking.

Mr. KALB. They speak in a dialect that I can hardly understand half the time.

Senator THURMOND. It is most interesting to hear them talk.

Mr. KALB. Yes, sir.

Senator THURMOND. You feel this would hurt your business if this bill passes?

Mr. KALB. Senator, this wouldn't hurt my business; this would destroy my business.

I think it was Senator Engle asked a question of one of the witnesses, whether there was any evidence to support the statement that business would be injured. There is evidence that this would destroy my business. I will cite that evidence to you.

I told you that Baltimore City operated a bathing beach in Anne Arundel County. It was formerly an old Civil War fort known as Fort Smallwood, about a hundred acres. It was sold to Baltimore City by the Federal Government on the condition that the Government operate it as a public bathing beach or park. The city of Baltimore purchased it. When they purchased it, they operated it as a segregated beach.

You couldn't get near the place. It is about 20 miles from Baltimore. It was packed and jammed. Then the colored people brought suit in the U.S. district court to stop its—it is operated under our park board—to require the park board to stop operating as a segregated beach and to permit colored use of it.

The district court handed down an unusual decision, that the park board would have to allow the colored people certain days to use the beach. They then appealed that decision and the decision was reversed, and they were given complete co-use with the white people.

The white people are completely out of the park. After that took place the colored patronage began dropping off, and Baltimore City, the park board, has had under consideration a motion to abandon the park. In fact, within the last 60 days there was an article saying that the park board had decided to give it another try this year.

The same thing has taken place in the large State-operated beach, Sandy Point. The State of Maryland operated Sandy Point. It is about 600 acres. They set aside two beaches, a white beach and a colored. The colored people filed suit in the U.S. district court claiming that was discriminatory. The court agreed, after the *Supreme Court Cases.*

The beach is doing business, but it is overwhelmingly colored. And I know what I am talking about, sir, because patron after patron comes to my place because they don't want to visit there. We are not here in the business of keeping people out. We are in the business of having people who don't want to go to these places, to supply them a place where they can go.

Senator THURMOND. So you feel that this bill if passed would destroy your business?

Mr. KALB. Completely. Not only that, Senator, but in conjunction with my particular beach and in conjunction with most of these beaches I mentioned in my statement the fact that there are small residential communities adjacent to these beaches.

At our place there are approximately two or three hundred cottages that are adjacent, privately owned homes of people who, by deed, have the right to use this same particular beach. This would be a rape of those communities, in plain language. It would destroy those communities.

Senator THURMOND. You said you live in the southern portion of Maryland, which is very much like other parts of the South. Do you feel that this bill really applies to every property owner, whether he lives in the North, South, East, or West, and would jeopardize the use of his property and to a certain extent direct the control of it if it passes?

Mr. KALB. There isn't any question at all. It destroys—this is only an isolated instance of where the people demand segregated services. Your beauty parlors, your barber shops. And I could mention plenty—dancehalls. There are other places where the facilities furnished the colored people are not strictly, shall I say, a business facility. They are quasi-social. At the beach, when the people go in the beach, the contacts are quasi-social. And there are people who will not tolerate that. Certainly there may be some who will. But there are those who will not tolerate it, and they are the people who want and should be protected in their right of separate services.

Senator THURMOND. From what you said, then, I construe that it is your opinion, as a businessman who is now operating a business and has done so for some time, that this legislation will do great harm to people who own property in this country.

Mr. KALB. No question at all.

Senator THURMOND. That is all, Mr. Chairman. Thank you.

Senator MONRONEY. Senator Hart?

Senator HART. I don't know whether or not the record shows this. Who do you admit to the beach?

Mr. KALB. We have gatemen—first of all we have a sign at our entrance. The sign reads—I wish I had brought one of them to you. I think I can give it to you almost exactly correct—"Admission Restricted" and under it in letters about 3 inches large we say this: "No invitation is extended to the public, either expressly or impliedly, to visit this beach. Admission is limited to those persons expressly invited by the management."

Senator HART. Who do you invite?

Mr. KALB. We invite people whom we feel will be compatible to our established patronage.

Senator HART. What kind of person is that?

Mr. KALB. Generally speaking, members of the white race.

Senator HART. But not exclusively?

Mr. KALB. Yes, sir, I would say—occasionally we will deviate from that policy. We will have a man come along to see us and he will say: "I have a man with me who is not a member of the white race." He may be an Asiatic. And he asks permission. Occasionally we will say yes to that.

Senator HART. What is the reaction among your other patrons?

Mr. KALB. To that?

Senator HART. Yes.

Mr. KALB. Quite often we will have people say "Is he a member of the white race?" We quite often get severe reactions to that.

Senator HART. What do they do about it?

Mr. KALB. We don't do anything. We treat everyone courteously once we admit them. The people don't do anything about it. They complain to me about it.

Senator HART. An earlier witness described his rejection by a swimming pool operator because he was Italian. Would that be true in your situation?

Mr. KALB. I just didn't get your question clear, Senator.

Senator HART. The witness who preceded you said that he on occasion had been denied permission to a swimming establishment because he was Italian. Would this be true of your invitations?

Mr. KALB. We have Italian families at our beach.

Senator HART. Have you declined to invite some Italian families?

Mr. KALB. Have I ever declined? If their appearance was presentable I would not decline to admit them, because I feel, as members of the white race, that their associations were acceptable and compatible to the people. People who usually visit us.

Senator HART. Have you ever attempted to judge a Negro as an individual who is either good or bad?

Mr. KALB. I think there are lots of fine Negroes, Senator. I have working for me, I think, 35 or 40. I think they are just as fine a people as you ever ran into.

Senator HART. You would not object to swimming with them?

Mr. KALB. Oh, yes, I would, sir.

Senator HART. You would?

Mr. KALB. Yes, sir; and I wouldn't want my wife to swim with them, and I wouldn't want my daughter-in-law to swim with them; no, sir, under no conditions.

Senator HART. So it isn't a matter of economics that persuades you to say "No" to them?

Mr. KALB. It is economic in this way, that I must maintain a place that will draw the people who want to patronize my place. If I put people in who drive my people away, it is economic. I must be careful that the people who come in are those people who my patrons want to associate with.

Senator HART. I think we have your answer, but I want to be sure of the economic reasons you would reject them. You say——

Mr. KALB. Quite frankly, Senator, I hope I am not personally offensive. To me, with my tradition, I can't conceive of any white man wanting his wife to bathe with colored men.

Senator HART. So your objection to this bill is not because it would destroy your business?

Mr. KALB. Yes, sir; it would destroy the business.

Senator HART. Your objection is not that alone?

Mr. KALB. Not alone, sir; no, sir.

Senator HART. Your objection additionally is that you object to Negroes associating in this setting?

Mr. KALB. Under the particular setting. I may not feel that same way in another setting. In this particular setting it is just taboo, and it is taboo to the average white person that I come into contact with.

Senator HART. I was curious about the basis on which you would extend the invitation. I take it then that I would not be able to name a single Negro that you would extend an invitation to.

Mr. KALB. That is correct, sir.

Senator HART. Even a very distinguished American?

Mr. KALB. Yes, sir, we have some very distinguished American Negroes.

Senator HART. Who have contributed——

Mr. KALB. But they don't fit in a bathing beach with white men.

Senator HART. I think I understand your feelings, and that is all I want to find out.

Mr. KALB. Let me straighten you out on something else. There is another element in it.

Let us assume for the argument, I have responsibility on me to see that order, law and order, is maintained at my place. What would happen—let me paint you a picture—if I had a group of young Negro men, and they made what in slang language is called a snide remark to some young woman. I would have a race riot on my hand. The same thing would be true, sir, if I had a colored girl, and a group of unruly white men came in and made a disparaging remark toward her. I would have a race riot on my hands. It just does not work at a bathing beach, sir.

Call the reasons as you may, but it just does not work. And that is why I am asking the committee for special exception.

Senator HART. I think we understand your motive.

Senator MONRONEY. Mr. Kalb, I have a letter that has been referred to the committee that I would like to have you identify, if you will, if this is your signature on the letter.

Mr. KALB. I presume I know what letter it is, Senator. It is a form letter.

(The document was handed to the witness.)

Mr. KALB. That's correct.

Senator MONRONEY. The letter has been referred to us in an envelope that had been addressed to the Royal Thai Embassy, and reads, after your letterhead:

To Whom It May Concern:

This is to advise you that it is the established policy of the Triton Beach Club and the Beverly Beach Club to refuse admission to any person who possesses or claims to possess diplomatic immunity from arrest, and to all persons accompanying such persons.

To avoid unpleasant instances it is requested that the persons possessing diplomatic immunity from arrest be advised not to seek admission to the Triton Beach Club or Beverly Beach Club.

Signed by yourself, I presume.

Mr. KALB. That is correct.

Senator MONRONEY. As "Manager, Mr. Edgar S. Kalb."

Was this sent only to the Royal Thai Embassy?

Mr. KALB. As far as I know, sir, it was sent to every embassy and every legation in Washington. If any of them didn't get them, if you will apprise me of them, I will see that they get them.

Senator MONRONEY. This includes the British Embassy and our principal allies?

Mr. KALB. As far as I know.

Senator MONRONEY. And the French, and all?

Mr. KALB. All, as far as I know.

Senator MONRONEY. Have any of them attempted to intrude on the Triton Beach or Beverly Beach——

Mr. KALB. Are you now saying in truth after this was mailed? Or prior to this?

Senator MONRONEY. Prior to.

Mr. KALB. Prior to this there was no intrusion. What brought this about, sir, were not intrusions but were conditions that were brought about by people who are classed as diplomats, I presume—I am not speaking of the ambassadors; I wish to make that very clear—persons who are associated in these embassies not being in compliance with our laws.

Senator MONRONEY. The ambassador enjoys, of all people, flowing from him downward, diplomatic immunity from arrest.

Mr. KALB. That is correct, sir.

Senator MONRONEY. So this would be first taken by the British Ambassador, the French Ambassador, or any other of our greatest friends, even down to the newest of the countries.

Mr. KALB. That is correct, sir.

Senator MONRONEY. I was just trying to establish if any of these ambassadorial dignitaries had sought admission to the Triton Beach Club or to the Beverly Beach Club that would warrant this letter coming to them in their mail to tell them that they are so unwanted that they need not present themselves for admission to these two clubs?

Mr. KALB. All right, sir. I shall have to answer your question in full.

I will have to cite, first, an instance at Triton Beach. Some years have gone by; not too long ago. Beer is sold at Triton Beach. A young man of 18 attempted to buy beer. The clerk refused to sell him beer, in compliance with Maryland law. A man of approximately 45 years of age—we are not talking about colored people, sir; I am talking about white people—a man of approximately 45 years of age went over to the counter, bought a glass of beer, and handed it to the man.

When the clerk went over to take the beer away from the young man, the elderly man pulled out a card which gave him diplomatic immunity from arrest.

We had a situation then that we either had to physically eject this man or swallow his arrogance.

We swallowed it.

I had another situation at the same beach, Triton Beach. I received a call to come over to the beach, that there were two automobiles blocking the entrance. I went over. The entrance was completely blocked. The people, the occupants of the two automobiles, had diplomatic tags on their cars. And I asked the gateman what the trouble was. He said, "We told these people what the admission fee is and they said they wanted to pay by check, and we refused to accept the check, and they are blocking traffic."

I ordered them out and threatened to get a truck to pull their cars out if they didn't move. Finally, after quite a long discussion we got the cars out.

I wrote a letter of complaint to the State Department relative to the matter. In 2 weeks I received a reply from the Department of State stating they were sorry we had had this inconvenience; however the State Department wished to stay on friendly terms with these people and did not feel that they would care to carry the matter further.

I have had other instances. With a young woman—I will not identify the nation—on whom I had complaints. A number of women came to one of our guards and said there was a young woman changing clothing under a blanket. The guards went to her and she had then changed into her bathing suit. They ordered her off the property. She pulled out a card saying she had diplomatic immunity from arrest.

Then another man walked up who claimed to be from one of our friendly allies and presented his card showing himself as having diplomatic immunity from arrest, and he had a lot to say. We had to order both of them off the property.

The thing, however, that brought this about, the letter that you have in mind, was not all of these instances. The thing that brought this about was the lack of cooperation from our own State Department, and an article which appeared in the Washington Post of June 30 of this year, in which a man by the name of Pedro Sanjuan, who was identified in the article as being the Director of Special Services of the State Department, was quoted in the article as follows—as correctly as I can cite it to you:

"Mr. Sanjuan states that he has a well-documented file of incidents involving diplomats at the Maryland beaches, including,"—and I am now going to have to name my beach, which I have refrained from doing all the way along—"including the stoning of a diplomat at Beverly Beach in the summer of 1962." That was a flagrant and malicious lie.

I wrote to the State Department and I requested of the State Department an apology and a retraction of that statement made by their so-called Director of Public Services. I received no reply from the State Department.

I sent a copy of the letter to the Washington Post, and two days later the Washington Post did publish a retraction to its libel, in which the Washington Post stated that Mr. Sanjuan said that the article was inaccurate; that the incident had taken place at another Maryland beach.

Mr. Chairman, and gentlemen of the committee, we don't want people who have diplomatic immunity at our places; and the people who patronize our place have commended us greatly for rejecting these people.

And it was upon the article published by Mr.—it was on the basis of the article in the paper by Mr. Sanjuan, and the failure of the State Department to show us the courtesy of a reply, that we sent the letters out, sir.

Senator MONRONEY. Do you think this helps our foreign relations which we are trying to build up around the world——

Mr. KALB. Senator——

Senator MONRONEY. Just a minute. You have had plenty of time.

We have made great sacrifices to try to prevent vast areas of the world from going behind the Iron Curtain. This letter has come to the committee from the Thai Embassy. This is the country that is right in the saddle, that is risking its very existence to stay loyal to the West.

Have any Thais tried to force their way into your beaches?

Mr. KALB. I would not know, sir. I am not at the gate, and I would not know that.

Senator MONRONEY. You have cited, and properly so, experiences over the years with 3, 4, 5, or 10 diplomats. What I am driving at is that for a gratuitous insult to be sent to an entire embassy, telling them that they are not welcome and do not come out, I believe is certainly dealing very recklessly with America's reputation of hospitality for some hundred-odd countries that maintain embassies here in Washington.

They send and maintain these embassies, and while they should not be entitled to any more consideration than any American citizen, certainly they as guests should not be told to stay away.

I mean specifically to single them out, as diplomats, to keep away from our door.

It seems to me that those embassies with whom you have had a bad experience could be told in a diplomatic way, "We have had a little trouble with your people, so please tell them not to come and use our facilities." The others, dozens of them, probably never even thought of going to the Beverly Beach Club or the Triton Beach Club. They probably have other places where they swim; or maybe choose not to swim at all.

Mr. KALB. Senator, I have listened carefully to your remarks, and I think I understand them.

There are dignities of the American citizen as well as dignities of our foreign friends. I recognize no right of any person from a foreign government to infringe upon the dignities of the American citizens. I think frankly our rights are paramount.

As far as the individual letter, we did not single any particular legation out. That would have been wrong.

Senator MONRONEY. You sent them to all?

Mr. KALB. We sent them to all, because we did not want that charge laid at our door.

And I think that instead of interfering or harming our foreign relations, if Mr. Sanjuan has records in his well-documented file showing a stoning of a diplomat at any beach, we wish to avoid that, sir. We don't want any incidents. We want to cooperate with the State Department even though they show no effort to cooperate with us.

We want to fix it so the State Department won't have any occasion to have to apologize to any nation.

Senator MONRONEY. Aside from the four, five, or six cases, have any diplomats appeared—I don't know what the date of this letter is; it is not dated—say for the present season?

Mr. KALB. I will give you the answer.

After the letter was sent out diplomats from a certain south embassy came to our place and demanded admission. The gateman told them he could not admit them. He showed them a copy of the letter. The people in the car—there were two cars, both with diplomatic tags—turned away from the gate. They went down to a road about two blocks from the entrance gate at the beach—this took place at Beverly Beach—unloaded the people out of the cars, and the people trespassed on our beach.

We ordered the diplomats to go down and remove their people. That took place, sir, Sunday a week.

Senator MONRONEY. Any other diplomats that—this came out after the letter?

Mr. KALB. That was after the letter was sent out.

Senator MONRONEY. I'm talking about before the letter. This season, did you have diplomatic trouble?

Mr. KALB. Yes, we did. We had a man who did not have diplomatic tags on his car. The man had Maryland tags on his car. He pulled up to the gate and he had with him a woman who he said was a South American. The gateman told him that he could not enter the place. The man, instead of doing what a law-abiding citizen would do after having been told he couldn't enter, drove his car into the grounds and trespassed on the property.

He demanded to see the manager. I came. As I walked over to see him I was told the story by one of the parking men, that the man had been stopped at the gate, and the man had disregarded the notice and had driven down to lodge his protest with me.

I attempted to look at the woman. I thought if there was any way possible to work it out I would do so. They had her face covered up with some sort of a night garment, purple or blue, I do not know which.

The man, his approach to me was this: "I demand apology from you." He didn't get any apology from me and he has no right to demand the apology from me, as far as I was concerned.

I ordered the man off the property. He put up quite a strenuous argument. He left the property, that is, the resort area.

He stopped at a real estate office immediately outside of the resort area. And there he made the following statement in the presence of two witnesses: that if he had had a gun, he would have shot the two gatemen and would have shot me. This man claimed, and showed a card claiming to have diplomatic immunity from arrest. Had he shot me, had he shot my gatemen, he could not have been arrested for it. He would have been ordered out of the country, and we would have been buried.

Mr. Chairman, we don't want those people. I can't make it any plainer than that. We don't want them.

Senator MONRONEY. The point I'm still making is, was it necessary for all, including perhaps 99 percent of the diplomatic groups here in the United States, to to be warned to stay away? Can't you control it at the gate entrance?

Mr. KALB. No, sir. It means a fight every time. It means an argument. We want to avoid that.

Senator MONRONEY. You have in your letter set out the law against trespass.

Mr. KALB. That's correct. We thought that was necessary.

Senator MONRONEY. And the notice that an invitation is required. Would not it have been better from the standpoint of our struggle against other forces in the world, to have notified, if you had to notify, the embassies that admission was only by invitation of the management, and that therefore to avoid embarrassment, you are advised that no invitation had been sent out?

Mr. KALB. Senator, in answer to that may I make this observation: The incident I just reported to you, where the man said he would, had he had a gun, he would have shot the gateman and shot me, I reported that incident to the State Department. That was more than 3 weeks gone by, nearly 4 weeks. The State Department, which has the duty

of maintaining good relations with our people, has not had the courtesy to reply to that letter.

Senator MONRONEY. Did you——

Mr. KALB. It seems to me that if there is anything remiss, it is on our State Department, not upon me, sir. I have to maintain my rights. I'm not being supported by our State Department. The State Department seems to have as its objective to support the rights of the foreigners in this country, and not the rights of the American citizens.

Maybe I misconstrue the purpose of the State Department. I think it is to support Americans, and not foreigners.

Senator MONRONEY. The State Department is not the chaperon of the diplomats.

Aside from the cases that you have enumerated, did you have the name of this last diplomat?

Mr. KALB. I gave the State Department the automobile number.

Senator MONRONEY. You say it was not a diplomatic tag?

Mr. KALB. He was attached—the Washington Star published an article relative to it, and if I recall correctly, the Washington Star stated in its article that he was attached to a monetary fund commission or something or other. The exact phraseology I do not recall.

Senator MONRONEY. That has nothing to do with the State Department.

Mr. KALB. But he had diplomatic immunity from arrest.

Senator MONRONEY. This is an international organization, not representative of——

Mr. KALB. He still had diplomatic immunity from arrest.

Senator MONRONEY. But not under the State Department.

Mr. KALB. At least the State Department, that being the case, could have sent me a letter.

Senator MONRONEY. I don't know if he was attached to the Monetary Fund.

Mr. KALB. It could have sent me a letter and as an American citizen explained the matter. They could have avoided possibly what has taken place. I place the blame on the State Department, not upon myself, sir.

Senator MONRONEY. You feel that this is quite the proper thing to do?

Mr. KALB. I think I'm being cooperative in doing what I can as an individual citizen to avoid international incidents.

Senator MONRONEY. Do you have any questions, Senator?

Senator HART. Except to disagree as fully and as completely as I can with the last statement.

Mr. KALB. That is my version of it. Thank goodness we have a right to disagree, Senator. At least that is not taken away from us.

Senator MONRONEY. Senator Thurmond?

Senator THURMOND. This was your property?

Mr. KALB. Our property, sir. I say "our." It is my brother, my sister, myself, my wife, and my brother's wife.

Senator THURMOND. Your privately owned property?

Mr. KALB. Privately owned property.

Senator THURMOND. Foreigners came there and you accepted them and treated them with courtesy until they caused trouble?

Mr. KALB. That's correct, sir. Have done so for years, even in the face of prior abuse.

Senator THURMOND. And after they caused trouble, then you asked them to stay away?

Senator MONRONEY. This was every foreign nation that is represented here, the witness has testified.

Mr. KALB. That's right.

Senator THURMOND. After these foreigners caused trouble you sent this letter out to the different embassies, as I understand it?

Mr. KALB. I had the letter mimeographed after the last instance where the man said he was going to shoot. I kept it in my file——

Senator THURMOND. You had had your life threatened.

Mr. KALB. Yes.

Senator, I kept the mimeographed letter in my files for 8 days until the slanderous article attributed to the Director of Special Services of the Department of State appeared. Then I sent the letter out, and not until then did I send it out.

Senator THURMOND. And you wrote the State Department and complained about the conduct of these people and you got no effective response from them?

Mr. KALB. In two instances I have written to the State Department. One they replied to and said they were sorry we had had the inconvenience, but the State Department didn't wish to do anything to disrupt the friendly relations of these people.

To the second letter the State Department did not reply.

Senator THURMOND. And after being treated as you were on your own property, and had had your life threatened, and you received no cooperation from the State Department——

Mr. KALB. Absolutely none.

Senator THURMOND (continuing). Then you felt it was necessary to take the action you did, and only then; is that correct?

Mr. KALB. I did what any American citizen should do: protect himself against further incidents.

Senator THURMOND. Thank you very much.

Senator MONRONEY. The committee will stand in recess until 9:15 a.m. tomorrow morning in the caucus room. We will hear the Secretary of Labor, Mr. Willard Wirtz.

(Whereupon, at 5:40 p.m. the committee was recessed to reconvene at 9:15 a.m. the following morning.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

THURSDAY, JULY 18, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 9:25 a.m. in room 318 (caucus room), Old Senate Office Building, Hon. Warren G. Magnuson (chairman of the committee) presiding.

The CHAIRMAN. The committee will come to order. We have scheduled this morning the Secretary of Labor and our colleagues, the Senators from New Jersey, Mr. Case and Mr. Williams.

Mr. Case, do you want to proceed first or do you want to wait?

Senator CASE. Mr. Chairman, I would like, with the indulgence of the committee and the Secretary, to present briefly a statement which I have prepared.

The CHAIRMAN. Why don't you take the witness chair?

I understand you have a brief statement and you will put the rest in the record.

Senator CASE. My statement for the record is quite brief.

STATEMENT OF HON. CLIFFORD P. CASE, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator CASE. I would like, if I may at this time, to ask the committee's permission to put my statement in the record and make two or three sentences of comment about it.

(The statement is as follows:)

I appear as a sponsor of S. 1732, as well as S. 1217 and S. 1591, to urge this committee to report out a bill which would eliminate discrimination based on race, religion, origin or color in access to public accommodations.

The problem of equal access to public accommodations is only one aspect of the civil rights issue. It is, however, a vital aspect. For nothing is consistently more demeaning, more offensive to the self-respect and the dignity of the individual than to be turned away because of the color of his skin by establishments holding out their facilities or services to the general public.

After all the legal arguments are made—and I think the great weight of them is on the side of this legislation—there remains the simple moral issue: When will the Government of the United States act to redeem the pledge of the Constitution that all citizens are equal under the law?

Discrimination makes a mockery of the eloquent premise of the Declaration of Independence and the noble simplicity of the Preamble to the Constitution. It flaunts the specific provisions of the 13th and 14th amendments. In my opinion, Americans have grown increasingly uncomfortable over the gap between our professed beliefs and our actual practices. Whether it is under the 13th and 14th amendments or the interstate commerce provision, or a combination of both as I personally favor, most Americans want the Congress to act to right a wrong that has persisted for too long.

The hypocrisy in which all of us have had a part has had a corrosive effect on the national conscience. Discrimination is debasing, not just to those discriminated against but to those who discriminate.

The Nation as a whole has a bad conscience, I believe, because it has tolerated so long the unfair treatment of some of our citizens. It is ready and wants to square its deeds with its beliefs.

As a people, we put a high value on private property. But we also prize the right of individuals, who, in the words of the Declaration of Independence;

"* * * are created equal (and) * * * are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness."

Property and individual rights are not antagonistic. Each is subject to some limitations. From the earliest days of common law, the right to do as one pleases—and this includes the right to do as one pleases with one's own property—has been subject to restriction. I may not so act, and I am not free so to use my property, as to damage my neighbor or his property. I must obey zoning and health regulations, abide by various State and local ordinances. My business is most likely subject to a host of laws and regulations, some local, some State, some Federal.

Both my personal and my property rights are circumscribed by considerations not only of the health, safety and welfare of others, but by their rights. My personal and property rights do not include the right to deny others their rights, much less to compel others, under color of law, to join in that denial, whether they want to or not.

Yet, in some States, as the Committee well knows, legislation is still on the book and still being enforced which not only deprives certain groups of citizens of the rights enjoyed by others but arbitrarily forbids the businessman to serve potential customers solely because of their race. In this sense, they reverse the old common law which held that an innkeeper had an obligation to serve all customers so long as they were orderly, sober and respectable and he had the room.

Morally, the continued denial of equal access to public accommodations is indefensible.

Economically speaking, it is a drag on the country's development and precludes the full use of its resources, human and material. It restricts the movement of goods, services and persons in interstate commerce.

From a legal point of view, there are precedents which can and have been rounded up to oppose any Federal legislation under the 14th amendment in this area. I think they are bad precedents that fly in the face of the constitutional mandate embodied in the 13th and 14th amendments. I believe they would not be followed today. In any case, there is the undoubted authority of the Congress over interstate commerce.

The Attorney General has pointed out that Congress has exercised this power in a wide variety of ways, even to the extent of dictating the manner and shape in which restaurants must serve oleomargarine. The minimum wage, the drug labeling and a host of other acts testify to the reach of the interstate commerce power of the Congress. If the Federal Government, in order to protect the health of all citizens, can legislate standards mandatory upon a large proportion of our industry and business, surely it can, in order to protect the constitutional rights of U.S. citizens, utilize its authority over interstate commerce.

In short, I cannot see anything radical or un-American in the proposals now before the committee.

Rather they would help to vindicate an old pledge. They offer a way to remove some of the stain and the shame of past decades. And by lifting a burden from those so much oppressed, they will point the way to true freedom for all of us.

I am glad the committee is concentrating on this part of the civil rights program. Congress cannot, in good conscience, adjourn until it has accomplished action on this and other essential measures in the field of human rights.

(End of statement.)

Senator CASE. I am sure the committee, particularly this committee, on which I had the honor to serve for a number of years, is not at all in doubt about my position on this legislation in general, and I am glad specifically as a cosponsor of S. 1732, as well as S. 1217 and S. 1510, to urge the committee to report out a bill which would eliminate

discrimination based on race, religion, origin, or color in access to public accommodation.

This, I think, is a vital part, only a part but still a vital part, of the civil rights issue. Nothing is more demeaning or more offensive to the rights and to the dignity of an individual than to be turned away because of the color of his skin by establishments which hold out their facilities generally to the public.

After all the legal arguments are made, and I feel strongly the great weight of them is on the side of the constitutionality of this legislation, there remains the simple moral issue: when will the Government of the United States act to redeem the pledge of the Constitution that all citizens are equal under the law.

We have, I think, ample power, both in the interstate commerce clause and under the 13th and 14th amendments, to act, as I think most of the members of this committee agree. I know several of the members of the committee are working on the matter, and they favor reliance upon both broad bases of authority to deal effectively with this phase of the civil rights problem.

The CHAIRMAN. I think you make your views very well known in the first page where you said:

> Whether it is under the 13th or 14th amendment or the interstate commerce provision, or combination of both as I personally favor, most Americans want the Congress to act to right a wrong that has persisted for too long.

Senator CASE. This I feel very strongly, Mr. Chairman. I appreciate your highlighting that point. There has been a good deal of concern expressed in some quarters, I am sure, sincere concern, about the question of whether action in this area will invade rights of property.

I yield to no one in my respect for the institution of private property. I think it is equal to the rights of the individual, of course. But I don't think that the institution of private property gives a person a license to do what he couldn't otherwise do.

I do think a person, can, if he is unable, as I think he should be unable, to hurt another person that he is not given the license to hurt that person in the use of private property.

I think that this whole argument is irrelevant and besides the point. A man's own rights and the right to use his property, both are circumscribed by the rights of other people, and this, I think is the simple answer. There is no inconsistency here at all.

Just one other point, if I might emphasize it, and that is that I am very glad this committee is dealing so effectively, so earnestly and so promptly with this issue.

I know the chairman feels, and members of the committee, too, that we have too long neglected to deal with a shame in American life, and this committee has a unique opportunity in the existing situation, under the rules of the Senate, to get us going on the matter. The fact that the chairman has taken the initiative in fulfilling his responsibility and the committee is doing the same is a matter of great pride to me since I used to be a member of the committee and enjoyed service on it so much.

I feel very strongly that unless we get this done at this session of Congress, we will have failed miserably in our duty as a parliamentary institution. I strongly urge the committee to continue the course

that I know it is set on to bring action quickly. We have got to do it at this session.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Do the members of the committee have any questions?

Thank you very much, Senator.

Senator CASE. I appreciate your courtesy very much.

The CHAIRMAN. We will be glad to hear from the Secretary of Labor, Mr. Willard Wirtz.

STATEMENT OF HON. W. WILLARD WIRTZ, SECRETARY OF LABOR, DEPARTMENT OF LABOR, WASHINGTON, D.C.; ACCOMPANIED BY CHARLES DONAHUE, SOLICITOR, DEPARTMENT OF LABOR

Mr. WIRTZ. Thank you, Mr. Chairman.

I have with me the Solicitor of the Department of Labor, Mr. Charles Donahue.

The CHAIRMAN. We are glad to have you here, too.

Mr. DONAHUE. Thank you, sir.

Mr. WIRTZ. My statement, Mr. Chairman and members of the committee, is very short. It is unpretentious; it is modest. It is submitted to you in my capacity as Secretary of Labor and under the charge of that office, which is that I give special concern to the welfare of all working men and women in America.

You will know that my testimony comes equally strong as an individual. The matter before this committee now is one which has been, I guess, close to the center of my personal concern as long as I can remember. I feel very lucky to be here at a time when there is at least an opportunity to help remove a scar which I felt on my own face all my life as an American.

So, I give full support to this proposal. As an individual, I endorse it unequivocally.

The Attorney General and Assistant Attorney General in charge of civil rights have already testified on the legal aspects of the proposed Public Accommodtions Act, and I suppose there is very little I could add on that point.

I speak rather to the matter of the effect of this problem upon the economic area, which is a matter of my particular concern as Secretary of Labor.

I call attention to the fact that equal access to facilities and accommodations, regardless of color or creed, is part of every person's basic right in a free democratic nation. And if I may, Mr. Chairman, I should like to file for the record my statement and summarize it in the interests of the committee's time.

The CHAIRMAN. We will put the statement in the record in full.

(The statement follows:)

STATEMENT OF THE HONORABLE W. WILLARD WIRTZ, SECRETARY OF LABOR

The Attorney General and the Assistant Attorney General in charge of the Division of Civil Rights have already testified before this committee on the legal aspects of the proposed public accommodations act. As Secretary of Labor, charged with special concern for the welfare of all working men and women, I give my full support to the proposal. As an American, I endorse it unequivocally.

Equal access to facilities and accommodations regardless of color or creed is part of every person's basic right in a free democratic nation. The legal claim to be served anywhere in public commerce protects the dignity of the individual, and translates into law the design and spirit of America. To be refused service by any commercial establishment solely on the basis of race, beliefs, or national origin is to be debased and humiliated as an individual. To be refused such service is to be denied free access to the American marketplace and free choice in the American economy.

Of all the economic issues of the day, those most urgently in need of solution are the twin problems of further expanding economic growth and reducing unemployment. A public accommodations act, which will erase stigmas and remove barriers, will contribute immeasurably to the economy. It is a classic example, so often found in our American system, of legislation that is dictated by decency—and which also contributes to economic welfare.

First, inequality of opportunity and the unrest it fosters hurts the economy and affects employment. Industry is discouraged from locating or expanding in communities where equal opportunity does not exist and incidents have taken place or are likely to occur. Lack of equal facilities for employees and even the latent possibility of demonstrations often removes the locality from consideration as a site for commercial or industrial expansion. This affects industrial development regionally and nationally by limiting the flexibility and free choice of business and hampering labor mobility.

Second, the minority consumer market for services is largely untapped in many places. Because it is so channelized, expansion is unduly stifled in numerous types of trade and service establishments, with the associated loss of the well-known multipliers—increased investment, construction, employment, payrolls, and consumption. Although those against whom discrimination is practiced spend their money somewhere—sometimes abroad, in the case of the growing middle-income group of Negroes—the differential patterns of expenditures imposed by a restricted marketplace introduce artificial constraints on the economy. In fact, business in trade and services is reported to have improved among numerous firms and in cities where desegregation has occurred.

Third, and most significant of all, is the effect of discrimination on the Nation's most important resource—its people.

Economists now recognize that their analyses of past and projected rates of economic growth can be explained completely only by including a large factor for the productivity derived from investment in human beings. The public accommodations law would be such an investment, because by protecting individual dignity and self-respect, it would increase initiative and creativity and aspirations for increased levels of living, all of which are central to productivity and economic growth. The forces of innovation and the will to achieve have been among the most important elements in economic progress everywhere. They are derived from a second stage multiplier, as it were, that comes from keeping the doors open to equal opportunity and insisting on the importance of the individual.

I want to elaborate briefly on each of these points. First, the effect on business and industry. Numerous specific instances can be cited of firms that have changed their plans to locate in a town because of racial unrest. Whatever the character of the disquiet—boycott, demonstration, walk-in, sit-in, or wade-in—local industry, trade and services suffer. Firms seeking or having Federal Government contracts hesitate to locate their establishment where the fair employment practices required by the Government are not accepted in the community or where all employees are not welcome in public facilities.

Instance upon instance of the harmful economic impact of racial unrest has been publicized in the press and a brief summary of a selected few is appended to my testimony. I would also like to place in the record a news story in the July 15 issue of the Wall Street Journal, which gives examples of the lack of harmful and, indeed, beneficial effects of desegregation on various types of business. A striking example is that of the reported multimillion dollar increase in hotel convention bookings in two Southern cities, with all the increased business this will bring to other business establishment in thee cities.

According to economic studies of industrial and business location, one of the most important elements in assesing the advantage of one place over another is the community as consumer and provider of services. In addition to cost and market factors, findings confirm that an area improves its chances of attracting new firms be being a desirable place in which to live.

Where community conditions prevent the most economically desirable location of industry, they restrict the movement of the labor force. One of the most frustrating and troublesome problems in our economy today is that there are insufficient jobs for many people on the one hand and a shortage of labor for many jobs on the other. We could go a long way toward eliminating this paradox if plants and businesses were free to settle wherever economic feasibility guides them and to hire without discrimination, with the confidence that all of their personnel would be welcome and have the privileges of equal facilities.

Second, the effect on consumption.

Large and increasing numbers of Negroes are now bona fide members of the middle class in income, education, and potential economic advancement. In 1962 nearly a fifth of all the nonwhite families in this country had as much or more income as the average white family's $6,237—not a ratio for us to be proud of yet, but still a promising one. In that year, 10 percent of the nonwhite families, or nearly half a million, had incomes of $8,000 or more. Clearly, many nonwhite families are in a position to buy the extra amenities of life, including travel, vacations, and meals away from home.

If Negroes felt as free to travel and explore this country as white families of similar income, the economic stimulus would be very large indeed in the transportation, apparel, travel goods, sports, gifts, and camping goods industries, and in the full range of service industries—hotels, motels, and eating and drinking establishments. As soon as large numbers of families now arbitrarily excluded from local places of amusement and entertainment are welcomed ,a succession of important economic results can be confidently predicted. Box office, bowling alley and other recreational activity receipts and first-line employment will rise, followed by expanding demand for the capital, material, tools, and labor to build and run more accommodations.

Third, the effect on people.

The more effort we put into human enrichment, the greater the potential for economic growth, expanding employment, and declining unemployment. Discrimination frustrates and inhibits people. It destroys the motivation and incentive so essential to the development of an individual's full capacities. It prevents full and free association with other Americans. It limits experience and horizons and reduces opportunity. Even the best educated Negro cannot contribute to his profession as much as a white man, assuming equal ability and no prejudice, if he cannot attend professional meetings, luncheons, and functions on an equal basis. How do Negro parents succeed in raising their children to be studious, ambitious, and forward-looking when so many doors are closed to them.

Unlike an earlier day, when most Negro children received little schooling, today 95 percent of all nonwhite children aged 14 and 15 are in school. In the age group 25–29, nonwhite men now average 11 years of schooling, compared with 12½ years for white men. These people are in every sense ready, willing, and able to participate fully in our economic growth. To the extent that we take away their opportunity for full participation we have slashed the Nation's resources and frittered away our potential.

Whoever may not hold his head as high as others is not only denied his constitutional rights; he is not as free as others to achieve, to innovate, to invent, to aspire, and to create. He is limited, not by himself but by his fellow Americans. In dollars and cents this loss cannot be quantified, any more than the humiliation that discrimination heaps on our citizens can be quantified, but the price to the Nation is immense. Our whole history tells us that artificial ceilings on an individual's or group's opportunities stunt economic growth; broadening social and cultural horizons broaden economic horizons as well.

The changes we seek can be made as a right, peaceably and without demonstration only with the protection of law, because of intransigeance in many areas, and the unwilling of one to act unless all do. A law would hasten the opening of public accommodations to all, because in many places merchants are waiting for one another to act. Lack of a public accommodation law has prevented many owners who are willing and ready to desegregate from doing so, because they fear loss of present customers to their competitors.

If there is no law, the demonstrators and demonstrations will not disappear, go away, drop out of sight. They are likely instead to be more numerous and evident with the aid of a growing educated and forceful Negro leadership. Older organizations have expanded, other groups have emerged and flourished; and they are all working together with a growing number of both new and experienced interracial groups. Recently clergymen of many faiths have joined the demonstrations, wishing to affirm actively and unequivocally the moral indignation most citizens feel about discrimination because of race, color or creed.

The cause is just. It grows from the very meaning of democracy. Respected citizens of all races and faiths are actively behind it. The Federal Government cannot fail to be.

APPENDIX TO STATEMENT OF W. WILLARD WIRTZ, SECRETARY OF LABOR, ON S. 1732, INTERSTATE PUBLIC ACCOMMODATIONS ACT OF 1963

CITATIONS ON THE ECONOMIC IMPACT OF RACIAL UNREST

"Almost without exception desegregation of lunch counters has been accomplished peacefully and without any significant loss of white customers. This has led business leaders in some of the holdout area ot reconsider their positions." (New York Times, May 6, 1961.)

"There's a direct relationship between an area's handling of its racial problems and its business success." (Reed Sarratt, executive director, Southern Education Reporting Service, Nashville; AP, April 1963.)

"William P. Engel, former chairman of the Birmingham Chamber of Commerce Committee of 100, said industry was looking elsewhere because of the publicity resulting from racial troubles in Birmingham and Montgomery. Cooper Green, vice president of the Alabama Power Co., and the publicity over their racial difficulties had hurt both Birmingham and Montgomery, because responsible industry simply does not want to move into a troubled area. He said he had personal knowledge of two major plants and two minor installations that shelved plans to move into the State." (Birmingham Post-Herald; Jan. 6, 1957.)

"We've been hurt and hurt bad. In the last few days, I bet I've spent $50 in telephone calls trying to convince a big Ohio company that it should locate a pilot plant in Alabama. But I'm afraid we've lost it to New England and lost it strictly because of the unrest down here." (Top official of one of Birmingham's leading banks. Wall Street Journal; May 26, 1961.)

"The most obvious injury is to the cause of those who seek to entice new industry to Alabama to create payrolls and provide the material blessing so long denied by the Civil War and its aftermath. The police dereliction in Birmingham probably shrank business in every firm in the city. There are a lot of fundamental reasons why a city and State cannot tolerate violence in any circumstance. But the most obvious reason is that riotous conditions blight profits and payrolls and, politically, make the South's plight worse than before." (The Montgomery (Ala.) Advertiser, May 18, 1961.)

"In the two years before the school crisis erupted into violence in Little Rock in September, 1957, industrial investments totaled $248 million in Arkansas. During the period, Little Rock alone gained 10 new plants, worth $3.4 million, which added 1,072 jobs in the city. In the 2 years after the turbulence which brought Federal troops to the city, not a single company employing more than 15 workers moved into the Little Rock area. Industrial investments in the State dropped to $190 million." (Newsweek, Oct. 22, 1962.)

Now, and for the predictable future, when ever a company is planning a new factory, it will immediately think of Little Rock as a 'hotbed' of segregation—which is not true at all. This is going to set our industrial program back considerably." (Everett Tucker, Industrial Director, Little Rock Chamber of Commerce.

"Employees being transferred to Georgia worry about the school conditions for their children. Manufacturers worry about the conditions which could develop within their plants. Today, almost every major manufacturing company

is engaged to some extent in contract operations for the Government subject to the antidiscrimination laws. Most of us like to feel that we are a part of the community where we are located and that accordingly we must respect and accept local customs and traditions. None of us want to locate in areas where there is serious risk of conflict between local custom and Federal law. We need the good will of the community, and yet we must obey the law." Gen. Lucius D. Clay, chairman of the board, Continental Can Co., Inc., May 22, 1961, before Governor's Conference on Trade and Commerce, Atlanta.)

"Our abundance of natural resources should be like a beacon toward which all the great industrial concerns of the Nation should pilot their ships. We won't attain this goal, however, by being listed with Little Rock, Ark., as the most bigoted and hate-filled community in the Nation. We can hardly expect the industrial giants of the Nation to risk capital in a State which handles its problems (regardless of our personal feelings) as ineptly and inexpertly as we have handled the school problem.

"But there is yet time. No lasting damage has been done. No charge of communism or integrator should deter those political, business, civic, and labor heads of our community from leading us through this trying crisis." (New Orleans Councilman Fred J. Cassibry, speech, December 29, 1960.)

Mr. WIRTZ. I will proceed to the economic aspects of this particular situation, because I find here a classic example, which is so often found in our American system of legislation, which is dictated essentially by decency, but which pays off dividends in terms of dollars.

I would like to talk a little bit about the dollar aspects of this problem, in no way suggesting that they are the most important, but that they are sometimes overlooked.

I should like to point out to the committee three things: First, inequality of opportunity and the unrest it fosters hurts the economy and affects employment seriously. Second, there is a minority consumer market for service which is largely untapped in a good many places today. Third, and most significant of all, is the effect of discrimination upon the Nation's most important resource, its people.

I would like to elaborate just briefly on each of these points.

First, there is a very, very clear effect on business and industry in the discrimination which has taken place in the past in this country. My point is that by discriminating against a substantial segment of the population, its usefulness to the economy as a producer, as a consumer, as a taxpayer, is seriously depreciated, and that the effect of this discrimination on the economy of particular communities is an exceedingly serious matter.

I should like, if I may, to place in the record the news story in the July 15 issue, just this week, of the Wall Street Journal, which is a summation of some of the experiences which have been encountered in connection with this particular problem in various communities: Situations in which there has been a feeling on the part of entrepreneurs and businessmen that the opening up of their facilities on an equal basis would hurt them in terms of dollars, and the experience is to the contrary. It helps them in terms of dollars. It helps the whole community. It helps the whole Nation, and it helps the individual business which may be involved.

I don't mean to blink for a moment at the fact that there would be particular situations in which for a short period of time the converse might be true.

On net it is a matter of great gain to the community.

Every community which suffers today from the blight of discrimination and from the rash of demonstrations of one kind of another, loses business as far as that community is concerned. In the situation

that we have in this country today, there are simply a great many companies that don't care to go into areas in which there is discrimination because of the effect upon the work force which comes from the demonstrations, and so on and so forth, which might accompany that kind of situation.

My first point developed in the statement is that it is very, very bad business for the community from the standpoint of its industry, from the standpoint of its employment, to have a situation of discrimination as far as public accommodations or anything else is concerned. It is a very bad piece of business as far as the employment in the industry goes.

With respect to the matter of the effect of this kind of thing on consumption, I think that there is a too general feeling in the country today, too general failure, if you will, to recognize the importance of some 18 million people, producers, and as consumers. A large and increasing number of Negroes are very clearly members of the middle class in terms of income, education, potential economic advancement.

Last year we find that about a fifth of all of the nonwhite families in this country had as much or more income as the average white families, $6,237. That is not a comparison to be proud of, but it is one-fifth of the nonwhite group which measures up to the average of the others.

But it is a promising figure because it is so much better than it was before.

Last year 10 percent of the nonwhite families—that is, nearly half a million—had incomes of $8,000 or more.

It is very clear today that a large percentage, a considerable number of Negroes are in the position where they are traveling a good deal, using public accommodations, using hotels, motels, and so on and so forth, enjoying meals away from home. There is a very clear dollar aspect of the problem we are talking about.

If the situation were such that Negroes were free to travel around the country, enjoying the same accommodations that other people enjoy, if they were free to use the same recreational facilities which other people are free to use, there would be a very substantial increase in the business advantage of those particular industries.

But it hurts to talk about a problem of this kind in terms of dollars when it is essentially a human problem. And so I turn, third and finally, to the effect of this kind of discrimination on people as individuals.

It is perfectly clear that the more effort we put into human enrichment, the greater is the potential for economic growth, for expanding employment, and for declining unemployment. Discrimination frustrates and inhibits people. It destroys the motivation and incentive which are so essential to the development of an individual's full capacities.

I should like to make just one point, illustratively, in this connection. Concerned particularly with the employment aspects of the racial discrimination problem, I face today the question of what to do about discrimination in employment, the establishment of equal employment opportunities.

I know that there are three aspects to this problem, and not just one. There is the matter of removing the discriminatory habits. But

behind that is the necessity of qualifying Negroes equally with whites for the jobs which are available, and particularly the more skilled jobs which are going to be available in the economy. And finally, of course, is the fact that we simply have got to have more jobs, enough jobs to take care of everybody, or it is going to be a pyrrhic victory that we win.

I want to speak particularly to the second point.

We know that our problem today, as far as the construction trades, and as far as all parts of employment in this country are concerned, is that there have got to be more people of the Negro race qualified for the jobs which are opening up. The point of relevance to this title and to the public accommodations provision is this:

We know that part of the problem is that these Negro boys and girls have not been motivated in their educational career, and in their training courses, sufficiently to bring them up, some of them, in equal numbers to the demands of these new jobs.

Mr. Chairman and gentlemen, in my own experience this is largely because of the bruises that these children get in the course of their educational experience. I think there is no strain at all in relating the fact that a child, a Negro child, will walk past a hotel or restaurant where he can't enter on his way to school, and he will enter the door of that school wondering whether it is worth spending the day working very hard. And because he desn't spend enough energy and effort in connection with his education in that particular case, it results directly in his not being ready for the job which would await him later on.

I wish the Negro children today knew how different the situation is today than it used to be.

I can't emphasize too much the relationship of this motivation factor to the unemployment problem among Negroes today. And it is very closelly related to what we are talking about here.

And so, with respect to various aspects of this matter, as far as the individual is concerned, it is the third and final point, Mr. Chairman, and members of the committee, that the matter of whether people of all races are entitled to equal treatment as far as public accommodations are concerned, it is a matter of essential economic significance, both to the overall economic structure and progress of the country, and to the development of individuals for their place as employees and as consumers in the economy.

So I say in conclusion only this: Whoever may not hold his head as high as others is not only denied his constitutional rights; he is not as free as others to achieve, to innovate, to invent, to aspire, and to create. He is limited, not by himself, but by his fellow Americans. In dollars and cents this loss cannot be quantified, any more than the humilitation that discrimination heaps on our citizens can be quantified, but the price to the Nation is immense. Our whole history tells us that artificial ceilings on an individual's or group's opportunities stunt economic growth; broadening social and cultural horizons broaden economic horizons as well.

And so I say, Mr. Chairman and members of the committee, in conclusion, only that in my view as an individual, as a person interested particularly in the employment aspects of this problem, this is the cause that is just; it is the cause that grows from the very meaning of

democracy; that respected citizens of all races and faiths are actively behind it: that the Federal Government can't fail to be.

I should like to urge as strongly as it is within my capacity to do, to urge that this legislation receive sympathetic, vigorous, and the enthusiastic support of this committee, the Congress, and the country.

Thank you.

The CHAIRMAN. Thank you, Mr. Secretary.

I wonder if you would care to comment on the effect discrimination will have on the shift in labor force from one to another area of the country in an effort to gain better job opportunities. Has this shift caused, even now, great pockets of unemployment and made the situation even worse in some of the so-called northern areas of our country?

Mr. WIRTZ. Yes. Of course the movement of the nonwhite population from the South to the North with its present concentration in particular pockets, in particular cities, has presented one of our real economic as well as social problems.

Our studies are incomplete on that, Mr. Chairman, but what they show is that where it was a dispersed situation as far as the South was concerned, it is now a very concentrated situation as far as cities in the North are concerned. So that you have unemployment centered quite strongly in particular pockets, in particular areas, in certain cities. It is a concentration which follows not only race but also education lines. But it is a matter of very great concern to us.

I am not sure that I catch entirely the spirit of your question, but I should like to say this just in general: we face today a situation in which there is a large factor of mobility in the economy, in the work force.

Thirty days from today 400,000 people will be working in a different labor market area from the one in which they are today. A more than proportionate number of those will be Negroes, because this is a result of several forces. And a higher than normal percentage of those who are moving from one labor market to another are Negroes. If they are faced by denial of public accommodations, and the use, the increased use of public accommodations which comes when you are away from home, to simplify it, that problem will be that much aggravated.

There is the other side of it, too. We are at the same time, in connection with your question, increasingly dependent in this country upon mobolity of labor.

As one illustration of that, if you took three States—California, Texas, and Florida—today one out of every six jobs is in those States. But the interesting thing is not that figure so much as the fact that 10 years ago only one out of every nine was in those States, which is an illustration of the movement that is going on now. And this is essential. We don't like the idea of mobility of labor because it means that a person losing his job in one place has to pull up his family, pull somebody out of the middle of the third grade, pull up all the roots in the community, and move someplace else. It is not an attractive prospect, but it is part of the facts of present industrial work force life.

There is an increasing degree of mobility of the work force. It is related to the race factor. And it does affect very directly the importance of the use of public accommodations on a nondiscriminatory basis.

The CHAIRMAN. That is what I meant. So much of the abrupt movement of labor force is caused by some of these personal concerns rather than a pure economic consideration. It might be a combination of both.

Mr. WIRTZ. It is hard for us to tell. We know that there is a lot of movement. It is hard for us to tell which reflects one element or the other; but certainly both are in there.

The CHAIRMAN. I think that a lot of the industrial development of the South is somewhat handicapped by the fact that you have this situation down there. I don't know whether or not you will agree with me that the practice of segregation in the South may not particularly help the development of the South.

Mr. WIRTZ. The story——

The CHAIRMAN. I am speaking solely of industrial development.

Mr. WIRTZ. The newspaper story, which I have asked to add to the record, points specifically to specific instances where businesses just don't come to a particular community because of the aggravation and the problem—aggravations of the problem in that particular area. The stories are also increasingly complete of the increased business which comes to hotels, for example, when they break down these bars and attract conventions, which they could not otherwise attract.

There is a great business advantage to the whole community. That is only a small illustration of the much more permanent effect which comes from businesses coming to communities where there is complete lack of discrimination.

As we enforce increasingly the provisions of the Executive order prohibiting discrimination by Government contractors, it is going to mean that those Government contracts simply won't go to areas in which there is discriminatory practices of one kind or another.

The CHAIRMAN. The general effect upon the economy, or the buying power of the Nation, is surely not helped, is it, when certain industries—not too many of them—move to some of these areas solely because they get a cheap labor force? That doesn't help the overall situation either.

Mr. WIRTZ. It is destructive of the stability of the economy. That is correct.

The CHAIRMAN. This is what happens, too.

Mr. WIRTZ. The Council of Economic Advisers has attempted to place an overall pricetag on the effects of discrimination, the economic effects of discrimination. It is obviously a large, to some extent abstract, figure. But that can be evaluated. The kind of thing you are talking about can be roughly approximated in terms of roughly $12 to $13 billion a year loss of the gross national product.

The CHAIRMAN. We will put in the record your article from the Wall Street Journal.

(Full text of article follows:)

[From the Wall Street Journal, July 15, 1963]

INTEGRATION IMPACT

DESEGREGATED CONCERNS IN SOUTH SAY PATRONAGE HOLDS UP IN LONG RUN—SOME HOTELS, RESTAURANTS DO BETTER; ATLANTA, DALLAS CITE LARGER CONVENTION MARKET—NEW RIGHTS OFTEN NOT USED

(By James C. Tanner, staff reporter of the Wall Street Journal)

ATLANTA.—Things are swinging these days at the Wit's End, a swank North Side night club which opened its doors last November. Though the Treasury's new expense account rules made things tough at first, the Wit's End is now packing in customers regularly.

In Memphis, the 120-room Downtowner Motel is doing so well its occupancy is even running ahead of last year's booming 95-percent rate. The Downtowner has been filled to capacity much of the time in recent weeks and all signs point to a record year.

The financial fortunes of these southern establishments are of special interest because both are among those that have begun serving Negroes for the first time. Their experiences, plus those of scores of other businesses from Texas to the Carolinas, point up a significant and perhaps surprising fact: Among those restaurants, hotels, theatres and other places of public accommodation in the South that have begun serving or hiring Negroes, only a few report suffering any lasting economic consquences. A sizable number, in fact, declare that business has been better than ever.

"COULDN'T HAVE BEEN SMOOTHER"

"We were scared to death—we could just see all our white customers walking out the minute the first Negroes walked in," says Paul Stickney, manager of the Wit's End. "But things couldn't have been any smoother. We know of only one white couple who walked out because we admitted Negroes and they came back within 2 weeks. As far as stirring things up around here, it's been one big zero." The Wit's End is one of only three Atlanta nightclubs serving both whites and Negroes.

All this is not to suggest that desegregation would go smoothly for all Dixie establishments. At Ormond Beach, Fla., near Daytona Beach, Motel Operator George Thomas is still reeling from the financial punch delivered by boycotting whites when he decided it was the "right thing" to desegregate his 32-unit Star of the South Motel 7 months ago. "My business at first dropped about 50 percent," he reports. But he adds that an influx of Negro guests quickly took up much of the slack, and he expresses confidence that many of his white customers eventually will return.

But most businessmen questioned by the Wall Street Journal report no grave economic dislocations from integration and they leave no doubt that desegregation of commercial facilities has been less painful than expected.

NO LOSS OF BUSINESS

"Things have been going like clockwork—we're surprised and pleased," says Dallas Hotelman Henry Rather of last summer's decision by the city's major hotels and motels to integrate. Mr. Rather says a recent check of the city's 35 largest hostelries failed to turn up a single instance of lost business because of desegregation. "There were a few letters and a crank call or two at first, but that's all," comments Mr. Rather.

Broader access to privately owned places of public convenience, such as hotels, restaurants, amusement facilities, and stores, has become a prime goal of Negroes lately. The recent riots in Birmingham, and subsequent disturbances in such cities as Savannah, Ga.; Jackson, Miss.; Danville, Va.; and Tallahassee, Fla., primarily revolved around Negro demands that merchants open their facilities to Negroes—in some cases as customers and in others as employees.

The question has taken on added importance in recent weeks with the appeal to Congress by President Kennedy for Federal power to outlaw racial discrimination in all places of public accommodation. This is unquestionably the most controversial provision of the Kennedy civil rights program and seems likely to become the focal point of the coming congressional battle over civil rights.

NEGROES MAKING MAJOR STRIDES

Southern businessmen generally express strong opposition to this section of the proposed civil rights legislation. But even without such a law, Negroes are making major strides in their push to break down segregation barriers. The Justice Department reports that some desegregation of commercial facilities occurred in 143 cities in Southern and Border States in the 4 weeks ended June 18; others are joining the list daily.

Last week, for instance, a biracial committee in strongly segregationist Fort Worth announced that all of the city's public facilities, including hotels, restuarants, theaters, department stores, and athletic contests would be desegregated in September when the city's schools are scheduled for integration.

If the pattern emerging in other southern cities holds true, Fort Worth merchants can expect some protests and loss of business when they first begin accepting Negroes. But experience shows that such adverse effects are rarely lasting.

Fred Harvey, president of Harvey's Department Store in Nashville, says that when his store desegregated its lunch counters in 1960 only 13 charge accounts were closed out of 60,000. "The greatest surprise I ever had was the apparent 'so what' attitude of white customers," says Mr. Harvey.

Even where business losses occur, they usually are only temporary. At the 120-room Peachtree Manor Hotel in Atlanta, owner Irving H. Goldstein says his business dropped off 15 percent when the hotel desegregated a year ago. "But now we are only slightly behind a year ago and we can see we are beginning to recapture the business we initially lost," declares Mr. Goldstein.

William F. Davoren, owner of the Brownie Drug Co. in Huntsville, Ala., reports that though his business fell a bit for several weeks after lunch counters were desegregated, he's now picked up all that he lost. Says he: "I could name a dozen people who regarded it as a personal affront when I started serving Negroes, but have come back as if nothing had happened."

MEMORIES ARE SHORT

Even a segregation-minded businessman in Huntsville agrees that white customers frequently have short memories when it comes to the race question. W. T. Hutchens, general manager of three Walgreen stores there, says he held out when most lunch counter operators gave in to sit-in pressures last July. In one shopping center where his competition desegregated, Mr. Hutchens says his business shot up sharply and the store's lunch counter volume registered a 12 percent gain for the year. However, this year business has dropped back to preintegration levels "because a lot of people have forgotten" the defiant role his stores played during the sit-ins, he adds.

Some southern businessmen who have desegregated say they have picked up extra business as a result of the move.

At Raleigh, N.C., where Gino's Restaurant was desegregated this year, owner Jack Griffiths reports only eight whites have walked out after learning the establishment served Negroes, and he says "We're getting plenty of customers to replace the hardheaded ones."

In Dallas, integration of hotels and restaurants has "opened up an entirely new area of convention prospects," according to Ray Bennison, convention manager of the chamber of commerce. "This year we've probably added $8 million to $10 million of future bookings because we're integrated," Mr. Bennison says.

CONVENTIONS FOR ATLANTA

Within a day after 14 Atlanta hotels announced on June 13 they would begin accepting Negro guests who come to the city with conventions, the Atlanta Convention Bureau had nailed down three organizations for 1964 and 1965 meetings, a total of 3,000 delegates who otherwise would not have visited Atlanta. Walter Crawford, executive vice president of the convention bureau, says the hotels' decision opens up "the remaining 40 percent of the convention market that we estimate we haven't even been able to talk to before."

One frequently expressed fear of southern white businessmen, that their establishments would be overrun by Negroes if they integrated, apparently is not materializing. "The Negroes want the right to enter your place of business, but they're not so anxious to use the right," says a Nashville banker.

At Knoxville, Tenn., William Tiller, assistant manager of the city's largest hotel, the Andrew Johnson, reports that although the hotel has been integrated more than a month, "we've had only three Negro families and two couples."

The CHAIRMAN. Mr. Monroney?

Senator MONRONEY. I appreciate hearing Secretary Wirtz. I have no questions at this time.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Thank you.

Mr. Secretary, when the Attorney General testified before this committee I read him a letter published on the front page of the Nashville Banner on Wednesday, June 26, of this year. This letter was signed by Mr. O. B. Gentry and was addressed to the local chairmen and secretaries of lodges 215, 648, 720, 774, and 922 of the Louisville & Nashville Railroad. The Attorney General assured us that he would look into this matter and report back to the committee.

To my knowledge there has been no report.

I was just wondering if he had called this to your attention and if you were otherwise familiar with this.

Mr. WIRTZ. Senator, the letter has been called to my attention. In fact it came to my desk physically yesterday. I am in a position to give you no complete report on it yet.

I am in a position to say this to you: As far as the suggestion which I understand to be made in that letter is concerned, if it has happened there is no basis whatsoever for it. I propose to get in touch with Mr. Gentry directly to find out what basis. It is an unidentified story.

If there is anything of that kind going on, there is no basis for it. And if I find out that there is, I will do whatever I can about it.

In direct answer to your question, the matter has been brought to my attention.

Senator THURMOND. And you are looking into it?

Mr. WIRTZ. Now I am.

Senator THURMOND. Mr. Secretary, would it be a violation of the Railway Labor Act if the allegations contained in this letter are true?

Mr. WIRTZ. I am trying to think of the specific allegations contained in this letter. I think that the allegations are that Federal officials have instructed the railroad or the union—I am not sure which—that they must employ Negroes regardless of qualifications.

Senator THURMOND. I will be pleased to hand you this letter now so that you can look at it. I would like to have an answer to that question.

Mr. WIRTZ. All right.

There would, I think, Senator, be no violation of the Railway Labor Act referred to here in this statement because the Railway Labor Act does not include such a provision so far as I know [upon the employees or upon the unions]. The closest that you would come to it would be the discussion—the closest legal point I think would be the discussion in the *Steele* v. *Louisville and Nashville Railroad* case by the Supreme Court in about 1945, which implied that it was a constitutional violation, and stated that it was a statutory violation for a union to enter into a collective-bargaining agreement which had the result of discriminating on a racial basis.

That, to the best of my knowledge, would be the only legal question that would be presented there. But I go on to say that legal or illegal, any insistence as implied here—by Government representatives, that there be a preference treatment on the basis of race alone, either way, would in my judgment be absolutely wrong.

Senator THURMOND. If the allegations are true, it would be wrong for that to be done?

Mr. WIRTZ. If the allegations are true with respect to the action of Federal officials, then that would surely be wrong.

Senator THURMOND. But you do not feel it would be a violation of the Railway Labor Act?

Mr. WIRTZ. I don't believe there would be a violation of the Railway Labor Act.

Senator THURMOND. Mr. Secretary, have you received any complaints from ethnic organizations or other minority groups that their jobs are being threatened by the preferential hiring of Negroes?

Mr. WIRTZ. No, sir; I have not. I have heard general statements to that effect but have had no such——

Senator THURMOND. Are you saying that none have come to your office?

Mr. WIRTZ. That's right, Senator.

Senator THURMOND. Of course you have a lot to do, I know that, as a Cabinet member. It might be well if you would look into that.

Mr. WIRTZ. Surely. I will be glad to inquire as to whether there have been any communications to the Department which bear on that point, and to report.

(Subsequently, the following letter was received from the Department of Labor:)

DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, July 30, 1963.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Secretary Wirtz stated, when he testified before your committee on July 18, 1963, on S. 1732, the public accommodations bill, that he would submit certain additional information for the record of the hearing. That information is enclosed in this letter with notations as to the pages in the transcript of volume 12 in which the insertions are to be made.

During the Secretary's testimony, reference was made by Senator Thurmond to a letter from Mr. O. B. Gentry, general chairman of the Brotherhood of Railroad Trainmen, which was published in the Nashville Banner on June 26, 1963, concerning employment practices (p. 1400 of transcript). Senator Thurmond stated that the Attorney General at the time he appeared before your committee, promised that he would look into the matter and make a report. Secretary Wirtz also said that he was making inquiries about this subject. The letter from Mr. Gentry was an outgrowth of conferences on racial discrimination complaints within the jurisdiction of the President's Committee on Equal Employment Opportunity.

We understand that the Attorney General has submitted to your committee a detailed report on this matter which he obtained from Mr. Hobart Taylor, Executive Vice Chairman of the President's Committee on Equal Employment Opportunity. As the report shows, Mr. Gentry's letter was inaccurate in stating that Government representatives issued instructions that collective-bargaining agreements were to be violated. We do not believe that we can add to the detailed facts in the Attorney General's submisison.

Secretary Wirtz also was asked by Senator Thurmond if the Department had received any complaints from ethnic organizations or other minority groups that their jobs are being threatened by the preferential hiring of Negroes (p. 1403 of transcript). We have not found a record in the Department of any complaints of this kind.

If I may assist you in the future, please let me know.

Yours sincerely,

SAMUEL V. MERRICK,
Special Assistant for Legislative Affairs.

Senator THURMOND. Mr. Secretary, if this bill were enacted, what in your opinion would be the effect on the cafes, restaurants, and motels in the South that are owned and operated by Negroes for Negroes only?

Mr. WIRTZ. Such operation could no longer be permitted. I would assume that that would apply equally in that situation.

Senator THURMOND. I am speaking of the economic effect. Would that not put them out of business?

Mr. WIRTZ. I shouldn't have thought so, Senator. I profess to a lack of intimate familiarity with that situation. I would not think so. If I did, I would feel that that was unfortunate, it was an unnecessary price. I don't think it would happen.

Senator THURMOND. If the Negroes decided to eat in the white restaurants, naturally the Negro restaurants would lose that business, would they not? And this would produce an economic impact upon the Negro restaurants, would it not?

Mr. WIRTZ. On the assumption that you make, I think that conclusion would have to follow. But I would like to answer squarely: I don't think it will work out that way in many cases, but if it does, I don't believe there is any substantial number of Negro restaurant

owners who would care to remain in business as a price of continuing discrimination over all, I would be relatively sure of that.

Senator THURMOND. I believe you mentioned something about if the bill passed the South should grow faster in development.

Mr. WIRTZ. It is my impression that that would follow, sir.

Senator THURMOND. What part of the Nation has grown faster since 1940? Has not the Southeast grown faster than the North and other parts since then?

Senator LAUSCHE. Since when?

Senator THURMOND. 1940.

Mr. WIRTZ. I would have to check the specific figures on that. I don't mean to cast doubt on your general proposition. I believe there has been an expansion of economic activity in the South which is unparalleled in most other places of the country unless it is California or one or two others—Texas. I would confirm the implications of your question.

Senator THURMOND. Since 1940, has not the Southeast industrialized at a greater rate proportionally than other sections of the country?

Mr. WIRTZ. Again I don't answer as a matter of official information. My impression is that that is correct.

Senator THURMOND. So segregation has not hurt the industrialization of the South, has it?

Mr. WIRTZ. I do not go to that conclusion because it leaves the possibility that if it had not been for this, that rate of growth would have been infinitely larger.

(See following data:)

DATA INDICATING ECONOMIC GROWTH OF UNITED STATES SINCE 1940 ON A REGIONAL BASIS

Nonagricultural employment, by regions, 1940, 1957, and 1962

Region	Employment (annual averages in thousands)			Percent increase	
	1940	1957	1962	1940–62	1957–62
United States [1]	32,376.0	52,904.0	55,325.0	71	5
New England	2,726.1	3,648.1	3,790.8	39	4
Mideast	9,508.6	13,542.6	13,710.7	44	1
Great Lakes	7,378.7	11,722.8	11,646.3	58	−1
Plains	2,548.6	4,058.1	4,261.2	67	5
Southeast	5,105.8	9,082.1	9,903.0	94	9
Southwest	1,637.4	3,519.8	3,837.7	134	9
Rocky Mountain	610.9	1,114.0	1,285.1	107	14
Far West	2,707.7	5,896.3	6,708.2	148	14

[1] National totals differ slightly from sum of State totals.

Source: U.S. Department of Labor, Bureau of Labor Statistics.

Personal income, by regions, 1940, 1957, and 1962

Region	Amount (millions of dollars)			Percent increase	
	1940	1957	1962	1940-62	1957-62
United States	78,522	348,724	437,924	458	26
New England	6,898	22,793	28,523	346	25
Mideast	23,949	88,586	108,449	353	22
Great Lakes	17,818	78,469	92,404	419	18
Plains	6,515	28,099	35,216	441	25
Southeast	10,387	53,790	69,280	567	29
Southwest	4,090	23,697	30,170	638	27
Rocky Mountain	1,598	7,830	10,169	536	30
Far West	7,767	45,460	61,824	692	35

Source: U.S. Department of Commerce, Office of Business Economics.

Senator THURMOND. Mr. Secretary, do you feel that a man running a private business should be forced to use that private business in a way he doesn't want to?

Mr. WIRTZ. Yes, sir. If the question is——

Senator THURMOND. Suppose——

Mr. WIRTZ. I would like to complete my answer to the question.

Senator THURMOND. Certainly.

Mr. WIRTZ. If his use of that property is of such a nature that it cuts across a clearly established interest of the public of which he is a part, of the nation of which he is a part, my answer to the question would be "Yes."

Senator THURMOND. Suppose a lady has a beauty shop in a home—and a great many do—should she be required to take customers there that she doesn't want to take?

Mr. WIRTZ. This is Mrs. Murphy broadening out her business, I guess. I don't know that I could add in answer to that question, as far as the legality of it is concerned, and if your question raises this point of how large an establishment it is, and what its effect on interstate commerce may be, what has been testified to by the Attorney General and by the Assistant Attorney General, I don't believe I could add to the illumination of that point.

Senator THURMOND. I believe Mr. Marshall, the chief of the Civil Rights Division in the Department of Justice, stated that if this bill passed it would affect most businesses.

Mr. WIRTZ. I remember the report of his reference to hamburger shops, and so forth.

Senator THURMOND. Mr. Secretary, don't you think it is better if changes are to be made for them to come about voluntarily on the part of each business establishment that wishes to make such a change in the first place; next, by the community; next, by the State, but not inject the Federal Government into these matters?

Mr. WIRTZ. I would expect, with respect to the progression of preference, I would agree with you completely, and would hope it could all come voluntarily and could all come through the community, and could all come through the State, but would feel quite strongly if that progression leaves the accomplishment incompleted, there is the necessity of Federal participation, for the community as a whole has a very real interest.

Senator THURMOND. It has been brought out here, I believe, that 32 States have passed such a law as this, or somewhat similar to this, indicating possibly that the United States may not be in favor of such a law. Do you think it is proper for the Congress to force on those other States a law that people in those States may not wish?

Mr. WIRTZ. My answer would be affirmative. But I should want to put it in my own terms. I don't think of it as a matter of forcing one area by the Federal Government. I think of it as a matter of writing into law what I believe strongly is the now established consensus of the conscience of the people of this country, and that this is a matter in which we all, as part of the one committee of the whole, share and have an interest.

Senator THURMOND. Do you think a compulsory law by the Federal Government can be successful if public opinion is otherwise in the community?

Mr. WIRTZ. I think of Mr. Justice Holmes' suggestion, as I remember it, that when conflicting notions still hold the battlefront against each other, and the idea destined to prevail has not yet won the field; that the time for law has not yet come. I think, Senator Thurmond, that the time for law has come, according to that prescription, because I think today there is a unanimity, that there is a consensus of he conscience of this country, and so that where it might before have been too early, we are today clear enough in our minds as a Nation that we do need the law in the areas which have not yet been brought into agreement. But so many of us, so large a number of us, feel so strongly, yes, I think the time for law has come.

Senator THURMOND. Mr. Secretary, don't you feel that if this law is passed, which would violate the freedom of the individual in the handling of his own business, that it would be very difficult to enforce, and would require a large number of Federal agents to enforce it?

Mr. WIRTZ. Working backward on the questions because the first one you put to me is the hardest, I don't think it would require a large number of Federal officials for its enforcement. I do not think it would be hard to enforce.

If your first question, Senator Thurmond, is as to whether there is any diminution of the individual's freedom in this particular, as an application of this law, the answer must, it seems to me, be "Yes." I would only point out that the only freedom which any person in this country enjoys is a composite of the freedoms which other people give up voluntarily. There is nothing to an individual's freedom except what other people are willing to accord him.

Senator THURMOND. Mr. Secretary, when a man violates a law, do you feel he should have a trial by jury?

Mr. WIRTZ. I am not sure about the implication of the question, or the extent of the question.

That principle, that basic principle of trial by jury, is obviously embedded firmly in the doctrines of this country and in the Constitution, and I do believe in it.

Senator THURMOND. You, of course, know that this law provides no trial by jury?

Mr. WIRTZ. It distinguishes between the areas of the application of the constitutional provision and those to which it does not apply, Senator.

I know that the distinction is honored in this particular law. And I am not sure, again, that there is much that I can add by way of illumination to what the Attorney General has testified to.

Senator THURMOND. When a man is charged with a crime, does the Constitution make any exception as to whether he is to receive a trial by jury, or does it say he shall receive a trial by jury?

Mr. WIRTZ. I don't know. I don't remember that detail of the Constitution. I would be glad to refresh myself on it. I don't mean to avoid, in my present capacity, whatever broader responsibilities I may have had as a lawyer, but I wouldn't pretend to have a refreshed mind on these subjects at this point.

Senator THURMOND. I would suggest that you do refresh your mind on that, and you will find it does provide a man is entitled to trial by jury when he is charged.

Mr. Secretary, isn't this bill being advocated principally in order to appease the minority and try to get the minority block vote?

Mr. WIRTZ. Senator Thurmond, I can testify on that as an individual, and I have testified as an individual, and I say to you that I believe this thing, sir, from the deepest roots in my being as an individual, without any regard whatsoever to any of the political aspects of it.

Answering then as a member of the administration, my answer to your question, sir, is "No."

Senator THURMOND. You don't think that is the chief purpose of the bill?

Mr. WIRTZ. If the answer to your second question is not included within the answer to the previous question, the answer is "No" to the second question.

Senator THURMOND. That is all. Thank you, Mr. Secretary.

The CHAIRMAN. Senator Cotton?

Senator COTTON. Mr. Secretary, you have given us a very forceful and able statement, for which I commend you.

Mr. WIRTZ. Thank you.

Senator COTTON. I have only a couple of questions.

The first one is this: One of the statements of the President in his message, and the statement with which I strongly agree, is that it does not benefit a Negro much to be served in a restaurant unless he has a job and some cash in his pocket. Do you feel that this committee would be reporting a whole bill and a meaningful bill if it simply sought to reach out to the retail and accommodations establishments in this country and prohibited them from discriminating against customers but left them free to discriminate in hiring employees?

Mr. WIRTZ. I think that is a very proper question, sir, and raises the question as to the applicability of other parts of the President's

program. The parts to which you refer would be approached in connection with title VII of S. 1731 as far as the situation you raise is concerned, if a company was a Federal supplier; and there would be an absolute prohibition against that discrimination if that store was a store doing business, or was an establishment doing business with the Government.

I don't mean to avoid the question. It would be hit much more broadly in connection with fair employment practices or equal opportunity legislation, and on that we would support such legislation and do quite clearly.

And so my answer to your question is that there should also be coverage of that situation.

Senator COTTON. If I understand what you have said, I agree with it.

The President's proposal, which is not before this committee, but is before another committee, prevents discrimination in employment in any establishment or industry in which the Government is furnishing any money, either directly or indirectly, by contract or otherwise.

Mr. WIRTZ. That is correct, Senator.

Senator COTTON. I personally agree, and I have always supported that proposal. But we, in this committee, are going further and that is where some of us may disagree.

We are going in the matter of serving customers. We are going into private establishments with which the Government has no connection. What I am asking is: If we are going to take this step, and if we are going to attempt under either the Interstate Commerce Clause or the 14th amendment to control these establishments that substantially affect interstate commerce in the matter of serving customers, should we, to be consistent, control them in the matter of hiring employees?

Mr. WIRTZ. I would not presume upon your prerogative by suggesting where I thought said provision ought to be made, whether a part of this provision or another.

But on the question of whether there should be a prohibition of discrimination in employment, we would support that proposition unqualifiedly. Whether in one place or another is the remaining question.

Senator COTTON. Even though it goes beyond the present provision?

Mr. WIRTZ. Yes; I am talking about the broad application, fair employment, equal opportunities generally.

Senator COTTON. You think we should do both?

Mr. WIRTZ. Yes, sir.

Senator COTTON. Thank you.

Now, my other question. And if it mentions a political figure, it has no political implication.

On Tuesday, Senator Goldwater introduced amendments to the bill before this committee which would: (1) give the Attorney General the right, when he deems it necessary, to institute on behalf of a complainant who alleges that his rights under section 101 of the Landrum-Griffin Act, known as the labor bill of rights, have been violated or denied by the union, and (2) deny the privilege or right of exclusive representation in collective bargaining to those unions which arbitrarily exclude from membership those qualified workers within the bargaining unit who wish to join the union.

Would you care to comment on those proposed amendments? In other words, would it be proper and would it be desirable to see to it

that when we are dealing with this, and dealing with it from the commerce angle, that we provide against discrimination by unions as well as by these other establishments?

Mr. WIRTZ. With respect to the general inquiry which you put at the end of the question, my answer is, unqualifiedly, "Yes." It seems to me that the same rules for prohibiting discrimination should be applied to unions as to other establishments.

With respect to the specifics which are involved in your question about Senator Goldwater's amendment, I would have these two comments to make: the second part of Senator Goldwater's amendment would provide, if I understand it correctly, that discrimination by a union would be a basis for a denial of certification by that union.

I should make it clear that the National Labor Relations Board is an independent agency; it is not part, as you know, of the Department of Labor.

So my answer would have the casual official quality which that implies. I would think that this was a good proposal. It is a matter with which the Board, to my unofficial knowledge, has been engaged back to—well, the case was the *Larus Brothers* case, back, I think, in the middle forties. They played with this problem. They have done this to a degree, and they had had some trouble with it.

I think the principle is right, that there ought to be denial of certification where a union discriminates.

I think on Senator Goldwater's first proposal, there must be a misunderstanding. His amendment seems to imply that section 101 of the Labor-Management Reporting and Disclosure Act of 1959 had in it a civil rights provision. I am afraid that there has been an overlooking of the fact that that was proposed before the Congress and although Congress passed a so-called civil rights, or bill of rights, provision, they ruled out or they excluded any racial discrimination matter at all.

So we had that bill of rights without a real reference to this particular point before us.

So when, in this amendment, Senator Goldwater would bring in that section, I believe he overlooks the fact that there is nothing in it about civil rights, the point of this bill, and therefore would have no relevance here.

Senator COTTON. Section 101 of the Landrum-Griffin Act, the so-called labor bill of rights, if I recall correctly, deals largely with the right of individual members of unions to free speech, their right to participate in elections, and not be denied those privileges, and their right of having that enforced.

Doesn't that in itself cover any denial of such rights as may be made in any union to members because they are excluded for racial purposes?

Mr. WIRTZ. No, sir. And the legislative history made it painfully clear that that was excluded from the Landrum-Griffin Act.

If I am wrong on that, my answer would be different on this. But I am quite sure that the bill of rights provision in the Landrum-Griffin Act did not include this particular matter.

Senator COTTON. Isn't it intended to protect the rights of the individual member union if those rights have been denied, regardless of the reason?

Mr. WIRTZ. Not to racial points, Senator. The racial discrimination is a matter of legislative history as well as the clear wording of that provision that was not included. That is only an interpretation.

Senator LAUSCHE. Will the Senator yield?

Senator COTTON. One moment and I will yield. I want to complete one question.

I believe I am not allowed to yield under the rule.

The CHAIRMAN. We will have a little latitude this morning.

We have such a fine witness, I want everybody to have a chance.

Senator COTTON. If John Doe, a member of a union, is punished because he has talked too much, or because he has exercised the freedom of speech, or is denied his rights to appeal as a minority member simply because he is running contrary to the officers and those in power in the union, that is covered, is it not, by the Landrum-Griffin bill?

Mr. WIRTZ. With the exception of your reference to being denied because he is a minority member, I think your statement is correct. But on that point I think it would not square with the wording or the legislative history.

If I may be helpful: My position is one, Senator, that assumes that we should do everything with respect to labor unions to eliminate this discrimination that is possible; no quarter from that; no qualification at all. If I thought this were the way to do it, I would support it completely.

I think that it represents this misunderstanding about the civil rights—about the bill of rights. But on principle there is no disagreement between what you are implying and Senator Goldwater.

Senator COTTON. Thank you.

The CHAIRMAN. I will call on the Senator from Ohio in a minute.

Senator COTTON. Just let me ask one more question: The second part of the amendment which you have indicated you agree with, I believe——

Mr. WIRTZ. That is correct.

Senator COTTON (continuing). Is based on the same principle of not allowing discriminators the use of power conferred upon unions by their Government. It is based on the same principle that another proposal of the President is, that aid and Government grants and other beneficial programs may be denied to those States or communities that practice discrimination.

Mr. WIRTZ. Yes, sir; that is right.

Senator COTTON. And you regard that as a sound principle?

Mr. WIRTZ. Surely. I don't want to pass on the detail of whether this is the right form. But the principle, in my judgment, is absolutely right.

Senator COTTON. Thank you. That is all I have.

The CHAIRMAN. I want to suggest to the Secretary, and I know that the Senator from New Hampshire knows this, that that amendment suggested by the Senator from Arizona, was introduced as an amendment to S. 1732. There would be a serious question whether this committee would have jurisdiction over that part of it.

I am like the Secretary. I don't mind, as chairman—I don't know how other members feel—taking this matter up with this bill. But I think the Senate Committee on Labor would rise up and suggest that these are matters within their purview under the Reorganization Act.

It was sent here because Senator Goldwater specifically made it an amendment to S. 1732.

Whether the Labor Committee will take this up or whether they want it or not is another story. I don't know.

But they do have before the Labor Committee not only this amendment suggested here, but they have other bills and other amendments bearing on the same question.

Whether or not they will go ahead with it I haven't inquired of the chairman, Senator Hill, of Alabama. But they do have several of these proposals.

I say "several"; there are three or four bills along the same lines as the Senator from Arizona suggests. But because it was introduced as an amendment to S. 1732 it came here.

I am inclined to agree with the Senator from New Hampshire that when we are talking about the effect of this whole matter on the economy and business, and so on and so forth, we might have some jurisdiction. I don't know what they will do on the floor.

I wanted to clear that up.

There are several amendments being introduced to S. 1732. When they introduce them as such they all come here. In a strict interpretation of jurisdiction they do not belong in this committee, although we wouldn't be averse to taking them up if no one objected.

Senator COTTON. Mr. Chairman, this is not the place to discuss that, but I just want to review the chairman's remarks, if you will permit.

This particular part of the President's program, was referred to this committee on the basis of the interstate commerce clause. I am not suggesting that there was any straining of it for the purpose of getting it into this committee, but certainly we have got it before this committee. And the committee, since at least eight members are cosponsors of the bill, offers a fairly favorable climate.

They can't have their cake and eat it, too. Having referred this question to this committee, I, for one, feel that we should not curtail ourselves, and that we should go ahead and consider it fully. If the Labor Committee wants to object on the floor, that is up to them. But this was dropped in our lap.

I think we should be allowed to operate unhindered. That is a personal opinion.

The CHAIRMAN. This bill on interstate commerce would come to this committee whether all of the members were against it or not, legally, technically, and jurisdictionally, under the Rules of the Senate.

Senator COTTON. And we can work our will on it.

The CHAIRMAN. We can work our will on it, if nobody objects.

The Senator from Ohio.

Senator LAUSCHE. Mr. Wirtz, first I will try to explore the statistical situation to which you made brief reference in your paper dealing with income and unemployment.

On page 5 of your statement you state:

> In 1962 nearly a fifth of all of the nonwhite families in this country had as much or more income as the average white family, $6,237.

In other words, 20 percent of the nonwhite families were earning $6,237 or more?

Mr. WIRTZ. That is correct, Senator.

Senator LAUSCHE. You do not discuss what the situation was with regard to the other four-fifths. What was the average salary of income per family of the other four-fifths?

Mr. WIRTZ. Senator, I can give you that picture for the whole of the nonwhite population in the United States, and in whatever detail would be advisable, or simply add it to the record.

Under $500—this is family income under $500 a year, 4.6 percent of the Negro families earn less than $500 a year; $500 to $1,000 a year, 6.3 percent; $1,000 to $1,500 a year, 9.2 percent.

It goes on, and perhaps I should supply the complete table for the record.

The median income——

Senator LAUSCHE. Do your statistics show what the average white family income is in the areas where the $500 income dominates?

Mr. WIRTZ. 1.7 percent of the white families are in the under $500 area; and another 1.6 percent between $500 and $1,000.

Senator LAUSCHE. Your paper shows these comparative figures?

Mr. WIRTZ. Yes; it does.

Senator LAUSCHE. That is fine; if you will put them into the record.

Mr. WIRTZ. All right, sir.

(The material referred to follows:)

Income data table—Color and farm-nonfarm residence: Families and unrelated individuals by total money income in 1962, for the United States

Total money income	Families					Unrelated individuals				
	United States			Nonfarm	Farm	United States			Nonfarm	Farm
	Total	White	Nonwhite			Total	White	Nonwhite		
Number (thousands)	46,998	42,437	4,561	43,792	3,206	11,013	9,494	1,519	10,637	376
Percent	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Under $500	2.1	1.7	4.6	1.8	5.4	11.2	10.3	16.6	10.9	21.9
$500 to $999	2.1	1.6	6.3	1.8	6.0	17.7	16.5	24.7	17.3	28.3
$1,000 to $1,499	3.5	2.9	9.2	3.2	7.1	16.2	16.0	17.4	16.2	16.5
$1,500 to $1,999	3.9	3.4	8.1	3.5	8.8	9.7	9.5	10.9	9.7	9.4
$2,000 to $2,499	4.3	3.9	8.3	4.0	9.2	7.1	7.0	7.3	7.1	7.4
$2,500 to $2,999	4.0	3.5	8.0	3.8	6.3	5.0	5.1	4.3	5.1	3.4
$3,000 to $3,499	4.7	4.3	8.2	4.4	8.3	4.9	4.9	4.9	4.8	6.4
$3,500 to $3,999	4.5	4.3	6.9	4.4	6.1	3.9	4.1	2.7	4.1	.7
$4,000 to $4,499	5.0	4.8	6.8	5.0	5.3	3.5	3.7	2.3	3.6	.....
$4,500 to $4,999	4.9	5.0	4.6	5.0	4.9	3.5	3.8	1.4	3.6	1.7
$5,000 to $5,999	11.5	11.8	9.2	11.8	8.6	6.7	7.1	3.8	6.8	2.7
$6,000 to $6,999	10.9	11.3	6.2	11.2	6.6	3.2	3.6	1.1	3.3	1.7
$7,000 to $7,999	8.6	9.1	3.8	8.9	4.0	2.8	3.1	1.2	2.9	.....
$8,000 to $9,999	12.3	13.2	4.4	12.9	5.4	2.2	2.4	.8	2.3	.....
$10,000 to $14,999	12.8	13.7	4.3	13.3	5.8	1.7	1.9	.8	1.8	.....
$15,000 to $24,999	4.0	4.3	.8	4.2	1.7	.6	.7	.2	.6	.....
$25,000 and over	.9	1.0	.....	1.0	.3	.1	.2	.....	.2	.....
Median income	$5,956	$6,237	$3,330	$6,126	$3,418	$1,753	$1,876	$1,251	$1,794	$994

Source: U.S. Bureau of the Census (current population reports, series P-60, No. 40, table 2).

Senator LAUSCHE. Some time ago your Department sent me a letter stating that in our work force we have 11 million families in which both husband and wife are employed, and that we have approximately 4 million individuals who hold two jobs. Can you tell me how many of the Negro families in the country there are in which the wife and husband are both employed?

Mr. WIRTZ. I think we would not have that table. We don't have it here. I will make a check. We can probably get it, Senator Lausche, and we will.

Senator LAUSCHE. I am sure you can.

Mr. WIRTZ. We will do that.

(Subsequently, the Secretary of Labor provided the following information:)

It is estimated by the Bureau of Labor Statistics that in March 1962 there were slightly over 1 million nonwhite working couples in the United States.

Senator LAUSCHE. On July 2, 1963, Mr. Robert J. Myers, Acting Commissioner of the U.S. Department of Labor, wrote me and stated that in May 1962, when the labor survey was made, a total of 3,342,000 persons, or 4.9 percent of all the employed, reported that they had at least two jobs.

Then he further stated:

Statistics on the number of families in which both the husband and wife are employed are collected once a year. In March 1962, the latest date for which data are available, there were 11,103,000 families in the civilian population in which both the husband and wife were employed.

Will you supply for the record the situation reflecting how these statistics are applicable to Negro families and Negro individuals, and also the number of 14- to 15-year-olds that are listed as unemployed in the country?

Mr. WIRTZ. And the latter, Negro and nonwhite basis?

Senator LAUSCHE. Both.

Mr. WIRTZ. Surely. We will. I am advised that all those figures can be supplied.

(The Secretary of Labor subsequently advised:)

BLS figures indicate that in May 1962 there was 330,000 nonwhite persons who had 2 or more jobs.

In 1961 the average number of unemployed 14- and 15-year-old youths was about 100,000. The proportion of this group which was nonwhite was estimated at about 20 percent.

The CHAIRMAN. I don't understand. Do you list 14- and 15-year-olds as unemployed?

Mr. WIRTZ. Yes.

The CHAIRMAN. How far do you go?

Mr. WIRTZ. To 14.

Senator LAUSCHE. I was amazed when I saw these statistics, 11 million families with both husband and wife employed and more than 4 million individuals with two jobs.

Are you at all surprised by the fact that we have 11 million families in our country with both husband and wife working?

Mr. WIRTZ. I am quite depressed about it, because what it means in that case is that there is not full-time employment for either one, and they are both getting part-time employment to hold their families together. A considerable number of those are on a part-time employment basis.

Senator LAUSCHE. There is a considerable number of them in which both want to work, and increase the income at the expense of caring for the family and at the expense of caring for the children.

Mr. WIRTZ. We have been analyzing it. It is a so-called moonlighting problem. No, that is another, but related, problem. We have been

analyzing the situation where two or more of the members of the families work.

A good many of the people to whom you referred, with both the husbands and wives working, are the migratory workers who are out in the fields doing stoop labor of one kind or another, trying to hold their family together, and the reason they are both working is that one of them cannot make enough living to keep his family together.

Senator LAUSCHE. Are you trying to make the point that in the United States the ability to gain an income isn't large enough, and therefore, we have got to increase incomes so that wives will not have to work and people will not have to hold two jobs?

Mr. WIRTZ. My concern is related to that, and is typified in the figure that there are today still a very large number, I think about 30 million Americans whose incomes are less than $2,000 a year.

I would like to correct that figure for the record, if it is wrong. That is approximately right.

The CHAIRMAN. The record will stay open here, because we are dealing with a lot of figures. You may want to correct them.

Mr. WIRTZ. That is approximate.

(The following information was subsequently supplied by the Secretary of Labor:)

Bureau of Census figures show that in 1962 there were almost 39 million persons in the United States with incomes under $2,000.

Senator LAUSCHE. What is the average per capita income throughout the world?

Mr. WIRTZ. Throughout the world? I couldn't tell you. But I know the point that you have in mind.

I would guess that the figure is probably in the neighborhood of $700, something like that, maybe $500, or maybe less than that.

Senator LAUSCHE. You are dreadfully wrong. It is about $800 or $1,100 in Europe. I learned yesterday in Tanganyika it is $25 per year. In the Middle East it is $60. In China it is $63. So, the figure of $500 to $800 is completely incorrect. I am correct I am sure. I think it is about $250. But let's get it for the record.

Mr. WIRTZ. I should be glad to accept the point.

Senator LAUSCHE. On the matter of loss of industry, you mentioned that California, Texas, and Florida are getting it. That is a very sensitive point with us midwesterners.

Mr. WIRTZ. That is correct.

Senator LAUSCHE. I have before me a study made by a conference of economists of the Midwest. It covers Ohio, Indiana, Illinois, Iowa, Michigan, Wisconsin, and Minnesota.

It contains statistics and shows that each one of these States has lost in gross national product since 1953—are you, or aren't you familiar with that situation?

Mr. WIRTZ. I am familiar with the situation, not with the particular study.

Senator LAUSCHE. It points out that the Southwest and the South are the ones that are enjoying the greatest gain in economy, and that is a fact, isn't it?

Mr. WIRTZ. Yes, it is.

Senator LAUSCHE. It also points out that the migration of industry, let's say out of Ohio, to what extent there is, has been the result of a

change in the type of purchases made by the Department of Defense from heavy armament to sophisticated modern armament. Then, it goes on and says that water supply in the South, labor supply, climate, healthy governmental environment, and reasonable tax rates are the cause of the areas growing.

Will you express an opinion upon this statement that I have made, summarizing the statement of this group of economists?

Mr. WIRTZ. I am frankly not sure what aspect of it it is, Senator, to which you invite my comment. A good many of those items are obviously matters of importance and of undoubted relevance to this movement. I am not sure about some of the others. I would not know how to evaluate the phrase which you used——

Senator LAUSCHE. Tell me, why is Ohio losing—not growing—in population and losing industry, and why are Florida and Georgia and Alabama gaining?

Mr. WIRTZ. I share, coming from Chicago, the concern about the problem which you express, and it is true that the movement has been from the Great Lakes area to these other parts of the country. I think the listing which you gave there from that study is a quite comprehensive listing and would parallel the factors which I would have in mind. I would not mean to commit any particular part of the list, and would be glad to respond to a question about any particular aspect of it. But that is a fair checklist which you have there.

Senator LAUSCHE. In Ohio we have had for years a law which compels certain public places to indiscriminately serve and sell. I learned that within the last 2 years an additional law has been passed that intends to eliminate prejudicial discrimination. Yet, we are losing. Why?

Mr. WIRTZ. Because of the other factors in the list to which you referred.

The CHAIRMAN. The greatest growth in population, by percentage, is west of the Mississippi River.

Senator LAUSCHE. May I proceed?

The CHAIRMAN. For all kinds of reasons.

Senator LAUSCHE. Now, I direct your attention——

The CHAIRMAN. That is, better living conditions.

Senator LAUSCHE. First of all, Mr. Wirtz, is there in any of the bills that have been submitted to the Congress to implement the civil rights program any provision that labor unions shall come within the provisions of those bills?

Mr. WIRTZ. Did you say a specific reference to them as such?

Senator LAUSCHE. Is there anywhere in any of the bills submitted to implement the civil rights program any provision that the sanctions that will be applied to the private individuals shall be applied to labor leaders and labor unions?

Mr. WIRTZ. Yes; that is provided in the coverage, title VII, on employment and equal opportunity. It is not spelled out specifically.

Senator LAUSCHE. Will you tell us specifically how it is covered; what rights are given to a U.S. citizen who wants to get a job as a bricklayer and can't get it unless he is admitted to a union, and he can't get into the union because of his color?

Mr. WIRTZ. That right is not covered by this provision.

Senator LAUSCHE. Why isn't it?

Mr. WIRTZ. It is because it doesn't come within the applicability of that section which is a matter covering the Government contracts. It is not a matter of giving right.

If your question, Senator Lausche, is whether the administration does support a program——

Senator LAUSCHE. That is not what I asked. I asked you whether it is in any of the bills covered?

Mr. WIRTZ. The answer to your first question is that it is in. The answer to your second question is that the coverage of the establishment of the right of an individual is not in this package.

Senator LAUSCHE. The President's message states:

> I have called upon the leaders of organized labor to end discrimination in their membership policies, and some 118 unions representing 85 percent of the AFL-CIO membership have signed nondiscrimination agreements with the Committee on Equal Employment Opportunity. More are expected.

Is it or isn't it a fact that with respect to labor unions, and labor leaders, it was deemed advisable not to include them as being subject to coverage by the bills which were submitted?

Mr. WIRTZ. It is not a fact, and I should prefer to state it affirmatively.

Senator LAUSCHE. Tell me where specifically is the language that will give the Government, the Attorney General of the United States, the right to sue a labor union because it discriminates against admitting Negroes into membership?

Mr. WIRTZ. The only coverage in this part of the program is the coverage in title VII which would cover the Government contracts.

Senator LAUSCHE. All right. But the Government contracts are a different proposition.

Mr. WIRTZ. Not different; it is part of the problem.

Senator LAUSCHE. Will you favor writing into one or the other of the bills a provision that the same remedies, the sanctions, and penalties will be applied to labor unions as are applied to Miss Casey's or Miss Murphy's rooming house?

Mr. WIRTZ. Yes.

Senator LAUSCHE. You will support it?

Mr. WIRTZ. We do, and I am surprised——

Senator LAUSCHE. Why isn't it included in the bills then?

Mr. WIRTZ. There are various parts of the bills or program directed to the various parts of the problem. You have part of it here before this committee, you have part of it in this bill. You have part of it in other bills. And the part that you are talking about, Senator, would in our judgment best be covered by a Fair Employment Practices Act, which we support without qualification.

Senator LAUSCHE. I understand your statement that you support it here this morning, but if you support it as vigorously, which I believe you do, Mr. Wirtz——

Mr. WIRTZ. I know.

Senator LAUSCHE. That still doesn't answer the question why it was not included in the bills, specifically saying that whenever a worker is denied membership in a union because of color, he can call upon the Attorney General to bring a suit compelling admittance. Why wasn't that included?

Mr. WIRTZ. There has been a different legislative administrative development of the fair employment practices or equal opportunity pro-

gram from where there has been on this other part; no question about it; none at all. There are before the Congress, as we both know now, before both the Senate and the House, a number of bills covering equal employment opportunity in the broad sense to which you have referred to it.

In the President's message he said that he supported those bills, and we will. They had developed before some of this other legislation came in.

Senator LAUSCHE. I think it has been bad that an all-embracing program has not been submitted: the Attorney General has been authorized to bring suits on behalf of individuals in all instances except against labor unions. It is bad.

It has on its face implications that the little individual is to be covered but the powerful and the mighty are not to be covered.

Mr. WIRTZ. I would regret that implication. I know the legislative pattern to which you refer. I would like to make it clear, as I think it is to you—and I respect your appreciation of my own position on it—that there is no intention to draw any line between these various institutions or any coverage which would favor labor unions. In stating it affirmatively, I would support individually, and we do support as an administration, the complete application of the same antidiscrimination, equal employment, civil rights concepts for labor unions and for members of labor unions as we do for any other part of society, without qualification.

Senator LAUSCHE. I believe implicitly that you are expressing your honest judgment. To have taken a position different would be indefensible.

But I want to repeat that when these bills were submitted there should have been a provision of that type included in one or the other of the bills.

I want to get to another subject.

Did you study the Kennedy-Ives bill and the Kennedy-Ervin bill on labor that was passed, I believe, in 1959?

Mr. WIRTZ. Yes, sir.

Senator LAUSCHE. Was there included in either of those bills, as submitted by Kennedy and Ives, and then later by Kennedy and Ervin, a provision that there shall be equality of opportunity to become members in a union?

Mr. WIRTZ. No, sir. That was the point of my discussion with Senator Cotton.

Senator LAUSCHE. In neither of those two bills was there any language that would give Negroes an equal right to become members of a union. Your answer to that is in the affirmative, I understand.

Mr. WIRTZ. I am virtually sure that is right.

Senator LAUSCHE. Isn't it a fact that the material intended to insure equality of rights, or bill of rights, was offered by amendment on the floor of the Senate and that the original sponsors of the bill opposed the adoption of such civil rights provisions?

Mr. WIRTZ. I don't know that legislative history.

Senator LAUSCHE. When the Landrum-Griffin bill was finally adopted as a substitute for the Kennedy-Ervin bill it did contain provisions dealing partly with civil rights in the labor unions?

Mr. WIRTZ. I don't know the detail of the legislative history. We would be glad to check it, but do not know it offhand.

Senator LAUSCHE. You are not trying to place upon Congress the responsibility of the Landrum-Griffin bill not containing this bill of rights for the laboring man?

Mr. WIRTZ. Not by anything that I have had in mind. The question came up in answer to Senator Cotton's question about Senator Goldwater's amendment.

Senator LAUSCHE. I want to say to you that I remember that because I was arguing for a bill of rights, and we had trouble getting it through. The sponsors of the bill didn't want it in.

Now, to make my position clear, I, with you, Mr. Wirtz, want to accord unequivocally to every American the full enjoyment of his constitutional rights without preferential treatment being given to anyone or any group.

I want to ask you this question: What is your profession? I don't know. Pardon me. You are a lawyer?

Mr WIRTZ. I have become a nomad, I guess. It includes law practice, law teaching, and government service—labor arbitration.

Senator LAUSCHE. Have you studied this subject of interstate commerce in its relationship to the Constitution of the United States?

Mr. WIRTZ. In the papers the last few days, I guess, Senator.

Senator LAUSCHE. Under the language of the bill, and under the definition given to the word "substantial" as meaning more than minimal, or meaning more than an insignificant amount, can you tell me whether there will be any commerce left in the United States anywhere that will fall within the definition of intra-, as distinguished from interstate commerce?

Mr. WIRTZ. I hope you respect the candor of the answer when I say that I would be virtually sure that I could add nothing to that which the Attorney General and the Assistant Attorney General haven't already added, and there would be the larger possibility of confusion than of illumination.

I don't think I can add anything.

Senator LAUSCHE. My dilemma is that I cannot visualize any business, trade, or industry falling within the definition of intrastate and not interstate under the language of the bill. And I can understand you have a different problem and you are not going to try to discuss this phase.

Mr. WIRTZ. I would, of course, answer any question you ask me, but I would doubt whether I could add anything.

The CHAIRMAN. Of course, Mr. Secretary, this committee has the responsibility of making a decision under the decisions made under the Interstate Commerce Clause as to how far we might want to go for this particular purpose. You can limit the application of interstate commerce under judicial decisions any way you want. We don't need to go as far as the courts have suggested in interstate commerce. Broadly they have said that is interstate commerce. That doesn't mean this committee can't limit it as a matter of public policy how far we want to go within the interstate commerce decisions. That is our responsibility.

Senator LAUSCHE. If the chairman's remarks are intended to weaken my position——

The CHAIRMAN. Oh, no.

Senator LAUSCHE. I would be willing to discuss the subject. But Mr. Morton is waiting here to question.

The CHAIRMAN. I agree with you that the courts have gone a long way under the interstate commerce clause. We can surely put limitations as to how far we might want to go for this particular purpose as a matter of public policy.

Senator LAUSCHE. I think that is the issue before us.

I want to go the full length to guarantee and provide full enjoyment of constitutional rights without taking constitutional rights away from others.

The CHAIRMAN. The Senator from Kentucky.

Senator MORTON. Mr. Chairman, I think probably the Secretary of Labor has been about the busiest man in the United States for the last week. This committee may have before it another bill next Monday, or a request for legislation next Monday, in which he is vitally interested. So I will withhold my questions in the hope the Secretary of Labor can go and lend his good efforts to preventing any further deterioration in the setup of the railroad industry versus labor.

Mr. WIRTZ. Thank you, Senator.

The CHAIRMAN. We appreciate your testimony, Mr. Wirtz. We appreciate your coming here this morning to give us the benefit of your experience and advice.

Thank you very much.

Senator LAUSCHE. I am convinced that you are giving your innermost feelings on this subject in your testimony.

Mr. WIRTZ. I am very grateful to the committee.

The CHAIRMAN. Senator Williams from New Jersey is next.

STATEMENT OF HON. HARRISON A. WILLIAMS, JR., U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator WILLIAMS. Mr. Chairman, I am honored to have this opportunity to speak briefly to the committee. This is the first time I have ever appeared as a witness in this particular historic chair. It is a little awesome.

I am a cosponsor of this measure, and it seems to me that it is a giant step toward guaranteeing genuine freedom for all people in this country.

First of all, I would, as a Member of the Senate and as a sponsor of this bill, like to express my individual thanks to this committee for its energy and responsiveness in receiving the measure and proceeding immediately to its careful consideration without any delays, without any obstruction along the way. This is par for this committee. This is the way it does respond under your chairmanship, Senator Magnuson.

I remember the transit bill, you received it one day, hearings started the next day, and you proceeded day by day until it was done. We went to the floor in a joint venture there with Commerce and Banking, and passed that bill this year.

The fact that this bill or this part of the bill is considered under the commerce clause, using the flow of commerce as its basis in one

way I rather regret. It almost suggests that discrimination is all right unless it is in commerce, in cargo.

Of course, I very deeply feel that discrimination is wrong wherever it is, in commerce or out of commerce. But, certainly the fact that this is carried on the commerce clause and through the vehicle of interstate commerce absolutely should remove any bit of suggestion that the measure is unconstitutional.

And so as a practical matter I accept it, although with some reservation in principle. It is legislation; it does deal with a moral issue. As Martin Luther King said: "Morality cannot be legislated; but behavior can be regulated. The law may not change the heart, but it can restrain the heartless."

We have seen this in so many areas where we know we can't change the heart of man, the mind of man, but we can regulate his behavior. We have done it in the Armed Forces, and we have done it in many other areas.

As a matter of fact, half of our States have legislation very much like the legislation before us. I know we have it in the State of New Jersey. To those who suggest that this creates a police state, I only reply that that implies that we are a land of lawless people.

As a matter of fact, in the State of New Jersey we have an FEPC law, we have this public accommodation law, and far from a police state, it has been a remarkable step in quieting the friction and bringing greater peace to our community.

So, I think those who use police state as a reason to oppose this bill are part of the "fright wing" of our society that are using an unwarranted scare tactic.

I know that there are those who say that this is a deprivation of private property rights. Well, we all know that property is not to be enjoyed in absolute freedom against the public interest, and we regulate in so many ways. We do it with our zoning laws, with our building codes, safety regulations. The book is full of areas where law and regulation are brought to bear for the responsible use of private property in a way that is not contrary to public interest, and, of course, here we are talking about private property to be used in a way that will meet the constitutional test of freedom that we all live with.

Before closing, I was going to say a word about States rights as one of the arguments against this bill. We all honor the opportunity for States to meet public obligations. We want our society run as close to home as possible. However, where there are constitutional rights and they are being deprived, and they are not protected by the State, we know here and in other areas we have had to go to national legislation and national protection.

Again, I want to thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Are there any questions?

Senator YARBOROUGH. I have no questions of Senator Williams. I served with him, Mr. Chairman, on the Labor and Public Welfare Committee where I have seen his distinguished work on behalf of migratory labor and children of migratory laborers. I appreciate his efforts on behalf of the human welfare.

The CHAIRMAN. Off the record.

(Discussion off the record.)

The CHAIRMAN. I have no further questions.

We thank you very much.

We will leave the record open if you want to enlarge on your statement at all.

Senator WILLIAMS. Thank you, Mr. Chairman, and members of the committee.

The CHAIRMAN. We will recess until Monday morning at 10 o'clock.

We haven't got the witness list completed yet. We will have some very important witnesses Monday.

We will call the committee members and advise them when we have it firmed up this afternoon or tomorrow. The committee will be in recess until Monday at 10 o'clock in this room.

(Whereupon, the committee hearing in the above matter was adjourned at 11 p.m., to reconvene Monday morning, July 22, 1963, at 10 a.m.)

CIVIL RIGHTS—PUBLIC ACCOMMODATIONS

MONDAY, JULY 22, 1963

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C.

The committee reconvened at 10 a.m. in room 318 (caucus room), Old Senate Office Building, Hon. John O. Pastore presiding.

Senator PASTORE. This hearing will please come to order.

We are pleased and privileged this morning to have as our witness Mr. Roy Wilkins, executive secretary of the National Association for the Advancement of Colored People. Mr. Wilkins is appearing for his own association as well as on behalf of the Leadership Conference on Civil Rights. The conference is composed of 40 national church, labor, civic, veterans, and civil rights organizations, and coordinates civil rights efforts.

The reason for my presiding at this hearing this morning, instead of Mr. Magnuson, is because regretfully Mr. Magnuson is in his own State, confined to his bed because of a siege of the virus. We are all hopeful that he will be with us soon.

Do you have a prepared statement, Mr. Wilkins?

STATEMENT OF ROY WILKINS, EXECUTIVE SECRETARY, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. WILKINS. Yes, I have.

Senator PASTORE. You may proceed and present the testimony you desire to give to this committee in your own fashion.

Mr. WILKINS. Senator Pastore, and members of the committee, my name is Roy Wilkins. I live in New York City, and I am executive secretary of the National Association for the Advancement of Colored People, an organization formed in 1909 for the specific purpose of securing the constitutional rights, then and now widely denied or abridged, of the Negro citizens of the United States.

I wish first of all to thank the chairman and members of this committee for the invitation to appear and state the views of our association on title II, S. 1731, the public accommodation section of the proposed civil rights legislation now being considered by the Congress. These views are those of the NAACP, since there was not time to secure formal endorsement of them by member organizations of the Leadership Conference on Civil Rights. I expect, however, that a goodly number of member organizations, to which copies have been sent for inspection, will notify the committee of their stand on this text.

The public accommodations section seeks to invoke protective legislative action in a most sensitive area where great numbers of citizens suffer daily—almost hourly—humiliation and denial simply because of their skin color. These people are citizens of the United States, not merely citizens of the States wherein they reside. As such, they are entitled to the protection of the Congress of the United States against the infringement of their rights under color of any local or State law or custom.

As is the case with so many aspects of the vast minority rights question in our country, the tendency in debate has been to treat the complaints in a detached laboratory manner. Hypothetical questions are posed. Hairline delineations are set forth. Labyrinthine technicalities are pursued. Precedents, often bordering on the chicken versus egg level, are solemnly intoned. Expediency, usually on a rarefied political level but festooned with fine and flowing phrases, is held forth as morality or as reason, or, worse still, as "practicality."

The truth is that the affronts and denials that this section, if enacted, would correct are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity.

It must be remembered that while we talk here today, while we talked last week, and while the Congress will be debating in the next weeks, Negro Americans throughout our country will be bruised in nearly every waking hour by differential treatment in, or exclusion from, public accommodations of every description. From the time they leave their homes in the morning, en route to school or to work, to shopping or to visiting, until they return home at night, humiliation stalks them. Public transportation, eating establishments, hotels, lodginghouses, theaters and motels, arenas, stadiums, retail stores, markets, and various other places and services catering to the general public offer them either differentiated service or none at all.

For millions of Americans this is vacation time. Swarms of families load their automobiles and trek across country. I invite the members of this committee to imagine themselves darker in color and to plan an auto trip from Norfolk, Va., to the gulf coast of Mississippi, say, to Biloxi. Or one from Terre Haute, Ind., to Charleston, S.C., or from Jacksonville, Fla., to Tyler, Tex.

How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white?

Senator PASTORE. May I interrupt you at this point?

What do you do? That hasn't been brought out dramatically enough. What do you do?

Suppose a colored family starts out from Providence, R.I., or Boston, Mass., and wanted a journey on vacation, to go to the Republican convention in San Francisco, or to go to the Democratic convention in Atlantic City, as I did several years ago with my own family? What do you do?

You just don't go? What do you suffer if you do go?

Mr. WILKINS. Senator, you very often go. You have to pick a route; a route sometimes a little out of the way. I have known many colored people who drove from the East to California, but they always drove through Omaha, Cheyenne, and Salt Lake City, and Reno. They didn't take the southern route. And if they were going to Texas, they stayed north as long as they could. They didn't go down the east coast and across the South. They went across the Middle West and down the South.

Where you travel through what we might call hostile territory you take your chances. You drive and you drive and you drive. You don't stop where there is a vacancy sign out at a motel at 4 o'clock in the afternoon and rest yourself; you keep on driving until the next city or the next town where you know somebody or they know somebody who knows somebody who can take care of you.

This is the way you plan it.

Some of them don't go.

Senator PASTORE. Do you stop in private homes?

Mr. WILKINS. We stop in private homes in many cases.

Of course it must be understood in some areas now this problem doesn't present itself; I am happy to say in an increasing number of areas. But it is still a very great problem. And it is likely to be encountered even in areas which are thought to be free of it.

What do you do in the middle of Iowa, for example, in a small town? You have almost as much of a problem as if you were in a small town in, say, Alabama.

In some of the border cities you are likely to have trouble. In others, not.

When I go to Louisville, Ky., I can stay at a hotel. If I go to Meridian, Miss., I can't stay at a hotel. But if I go to Miami Beach I can stay at a hotel. If I go to Ocala, perhaps not.

How do you figure these things out? The answer is that you don't figure them out. You just live uncomfortably, from day to day.

It must be remembered that the players in this drama of frustration and indignity, which you have sharpened up, Senator Pastore, are not commas or semicolons in a legislative thesis; they are people, human beings, citizens of the United States of America. This is their country. They were born here, as were their fathers and grandfathers before them, and their great-grandfathers. They have done everything for their country that has been asked of them, even to standing back and waiting patiently, under pressure and persecution, for that which they should have had at the very beginning of their citizenship.

They are in a mood to wait no longer, at least not to wait patiently and silently and inactively. One of the four Negro college students who sat in at a lunchcounter in Greensboro, N.C., February 1, 1960, was an Air Force veteran and an officer of the A. & T. College chapter of the NAACP. In an interview he said he was born and raised in North Carolina and returned there after his time in the Air Force to study to be a physician.

The fact that he, a veteran in his country's nonsegregated Air Force, after service overseas to spread and preserve democracy, could be refused a cup of coffee and a piece of pie in his home State seemed suddenly in the 1960's, to be something he just could not

take any longer. He engaged in direct action to make known his views. The fact that such action has swept the country, in the North as well as in the South, is testimony enough, for those who can read the signs of the times, that this veteran's reaction accurately mirrors the reaction of millions of his fellow citizens of both races.

Indifference to this widespread feeling and to the ugly gap such indifference perpetuates between our Nation's promise and performance in the area of citizenship equality will but serve to prolong and intensify the eruptions of protest now underway throughout the country.

In a very real sense, it was the indifference toward, and outright defiance of, the U.S. Supreme Court decision of 1954 in *Brown* v. *Board of Education of Topeka, Kans.*, which helped substantially to build the basis for today's demonstrations. The notorious defiance of Brown, concurred in and encouraged by such documents as the Southern Manifesto, capped the disillusionment of millions of Negro citizens and convinced many of them that little or no faith could be placed in the usual processes for prompt redress of demonstrable grievances.

It convinced them, further, that even when they have fought their way, tortuously and painfully, to the highest court in the Nation and have won there, after observing all the rules and amenities, their victory can be nullified by defiance, collusion, trickery, violence, legislative, and administrative shenanigans and by assassination.

They are not to be dissuaded, then, by talk that they are "hurting their cause" through demonstrations. No one noticed their cause except to lambast or subvert it, during the years they waited for the Nation to act positively in support of the Supreme Court decision. How can a cause which has been betrayed by every possible device, beaten back in the crudest and most overt fashion and distorted in highsounding misrepresentation by the suave kinfolk of the mob—how can a cause in such condition be hurt by the crying out of those who suffer and by their determination to alter the pattern of persecution?

Nor are the demonstrators and their sympathizers and supporters impressed with the contention that the Congress ought not legislate in this field. It is contended that such legislation as is here proposed—the U.S. citizens be protected from humiliating racial discrimination in public places and services in their own country—is an invasion of "property rights."

It is strange to find this argument, in connection with the fortunes of this particular class of citizens, made in 1963. This was the argument of slavery time. It was argued then that if the United States were to free human slaves, it would be invading property rights. Today, 100 years later, if the United States legislates to secure nondiscriminatory treatment for the descendants of the slaves, it will be invading property rights. It is ironical that a proponent of this argument should be a representative of the State of Abraham Lincoln.

What rights, gentlemen, are thus being defended? Legal human slavery is gone, but its evil heritage lives on, damaging both the descendants of the slaves and the descendants of those who owned them—or those who have identified themselves with that class. Is not the "property rights" argument but an extension of the slave

ownership argument? The disclaimers would be loud and indignant if it were suggested that any Senator approved human slavery; but how fine is the line between approval of slavery and acquiescence in a major derivative of the slave system.

The answer has to be that our Nation cannot permit racial differentiation in the conduct of places of public accommodation, open to the public and with public patronage invited and solicited. While such establishments may be privately owned, they owe their life and their prosperity not to the personal friends and relatives of the proprietors, but to the American public, which includes today, as it has for generations, all kinds of Americans. The proprietors of small establishments, including tourist homes and gasoline filling stations, are no less obligated to render nondiscriminatory public service then are the proprietors of huge emporiums or hostelries.

The supporters of this legislation are again not greatly impressed with the timeworn admonition that this is an area which the Congress should leave to whimsy, to that great variable, men's hearts, to State and local sentiment or to that champion among the reluctants, voluntary action.

The Negro American has been waiting upon voluntary action since 1876. He has found what other Americans have discovered: voluntary action has to be shared by something stronger than prayers, patience, and lamentations. If the Thirteen Colonies had waited for voluntary action by England, this land today would be a part of the British Commonwealth.

In the welding of this Nation, the Congress has not depended upon voluntary action. It has not elevated States rights above the national interest. Minnesota, my adopted State, does not own the Mississippi River simply because the mighty stream originates there. We have divided the waters of the Colorado between California and other States. We have raised dams and blotted out villages and towns in the national interest. I am sure a hundred other examples will come to the minds of members of this committee.

Shall we now continue to assert, in the world of the 1960's, that a State shall be permitted to mistreat U.S. citizens who live within its borders, simply because they are not white? Shall these States be free, as they once pleaded to be free in the staging of lynchings, to abridge or deny constitutional rights as though there were no U.S. Constitution? Shall they be permitted to continue "standing in the doorway," although everyone recognizes this as a mere exercise, albeit a vindictive one?

Shall the racially restrictive ordinance or the law of an illegally constituted lily-white city council or State legislature supersede the U.S. Constitution? Shall a police chief or a sheriff or a constable continue to be the arbiter of the rights of U.S. citizens?

One spokesman, the distinguished senior Senator from Georgia (and except in the human rights field he is distinguished) has declared the civil rights bills submitted to the Congress by President Kennedy to be "unpalatable." We submit that the daily diet of racial discrimination force-fed Negro citizens is the real "unpalatable" element in the present crisis. If the Senator from Georgia had to swallow our treatment for 24 hours, he would be on a picket line in the next following 20 minutes.

The Congress has legislated for the health and welfare of livestock. Why does it balk at legislating for the welfare of its 20 million loyal Negro citizens? Railroads or other carriers are prohibited by 45 United States Code, 71–74, from confining livestock for more than 28 hours without unloading them into pens for at least 5 hours for rest, water, and feeding.

Are cows, hogs, and sheep more valuable than human beings? Is their rest, water, and feeding a proper subject for congressional legislative action, but the rest and feeding of Negro Americans in hotels, restaurants and other public places an improper subject for congressional action?

President Kennedy has sent a moderate, but comprehensive program of civil rights bills to the Congress which should be enacted. The section before this committee is one part of that program. It was quickly labeled "the most controversial" section and debate has been building around it.

Usually where there is no controversy there is no great problem and no pressing need. Undeniably the need is here. Evidences of it abound on every side. Our communications media are full of the doings of the people on this need.

Contrary to a notion which some defenders of the racial *status quo* have advanced, the doings of the people on this issue are not subversive. On the contrary, they are thoroughly American. When Americans are stepped upon or pushed around, they protest and they demand corrective action. They protested the tax on tea. They protested their lack of representation in the English Parliament, just as Negroes today protest their lack of representation in the Mississippi or South Carolina Legislatures.

Americans protested restrictions on freedom of the press. They protested and paraded and pamphleteered and legislated against slavery. They demonstrated again and again against the denial of suffrage to women. They protested child labor and campaigned for safety in factories. They fought sweatshops. They demonstrated against the Kaiser and Hitler and finally went to war. They are today parading and feeling strongly about nuclear warfare.

Wherein is a demonstration against police brutality, against discrimination in employment, against exclusion from voting booths, lunch counters, and public recreation facilities judged to be un-American or subversive?

In truth, the resolute determination and action of our Negro citizens upon the civil rights issue constitute exemplary American conduct. If we desire to kill off such conduct and to fashion a nation of cautious crawlers, we should cease the teaching of American history.

It is no secret, that despite our military might and our industrial genius, our faltering fealty to the great ideal of "all men," set down in our Declaration of Independence, has shaken the confidence of the millions of mankind who seek freedom and peace. Do we mean "all men" or do we just say so? Is our Nation the leader of the free world or of the white world? Are we for democracy in southeast Asia, but for Jim Crow at home?

Insofar as the Negro citizen and his allies renew and strengthen our fidelity to the founding purpose of our Nation, they put in their

debt all those who maintain hope today, and all those who shall come after.

Insofar as the Congress responds, favorably and decisively, to the deeply seated yearnings sought to be realized in the pending legislation, it will be discharging its high duty, not to a clique or a race or a region, but to our beloved America and to its people, of all races and sections of our fair land.

Thank you, Mr. Chairman.

Senator PASTORE. Thank you, Mr. Wilkins.

I congratulate you for a very temperate and a very, very brilliant presentation to this committee.

I merely want to make one announcement. I have to attend a meeting at the White House at 11 o'clock. I shall leave here in about 5 or 7 minutes and turn the Chair over to my distinguished colleague Senator Monroney from Oklahoma.

Until that time, the Chair recognizes the Senator from Oklahoma.

Senator MONRONEY. I would like, Mr. Chairman, to agree with you on the very effective presentation made by Mr. Wilkins on this important and controversial matter.

I have been, as you know, one of the members of this committee who have questioned the extension of the commerce clause to cover businesses which are purely local in their nature. You make a very effective point I think in the analogy that we can require livestock to be fed every 24 hours but we provide no effective congressional or legislative action for human beings.

However, the line on the side of interstate commerce is rather clear in this case. In recent years we have at least taken care of those passengers in interstate commerce and interstate travelers.

Do you have any further examples that are not in your statement with reference to the application of the commerce clause in this field? I don't believe the 14th amendment covers these accommodations, and I don't believe that you stressed that either.

You rely more on the commerce clause, do you not, for the constitutional framework on which this legislation would rest?

Mr. WILKINS. Senator, one reason I didn't address myself to that aspect of it was because I felt that the issue itself had become engulfed in a discussion of technicalities. As to whether the 14th amendment or the commerce clause is broader or narrower or best able to accommodate this, we have no strong feeling. Our feeling is that whatever basis gives the maximum coverage to correct these inequities is the basis that ought to be used. If it is one or the other, or if it is a combination, it is all right with us.

That may sound like a kind of a down-the-middle-of-the-road answer, but our concern is with the maximum attack upon this. We realize, of course, that basing it on any one, either the commerce clause or on the 14th amendment, or on some other aspect of the Constitution, might impose limitations. We want the fewest limitations.

I am not a lawyer and don't go into these constitutional technicalities.

Senator MONRONEY. I am not a lawyer either. I find myself very lonely in the Senate sometimes on these matters.

But it does seem to me that no matter how good the purpose of legislation, it must be soundly based on the solid foundation of the

Constitution as written down. For that reason I have been seeking an answer and have been quite critical of some of the Southern Governors' testimony because in most cases they didn't come with any clear legal argument that dwelt on this point as on extraneous points.

If we cannot find clear, unchallengeable constitutional authority under the interstate commerce clause to reach all of those who hold out their places for public accommodation would it be sufficient to apply the law to businesses that do operate in interstate commerce. We might include those operated in more than one State, those dealing with transportation, and related services such as hotels, motels, or parts of chains or service organizations specializing in highway accommodations. If we covered perhaps 70 percent of the accommodations, would this be sufficient?

I notice in your statement you say it would not.

I am not saying this to create exemptions in the law, but to be sure we are soundly based; that these do have a significance in interstate commerce, and therefore that we are able, without stretching the commerce clause beyond its original intent, to include them.

Mr. WILKINS. Senator, I would say that whatever basis achieves the maximum coverage will be the one that ought to be used.

It is conceivable, of course, that no basis, or no combination of bases, might cover 99.44 percent of every case. But the need for action in this area by the Congress is so great, and has been neglected so long, that I am confident that any formula which achieves the maximum coverage under the constitutional limitations will be gratefully received if not welcomed as a complete answer.

Senator MONRONEY. Perhaps you may not want to answer this: What would be your attitude or the attitude of those seeking legislation if we stayed within the area of significant impact on interstate commerce, and then submitted a revision of the 14th amendment making clear, absolutely, that all American citizens are entitled to the same privileges, the same rights, and that discrimination against any would be prohibited by laws passed by the Congress? In other words, we would make it crystal clear.

You have had very unusual success I think in all but one or two of the States during the first year that the poll tax amendment had been submitted. It will probably be ratified early in the next year when the legislatures meet. I wonder if it isn't necessary to create an unchallengeable base. With 32 States already recognizing this problem it would appear that the number necessary to pass a constitutional amendment may be there. Then you would have a clear constitutional direction that there are no second-class American citizens.

Mr. WILKINS. That sounds reasonable to me.

Senator MONRONEY. I am not proposing it. I am merely sounding it out to see if there is any place for a compromise on the legal challenge to our right to intervene in matters which have great importance nationally, but still affect only local rather than national commerce.

Mr. WILKINS. The Senator of course recognizes, I am sure, even more than I do, that there is hardly a piece of legislation proposed on the basis of the Constitution that is not challengeable, to use

your own word, or somebody in America does not challenge as to whether it is soundly based on the Constitution or not.

I am sure we only have to go back to the comparison of similar emotional times, to the 1930's when the National Recovery Act was enacted by the Congress, and under a very great need. And yet a chicken farmer in New Jersey successfully challenged the National Recovery Act on the ground of something about a chicken leg or a chicken wing, or what-have-you.

Senator MONRONEY. It was on the commerce clause—and it was a different court in those days.

Mr. WILKINS. Yes; but it does illustrate, as I am sure you will agree, that no matter how careful you might be, somebody might challenge; and we hope not as successfully as the chicken farmer in New Jersey did.

Senator MONRONEY. I have challenged on other matters constantly, especially on the extent of the Wage and Hour Act, and other measures that I thought exceeded the bounds which limit the Federal Government. That is why I am reaching and searching for all information I can get in these hearings. I doubt very seriously that the Supreme Court's holding on the 14th amendment, would justify the bill being based on that constitutional provision.

Mr. WILKINS. Might I offer to submit a memorandum on this point?

(The memorandum referred to follows:)

LEADERSHIP CONFERENCE ON CIVIL RIGHTS,
July 24, 1963.

SUGGESTED POSITION CONCERNING "COMMERCE CLAUSE-14TH AMENDMENT CONTROVERSY" AS PREFERABLE BASIS FOR PUBLIC ACCOMMODATIONS BILL

1. A controversy has arisen over the best constitutional predicate for the public accommodations part of the President's civil rights package (title II). While there are hopeful signs that the controversy is already on the road toward settlement by a combination of the Commerce Clause and the 14th amendment, this memorandum concerning that controversy is submitted at the request of organizations attending the Leadership Conference meeting last week.

2. The Commerce Clause-14th amendment controversy has deep political and substantive roots. The Republicans quite naturally feel a proprietary interest in the 14th amendment; they took the lead in its enactment after the Civil War. The Democrats have a somewhat similar feeling toward the Commerce Clause; President Roosevelt and the New Deal gave this clause real meaning as the basis for social and economic legislation in the 1930's. Both parties also have important substantive arguments in favor of their constitutional approach. It would seem best for those whose only interest is the enactment of effective public accommodations legislation to accept both parties' predilections and arguments in respect to those constitutional issues and work toward a combination solution which permits both parties to act in accordance with their own best interest and judgment.

3. Commerce Clause: Article I, section 8, of the Constitution gives the Congress power "to regulate commerce * * * among the several states * * * *." It is certainly a regulation of "commerce among the several States" to regulate the service at places of public accommodations which utilize supplies or personnel from outside the State. Can anyone seriously argue that Congress has power to regulate the color of the margarine that goes on the restaurant table but may not protect a citizen of color who seeks to sit at that table?

4. The recent cases under the Fair Labor Standards Act and other laws predicated upon the Commerce Clause make clear that minimal crossing of State lines is sufficient to bring the Commerce Clause into play. Furthermore the Supreme Court's decisions on "affecting commerce"—highlighted by its 1942 decision that Congress can regulate the growing of wheat for consumption right on the farm

(*Wickard* v. *Filburn*, 317 U.S. 111)—support regulation of public accommodations without any crossing of State lines; discriminatory public facilities, which might otherwise be deemed local, adversely affect other establishments clearly in interstate commerce. There can thus be little doubt that the Commerce Clause is one very certain and broad basis of congressional power in the area of public accommodations.

5. The 14th amendment: Section 5 of the 14th amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Section 1 of the amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Thus Congress clearly has power to enforce the equal protection clause.

6. The argument against the power of Congress to act under the 14th amendment in the area of public accommodations is that discrimination by a restaurant, hotel, or movie is the action of the private owner and not of the State and the equal protection clause applies only to State denials of equal protection. But this argument would no longer appear valid in the face of continuing Supreme Court decisions like the restrictive covenant cases (*Shelley* v. *Kraemer*, 333 U.S. 1) and the Delaware restaurant case (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715) where a limited degree of State involvement was deemed adequate to bring the 14th amendment into the picture. These and similar cases point the way toward invoking the 14th amendment wherever the State authorizes, licenses, protects, or regulates private facilities open to the public.

7. Nor need the 1883 *Civil Rights Cases* (holding unconstitutional the 1875 public accommodations law) frighten one off from this position. That case was decided at a time when the concept of State action was narrow and property rights were deemed practically inviolable. The underpinnings of that case have been swept away by the ever-broadening concept of State action and by the ascendency of the public interest over property rights (as, e.g., in the 1934 milk regulation case, *Nebbia* v. *N.Y.*, 291 U.S. 502). The probabilities favor a distinguishing or overruling of the 1883 case, quite likely with the same unanimity that the Supreme Court overruled another product of this same era, *Plessy* v. *Ferguson*.

8. Some concern has been expressed that the 14th amendment approach might be rendered nugatory by a State repealing all its laws dealing with authorizations, licenses, protection, or regulation of private facilities open to the public. It is not believed that such a total abnegation of State responsibility is a very real possibility. At any rate, the inclusion of the Commerce Clause as an equal predicate for the bill would remove any incentive for such State repeal of laws in this area.

9. If any matter of constitutional law can be stated with certainty, it is that the Supreme Court will find the public accommodations bill constitutional on one or both of the above bases. The Court will attach great weight to findings by Congress under the Commerce Clause and equally so to a finding by Congress that there is adequate State involvement under the 14th amendment wherever the State authorizes, licenses, protects or regulates private facilities open to the public. It becomes almost ludicrous to suggest that the Supreme Court, which has so long protected the rights of Negroes while Congress stood idly by, should now, when Congress at long last does begin to move, find constitutional deficiencies in its action.

10. The administration bill, as initially drafted, was predicated on the Commerce Clause alone. Because of pressure from those who relied in whole or in part upon the 14th amendment, findings were inserted in the bill concerning the 14th amendment (section 201(h)(1)). But the operating sections of the administration's public accommodations bill are drafted solely in terms of the Commerce Clause. The operating sections use such terms as "traveling in interstate commerce," goods and services "provided to a substantial degree to interstate travelers," and activities which "substantially affect interstate travel or the interstate movement of goods." These varying commerce concepts have caused some confusion at the hearings to date. Both to avoid this confusion and to make full utilization of the 14th amendment underpinning of the bill, it would appear preferable that the bill rely equally upon the Commerce Clause and the 14th amendment in its findings and that the operating section of the bill (sec. 202) be rewritten to eliminate Commerce Clause limitations. Section 202 should simply forbid discrimination in all facilites open to the public except those which Congress deems it necessary to exempt. Reliance would be placed upon both constitutional bases, but neither would serve as a limitation on public facilities covered by the bill.

11. There is very direct precedent for combining the Commerce Clause and the 14th amendment as the constitutional underpinning for the President's civil rights program. The Tennessee Valley Authority was based on three constitutional powers—the war power, the navigation power, and the right to dispose of property. The Holding Company Act and the Securities Exchange Act were both based on the commerce and postal powers of the Constitution.

12. As we favor the broad coverage spelled out above, so we question the need for exceptions. There is no possible warrant for an across-the-board dollar limitation on what is covered by the bill. It is just as immoral for a little place to discriminate as it is for a big one; a person seeking service at a small lunch counter may be just as hungry as one seeking service at Howard Johnson's.

13. The question of Mrs. Murphy's guesthouse has created something of a political problem. It should be noted, however, that the reason for excluding Mrs. Murphy's guesthouse, if there is one, is not the small size of her place but rather her right to privacy. If Congress deems it necessary to exempt an owner-operated home in which there are few guests, that should be done on the basis of the right of privacy of one's home. In this way, Mrs. Murphy does not become a precedent for exempting a small restaurant, motel, or place of amusement. Incidentally, owner-operated roominghouses with a few guests have been exempted from fair housing laws on this same principle of the right of privacy.

14. Suggested position: At this stage of the legislative battle, it would seem best for the organizations to urge—

(i) That the public accommodations bill be predicated upon both the Commerce Clause and the 14th amendment;

(ii) That the operating section not be written in terms of the Commerce Clause as at present but instead be written in terms of covering everything that is open to the public;

(iii) That, if any exceptions must be made, they be predicated on the right of privacy and not on size;

(iv) That there is no basis for a dollar limitation on the public accommodations covered by the bill.

Senator MONRONEY. I would appreciate it very much. I have asked the Attorney General for help on it. I have asked the southern witnesses who have appeared. And I am still very much interested in this phase of it.

Thank you very much, Mr. Wilkins.

I would like to call on Mr. Prouty.

Senator PROUTY. Mr. Wilkins, I think you said in your statement your organization had been founded in 1909.

Mr. WILKINS. Yes, sir.

Senator PROUTY. Is it one of the oldest Negro organizations fighting for the rights of the Negroes of the country?

Mr. WILKINS. It is the oldest in our field; that is, strictly the civil rights field, yes.

Senator PROUTY. Originally at least your efforts were oriented toward obtaining Negro rights through the processes of the legal structure, is that correct?

Mr. WILKINS. Well, we also utilized legislation very, very early. But I suppose it is fair to say, without any delineation, that the emphasis in 1909, in fact for 20 years after that, had to be on legal action through the courts in order to establish the status and rights of the Negro citizens.

Senator PROUTY. I might say if I were a Negro I would place a great deal of faith and reliance on the activities of your organization. I think it has rendered a great service to the Negro community in this country.

Mr. WILKINS. Thank you, Senator Prouty.

Senator PROUTY. I do find, however, that recent press releases suggest that you have now become a direct-action group, is that correct?

Mr. WILKINS. It is partially correct. I object to the word "now," because we have been using direct action for a great many years. I was just thumbing back through some of our records the other day and found a picket line of the NAACP around Constitutional Hall in Washington, D.C., in 1936. We had pickets in front of Albert Hall, in London, in 1921, protesting lynching, the people who went to the lectures and concerts in Albert Hall in London.

I would object only to the word "now."

In line with your previous question, we have emphasized the work in the courts and in the legislative halls, but we have not hesitated to use direct action and we have simply intensified the use of it under the present circumstances.

Senator PROUTY. Are the funds which your organization uses to carry out its various programs based on contributions?

Mr. WILKINS. They are based on memberships and contributions. Memberships account for roughly 40 to 45 percent of the income, and other fund raising by members accounts for I would say another 35 percent, and a relatively small amount comes from general contributions.

Senator PROUTY. Is that true of the other leading Negro organizations also?

Mr. WILKINS. I am sorry, Senator, I haven't seen financial statements from some of them, and those that I have seen I haven't been able to analyze properly because I don't have the background information. But our association has issued audited financial statements by a firm of certified public accountants since 1911, and these are freely available to any member or to the public.

So that I am able to say that out of the $950,000 to $1 million a year that we raise, and have raised in the last 4 or 5 years, 80 to 85 percent of it comes from our membership, which means largely from colored people, in one form or another; either in the form of direct memberships or in the form of contributions or benefits or all the things that organizations do to raise money.

Senator PROUTY. Are the financial records of other leading Negro organizations made available to the public?

Mr. WILKINS. I have seen financial statements of the Southern Christian Leadership Conference, Dr. King's organization. I have seen summaries of the financial statements of the Congress of Racial Equality, Mr. Farmer's organization. Those two I have seen.

Senator PROUTY. I raise this question, and I certainly do not want it to be stated or suggested as a fact: Certain members of various news media have indicated that there is a rivalry now between various Negro organizations in order to obtain the maximum support of the Negro community and others in favor of civil rights legislation, and I wonder if you would care to comment on it.

Mr. WILKINS. I don't know about it. I suppose there is a normal amount of rivalry as there would be in any field. I don't suppose Macy's tells Gimbel's everything, and I don't suppose Westinghouse tells General Electric.

So that there is rivalry, of course, and each organization seeks to render the service to its membership and toward its objectives that

it feels will be effective. And it also seeks to delineate its services from those of others. This produces the rivalry.

Senator PROUTY. I mean a fund-raising rivalry problem.

Mr. WILKINS. There may be a fund-raising rivalry problem. We get our funds largely from our members. Thus we don't compete except on a smaller scale in what might be called open solicitation for funds.

For example, we don't use direct mail solicitation. Perhaps we should, but we don't. We don't send out 50,000 letters and hope to get back 20,000 replies, or even 5,000 replies. We get our funds from our members.

Of course in holding your membership and maintaining your structure, just in a sense as with a commercial organization you have to offer a good product and you have to offer good services, and you have to convince your customers—that is, your members—that you are rendering something that it pays them to belong to. In this sense, of course, there is a striving.

But I don't think this is harmful. This is a very large field, a vast field, and the problems are numerous and diversified. They differ.

They differ, for example, in New England from the southwest. They differ from the southwest and the southeast. And they differ in the border States.

It isn't possible for any one organization—whenever I think of the number of organizations among other groups, or for other purposes, I find it remarkable that there are only four or five recognizable Negro organizations in the civil rights field, because there are literally dozens of other organizations and other groups—racial, ethnic, religious—following every shade of opinion and activity. So I don't think it is remarkable that there are four or five Negro organizations and that there should be some rivalry among them.

Senator PROUTY. Under the legislation presently before us, the concept of the commerce clause is paramount. Doesn't that suggest, in a sense, that Negroes, under the proposed legislation, will be treated as chattels, as goods in interstate commerce, rather than as American citizens?

Mr. WILKINS. Senator, I think that is, if you don't mind my saying so, an extreme interpretation. I think the commerce clause was drawn for the purpose of facilitating the conduct of business and the movement of people as well as goods in this country.

I don't see that there is anything in the basing of this on the interstate commerce clause that classifies Negroes as goods or chattels.

Senator PROUTY. That will be determined only because of its effect upon interstate commerce.

Mr. WILKINS. Senator Prouty, I am trying to remember—I don't have to remember very hard. You recall the great difficulty we had as a nation in getting our hands on Al Capone. We had all the lawyers in the country, in and out of Congress, figuring out how to get hold of Capone, and nobody could arrive at anything except the income tax. They didn't hesitate to use the income tax to get hold of Al Capone just because they couldn't get hold of him for his obvious activities. They got him on a technicality. But they got him.

And as far as we are concerned, if we can get some of this under the commerce clause, we want it under the commerce clause, even though it may be, say, unorthodox.

Senator PROUTY. How do you interpret the phrase "substantially affected," which appears in this bill?

You say you are not a lawyer; neither am I. These terms are confusing, I admit.

Mr. WILKINS. Not only, sir, are the legal terms confusing to me, but often I find myself confused by the English language.

I think I would agree with what Chairman Monroney outlined a moment ago, and that is that if 70 or 80 percent of the field could be covered in this clause, he asked me would I agree to it. I traditionally sidesteped a flat answer, but tried to indicate that what we wanted was maximum coverage under this basing of the new bill.

"Substantially": I don't know, whether you would say under some circumstances 60 percent would be substantial; under others, not less than 80 percent would be substantial.

Senator PROUTY. Under the bill some Negroes—no one seems to know how many—will still be discriminated against.

Mr. WILKINS. Some will be, to use a favored word, uncovered. The question is whether I or any other person sitting in this chair, or in my position, would be willing to throw 30 percent of his people outside the pale in order to get 70 percent in.

I dislike answering that question, of course. No one wants to be put in that position, you can understand.

Obviously in these kinds of endeavors you can't get everything in one piece of legislation or based on one portion of the Constitution.

I retreat to my first assertion, that we would like to secure the maximum coverage.

Senator PROUTY. But if some approach could be worked out under the 14th amendment which would guarantee all the Negroes their rights as American citizens, you approve of that?

Mr. WILKINS. Yes, indeed; either under the 14th amendment or any other amendment. If any legislation or approach could be worked out that would guarantee all of them, this is what we want, of course; for all of them to have it.

Senator PROUTY. Mr. Wilkins, I am a little bit concerned, as I know many Members of Congress and others are, with the proposed March on August 28. Some of us who are sympathetic to civil rights legislation feel that if violence or bloodshed or rioting results from that march, that it is going to have a highly adverse effect upon legislation presently before the Congress.

I assume that your organization, along with other Negro organizations, is involved in that proposed march. Is that correct?

Mr. WILKINS. That is correct.

Senator PROUTY. Can you, as an individual, guarantee categorically that there will be no violence as a result of that march?

Mr. WILKINS. No, I cannot. Obviously no one could guarantee that. We can say only that we expect and are now taking every precaution, of course, to see that no violence takes place.

But it would be a pretension for anyone to maintain that out of a gathering of 50,000 or 100,000 people he could guarantee that there would be no violence. That couldn't be done even, sir, in New England, where self-control is a virtue of the population. But if you got 50,000 New Englanders together, no one could guarantee that they would maintain their traditional self-discipline.

All I can say is that we will do everything possible, and have already taken steps—in fact conferences have been in progress with the District of Columbia Police Department, and we are planning our own system of marshals. Not only that, but a great many of the persons who are coming here themselves recognize the danger that the Senator has pointed out, that if violence or disorder should ensue, that it would hurt their cause; and they are not coming here to sponsor violence or to take part in it.

I am relying on their good sense and their restraint, which thus far has been exemplary in all parts of the country.

Senator PROUTY. I certainly hope that will materialize.

I have one or two more questions of Mr. Wilkins.

In the omnibus bill presently before the Senate Judiciary Committee there is no provision which relates to discrimination in labor organizations. There is an FEPC bill before the Labor Committee, of which I am also a member. Do you feel that that is a matter which should be given serious consideration in this legislation?

Mr. WILKINS. I think, Senator, that provision is included in the FEPC bill, is it not? It does define unfair labor practice, as applying to labor unions as well.

Senator PROUTY. There are various interpretations of what is in those bills. Wouldn't it be better to include that in the whole package?

Mr. WILKINS. Of course I came here today just to talk about public accommodations. We are in favor of the passage of a Federal fair employment law, similar to the laws that have been passed in a number of States. And each one of these laws includes the unions as well as the employers in its provisions. We certainly believe that as a part of the civil rights package to be enacted, hopefully by this session of the Congress, an FEPC bill will be a part. And we are urging such passage. And the President, in his message transmitting this package, gave his endorsement to an FEPC bill, although he did not include it in the package as made up, knowing that there were bills already in the hopper.

Senator PROUTY. I think there may have been other reasons, but that is one which has been suggested, certainly.

Someone told me the other day that in the Perry Mason TV show a young Negro actress was engaged and played the part of an elevator operator, and also being one of the principals, I suppose the starring witness, and that your organization objected to her taking that part because you said the fact that she was operating an elevator represented a menial task. Is that correct?

Mr. WILKINS. Senator, I know nothing about the Perry Mason show or the lady who took part in it. And certainly I am too busy right now with other matters to write to the producers and say that she shouldn't have had the part.

Senator PROUTY. That appeared in Variety, and your organization said it made it impossible for her to make——

Mr. WILKINS. May I say, Senator, we have 1,300 local units scattered in 49 States. The only State we don't have any units in is Alabama, where they have taken out a permanent injunction against us which is now being litigated in the courts. They took this step in order they said, to have racial peace and harmony and get rid

of that agitational NAACP. But a reading of the public prints would seem to indicate that they have had a good deal of racial disturbance even without us there. Nevertheless we are active in 49 States.

And some of our local chapters could very well have objected to this. Our Hollywood chapter could have done so, or a section of it, or one person purporting to speak for it.

We can't control every single chapter. We don't have a monolithic bureaucratic organization which hands down the word from Olympus and everybody jumps.

So that if somebody felt that this young woman should not have been running an elevator, and objected, and wanted to say that the NAACP objected, and Variety wanted to print it, there is nothing I could do to stop it.

It is like a story I saw in the paper yesterday. Sonny Liston said that he didn't like the NAACP because it had tried to get him not to fight Floyd Patterson, thinking that would be bad for the race problem. I don't know Mr. Liston, only by reading the sports pages.

Senator PROUTY. It may be bad for Mr. Patterson.

Mr. WILKINS. Our business is not forced—fortunately our business is not protecting Mr. Patterson. He is supposed to be able to protect himself.

These are stories that are unavoidable. And I want to assure you that in this particular case, in answer directly to your question, as an organization we did not intervene with the producers, nor did we say that this young woman should not have had this role.

Senator PROUTY. I thought that should be clarified. I appreciate your frankness in answering.

One other question, and then I shall defer to my other colleagues.

Assuming that there are 50 members of the union, they all are white, perhaps because of discrimination or for some other reason, and they engage in erecting a building: Do you feel, or is it the attitude of Negro leaders generally, that 10 percent, perhaps, of the 50 employees now working should be discharged in order that 5 Negroes could acquire employment?

That is a problem which I think we have got to face up to.

Mr. WILKINS. Senator, I will answer very quickly.

In the first place, our organization is not in favor of anyone being fired in order to hire a Negro; not 5 white men or 10 white men, not 1 white man.

In answer to the second part of your question, we have never said 10 percent ought to be Negro, or 25 percent ought to be Negro, or 4 percent, or 50 percent. We believe that if the work is there, and the men are qualified, and apply for it, they should be employed without respect to color. And if you employ 10 percent Negroes, well and good, under that system. If you employ 12 percent, well and good. If you employ 50 percent, well and good.

But we have never subscribed—I am speaking now of my own organization—to any quota system. We think quotas are evil. They give some people an "out." And they deter other people from doing what normally they might do.

What would it do in a section where the vast majority of the working population happen to be Negro and you said, "We demand 10

percent of the jobs"? Actually, from the standpoint of preparedness and a general labor market, you might normally have 40 percent of the workers, or even 70 percent. And yet you tie yourself to a quota of 10 percent. And obviously, of course, it works the way you suggested: that it might require the firing of somebody in order to hire a Negro.

We don't believe in that, no more than do we believe in tokenism or front-office hiring, showcase hiring, two Negroes in front and none in the back.

I get a little excited about this idea.

Senator PROUTY. I think you are taking a very statesmanlike attitude and one which, if carried out, will work to the advantage of the Negro population generally.

Thank you very much.

Mr. WILKINS. Thank you, Senator.

Senator MONRONEY. Senator Thurmond.

Senator THURMOND. Mr. Chairman, if there is any Senator here who has an emergency and will take only a few minutes, I will be pleased to yield.

I understand Senator Scott possibly does.

Senator SCOTT. Would the Senator permit me 9 or 10 minutes? I will be finished in about 9 or 10 minutes.

Senator THURMOND. Suppose you go ahead, and if I think you are going too long——

Senator MCGEE. If you are accepting bids, Senator, may I say that I can finish in 3 minutes?

Senator BARTLETT. I can conclude in a minute and a half.

Senator SCOTT. I thank the Senator for yielding.

I want to join, first of all, with Senator Prouty and say to you that your statement is remarkably persuasive. All in all I think it is an admirable statement. I find myself in agreement with it throughout.

The President's proposal to allow the Attorney General to initiate suits in cases of civil rights violation does not, it seems to me, go as far as the proposed title III provision of the 1957 Civil Rights Act. I think you would agree with that.

Mr. WILKINS. I do agree.

Senator SCOTT. And it does not go as far as the bills introduced in this session by myself, for example, and by others, which would include the old title III?

Mr. WILKINS. We have always been in favor of title III.

Senator SCOTT. My bill, as well as others, would for example allow the Attorney General to bring injunctions when Negroes are unjustly arrested in exercising their 1st amendment civil rights liberties, such as the right to assemble peaceably, to ask for redress of grievances, which the Supreme Court covered in the 14th amendment.

The present bill limits the Attorney General's power to education and public accommodations suits; and voting suits were authorized by the 1957 act.

Does it not appear that the administration has raised no legislative proposal in the form of objection to the forceful suppression of constitutional and lawful Negro protest demonstrations? In other words, the bill offers no protection against the attempt forcefully

to suppress lawful Negro protest demonstrations; no coverage in the bill.

Mr. WILKINS. I don't think, in the seven sections, there is any specific language in that respect.

But I think, if I may say so, Senator Scott, the import of the presentation of this package, and its comparatively wide range—wider than any President has proposed thus far—taken together with the tenor of the President's remarks, both in his message of transmittal and in his television talk, as well as his subsequent remarks in press conferences, would indicate that while specific legislative endorsement or protection of such activity has been omitted, that it is implied and inherent in the whole program.

That may not be very sufficient for a person in a specific local situation.

Senator SCOTT. In your view does the administration demand in its package the mandatory elimination of Federal money used in cited operations?

Mr. WILKINS. Does it demand the Congress pass legislation saying that?

Senator SCOTT. Yes.

Mr. WILKINS. No; it makes no such demand. But here again, the attitude of the administration has been made known on this matter, and some of its actions in this field, on the periphery, I might say, have tended to indicate its attitude.

Senator SCOTT. Is not, in your opinion, the exclusion of FEPC in the actual package of legislation submitted, by merely incorporating it by reference, something else which might be considered by the Congress?

Mr. WILKINS. We would like to see FEPC considered and enacted.

Senator SCOTT. Does not this mode of handling FEPC in the message, by giving it a sort of fringe or second-rate priority, endanger in your opinion the passage of a FEPC bill?

Mr. WILKINS. I don't know, Senator, whether it endangers the passage any more so today than it has been endangered in the past. I would say this is a very highly desirable, of course, FEPC. As we all recognize, one of the root troubles in this civil rights crisis has been the unemployment, the racially-imposed unemployment, 2½ times as many Negroes are unemployed as whites.

And while this is very desirable, I don't know that the failure to include it in the package which we criticized at the time, endangers it any more, as I say, than it has been endangered in the past. After all, the bill has been in Congress how many years?

Senator SCOTT. 1943.

Mr. WILKINS. That's right. And it has been proposed and reproposed. Apparently the danger that has kept it in the limbo has been constant and pervasive. I don't know that failure of the administration to include it in a package has added to the depth of the burial that it has received thus far.

Senator SCOTT. Your description of the President's message is that it was moderate and comprehensive. I was raising the question that it might have been more comprehensive if the same pressure had been included for FEPC as for other items mentioned.

To that extent, I take issue with your description of the President's message as comprehensive, because you have earlier criticized it as not being comprehensive enough.

Mr. WILKINS. I think, Senator—I am at a loss to recall my exact phraseology at the moment—but I think if you will include the tail end of that sentence, "the most comprehensive ever proposed by an American President," that it falls into its proper category.

It doesn't say it is the most comprehensive civil rights bill that should have been proposed.

Senator SCOTT. That is a tribute to your care and use of the English language.

May I now cite four instances and ask you if it is not a fact that these subsidies for segregation could in fact be ended by Executive order?

First, grants-in-aid for education: Federal money for construction and operations of schools continues to flow to 11 States which operate their schools on an almost completely segregated basis. Out of nearly $2½ billion Federal aid to education, about 15 percent goes to construction and use of segregated facilities.

The recent Presidential order prohibiting discrimination in employment on grants-in-aid construction projects says nothing about use of these facilities.

Should not that be secured by Executive order?

Mr. WILKINS. Senator Scott, we have presented a comprehensive and detailed memorandum in 1961, going into all these areas, and calling for an across-the-board Executive order of banning the use of Federal funds for the maintenance of segregation. Of course, we believe it can be done, and we continue so to believe.

Senator SCOTT. I agree with you. I was trying to establish this for the first time on the record, so far as I know.

The second illustration is grants-in-aid under the Hill-Burton Hospital Construction Act, Federal money for construction and operation of hospitals. The separate but equal clause written into the authorization act may be unconstitutional on the basis of the 1954 segregation decision, but the Federal Government has supplied over $1½ billion for nearly 4,000 hospitals since 1947 and throughout sections of the country the general practice is to follow discriminatory customs in the operation of these hospitals.

Colored patients have been segregated, if admitted at all. Could not that be covered by Executive order, to correct that?

Mr. WILKINS. We believe so, and we have urged it. There are others, of course, who maintain that there are certain difficulties in the way. But we continue to belive that it could be.

Senator SCOTT. The third illustration is grants-in-aid under the Morrill Act, Federal money for extension services in the States.

The separate but equal clause has been written into the act since 1890. While this would perhaps be termed unconstitutional, this also might be met and corrected by Executive order?

Mr. WILKINS. I think that is one of the areas that we cited that could be corrected.

Senator SCOTT. And the fourth one, grants and loans under Area Redevelopment Administration? Over one-fourth of ARA's loan funds go to construction of public accommodations—hotels and

motels—whose operation may be discriminatory. Discrimination in employment by ARA projects—North and South—is at present unfettered, even though employment discrimination in construction of these projects is now partially covered by the President's grant-in-aid order.

The entire operation, ARA, could be classified by the total removal of discrimination by Executive order, in my opinion. Do you agree with that?

Mr. WILKINS. That we do.

Senator SCOTT. Thank you very much.

I would like to go into other questions but the time limitation is such, and the agreement with the Senator from South Carolina was that he would give me the time to ask you now rather than to run the risk of forcing you to return.

I have one statement to make. Senator Morton asked me to say that he has had a long-standing commitment antedating these hearings in his home State. He regrets very much that he is unable to be present, and that he would like to be here.

Senator MONRONEY. Thank you, Senator.

Senator Thurmond?

Senator THURMOND. Mr. Chairman, Senator McGee said he would take only 3 minutes and I am going to yield to him in order to accommodate him.

Senator MCGEE. I thank my colleague from South Carolina. I express the thought that Mr. Wilkins has said he is not a lawyer, the acting chairman is not a lawyer, I am not a lawyer, and the Senator from Vermont said he wasn't one. I don't recall in my few years here so few lawyers being present to discuss so much that involves so many people.

I am not sure that this augurs well or not in honor of my colleagues who are members of the bar.

I have but one question that I would like to put to you, Mr. Wilkins, because it returns again and again in my mail that I receive not alone from Wyoming but from all over the country, and that is the issue involving private property rights. It is surprising to me the number of our citizens who continue to raise this question.

Does this not stand in violation of whatever doctrine of protection of private property rights that we have sought to adhere to in this country?

You alluded to it on page 4 of your testimony.

Mr. WILKINS. Senator McGee, I can only repeat what seems to me at least to be a very clear position, and that is that no one in this country who operates a public business, a business catering to the public, inviting the public in, either by advertising or other means, has a right to discriminate between the citizens of this country who live here and pay taxes here and who have a right to enjoy the services of this country.

It is true, of course, that we have built up under our system of government and economics a vast private property, private industry, private enterprise system. Some of the revelations in recent years have suggested that some of the enterprise is not so private as it is collusive.

But no one has ever suggested that a business has a right, some sort of an inherent right, to stand at the door and say this customer may come in and the other must stay out.

Only certain general restrictions that apply to all people may be applied, as disorderly, drunk, and so on and so forth, and even then our so-called private businesses bend over backwards not to offend even those who were drunk and disorderly. They handle them with extraordinarily tender care under many circumstances.

So that while we understand this feeling that you have seen reflected in your mail, we don't feel that it has much validity with respect to differentiation between people on the basis of color.

I recall in your section of the country—I don't think it was in your State—some years ago I went on an automobile trip to California. In Utah, Salt Lake City, which is renowned for many things, my wife and I found ourselves unable to get a cup of coffee and some toast for breakfast before we left Salt Lake City.

We were right under the shadow of the temple in Salt Lake City, a restaurant on the main street, or near the main street, and yet we were told bluntly that they didn't serve colored people there.

We drove in a good deal of anger and frustration and I am afraid at a great rate of speed across the Salt Lake flats and we came to the neighboring State of Nevada, which of course doesn't have many temples, only the temples of chance, and which has what some people describe as a wide open atmosphere, a great tolerance for the weaknesses of human nature and their enjoyment.

The first restaurant we went to in this sinful State welcomed us with open arms and made us at home. We found bacon and scrambled eggs and coffee and toast and all the things that go with a breakfast.

I began to doubt then whether the evil people were as evil as they had been pictured, or the holy people as holy as they had been pictured.

So that this public accommodations thing, it seems to me, no one has the right to stand at the door and say, "This man may come in because he is the right color, but this one must stay out because he is the wrong color." No mantle of privacy or private enterprise in our opinion can justify that.

Senator McGee. I must say that I am inclined to agree with you on this. I think this has been a problem throughout our history. Our founding fathers were plagued with it to a very large measure. They talked about natural rights and inalienable rights when they couldn't find the rights in English law.

Mr. Wilkins. That is right.

Senator McGee. It bothered those who wrote our Constitution the same way. But we have written a record where private interest is sacred and is to be protected as long as it is consistent with the public interest. I think the same thing must be said for private rights when they come into conflict with human rights, even though it is not always possible to find the particular clause in the statutes where it is spelled out that carefully. I think this is one of the things we tend to overlook in our days of material affluence. That is, what has happened to this very intangible but very deep-running concept of human rights?

I am rather discouraged myself at the ease with which some of our people, for material reasons, would tend to sweep some of these things under the rug because they can't see it spelled out in literal black and white language.

I want to thank you very much, Mr. Wilkins.

Mr. WILKINS. Thank you, Senator.

Senator THURMOND. Mr. Chairman.

Senator MONRONEY. Senator Thurmond?

Senator THURMOND. Senator Hartke says he wants 1 minute. I am going to give him a minute and a half.

Senator HARTKE. Your generosity overwhelms me, Senator.

Mr. Wilkins, on page 6 of the bill is a section which provides coverage of such place or establishment that substantially affects interstate travel. Under this provision do you feel that the so-called small coffeeshop, for example, on the road, would be included or excluded?

Mr. WILKINS. I don't see how it could be excluded, Senator. A coffeeshop on the road lives by the people who go down the road. They could be, as many have been, presumed to be in interstate travel as long as they are on this road.

I would say it certainly would include such a coffeeshop.

Senator HARTKE. As a lawyer, with deference to my professors, I think the problem here is the term "substantial" which creates a real problem, and I don't think there is any question that this would have to be interpreted. I was wondering whether you considered the police power provisions rather than the interstate commerce provision as the more effective approach.

Mr. WILKINS. Senator, I am at a disadvantage, of course, since I am not learned in the law. Answering your question, the mere mention of the police power of the State brings to mind certain images that are not pleasant. I understand in a broad sense what the police power means, it means keeping of public order and so forth.

Senator HARTKE. I am talking about the 14th amendment provision.

Mr. WILKINS. That is right. We would want to secure a maximum coverage, and I would think if any coffeeshop wanted to go to court to prove that it did not come within the substantial provision of the language of this bill, if it should be adopted in that fashion, then it ought to be free to do so, and to attempt so to establish. I would imagine that others would take a differing view, which accounts for the proliferation and affluence of your profession, because people do differ.

We would certainly contend that this was substantial.

Senator HARTKE. Thank you, Mr. Wilkins.

I thank Senator Thurmond for his courtesy.

Senator MONRONEY. Senator Thurmond?

Senator THURMOND. Mr. Chairman. Senator Bartlett has an engagement and has asked me to yield for a minute-and-a-half and I now do so.

Senator BARTLETT. Not 2 minutes?

Senator THURMOND. Mr. Chairman, I will increase it to 2 minutes.

Senator BARTLETT. Mr. Wilkins, Senator Scott has explained to you why Senator Morton cannot be here. I suggest the member of the committee who is really going to be sorry that he wasn't in attendance is Senator Cannon of Nevada.

Mr. Wilkins, more than one witness who has appeared before this committee has said that if the public accommodations section of the bill is adopted, that many business establishments which now provide only segregated service will face economic hurt or perhaps economic ruin.

Will you please comment upon this?

Mr. WILKINS. Senator, of course I can't estimate what will happen to some businesses, or all businesses. But I would suggest that these fears are exaggerated, except in certain areas.

I hesitate to join in committing us to the theory that the American people lack the ingenuity to adapt themselves to a new situation.

It seems to me that a week or 10 days ago, within the last week or 10 days, the Wall Street Journal had an article which tended to indicate by such coverage as they gave it, that businesses which had desegregated had not lost any volume, and had not suffered loss in profits.

I just can't believe that the American people cannot adapt to a new situation, especially one based upon human care of the human being.

I can understand it would be a great shock, and I can understand the proprietor of the coffeeshop mentioned by the Senator. I can understand that this would be a change that their grandfathers and their fathers didn't know about and that they themselves had never experienced. But Senator Bartlett, a good many southern white boys went into a nonsegregated Army and Navy and Air Force in the last 5 or 10 or 15 years, and this was a great shock to them. But they survived it, and a good many of them survived it and went back home to say that they felt that their old ways had not been good. Some went back home saying that we should have the old system. They had had some unfortunate experiences with Negroes in the service. But by and large, these young white boys adjusted to this. And I am convinced that American businessmen will adjust to this. After all, it is the right thing to do.

Sometimes the right thing, in the long run, the right thing in business pays off. It is only the wrong thing that pays off in the short profit.

Senator BARTLETT. Thank you very much, Senator Thurmond.

Senator MONRONEY. Senator Thurmond.

Senator THURMOND. Mr. Chairman, my friend, Senator Hart, has asked for 8 minutes. I yield to him.

Senator MONRONEY. Senator Hart.

Senator HART. Mr. Chairman, I did ask, and I am grateful that the Senator from South Carolina granted it. I developed a feeling that perhaps I ought to reserve my time. I just want to acknowledge that I thought the presentation of Mr. Wilkins was a moving and an eloquent one. I was struck with the simple power of his language. I have never heard a statement that struck me as more moving. I am very proud of the performance of Mr. Wilkins and proud also of my father. My first membership in the NAACP was purchased for me by him when I was in high school.

Thank you.

Mr. WILKINS. Thank you, Senator.

Senator MONRONEY. Senator Thurmond.

Senator THURMOND. Mr. Chairman, I don't believe there are any more Senators to request time, so I guess I may proceed now.

Senator MONRONEY. Surely. As long as you wish.

Senator THURMOND. Mr. Wilkins, did you know that when I was Governor of South Carolina I led the movement to repeal the poll tax as a prerequisite to voting and recommended this to the State legislature, which submitted it to the people who acted favorably and then ratified it?

Mr. WILKINS. I did know that, Senator Thurmond, and we were all glad to see you take leadership in that point.

Senator THURMOND. Did you know when the question came up as to removing the poll tax and passing an act of Congress that I opposed that because I felt it was in violation of the Constitution of the United States, although we had no poll tax in South Carolina?

Mr. WILKINS. Yes; I was aware of your views on that matter also.

Senator THURMOND. There are certain goals that are desirable, but we must preserve the Constitution. Do you not feel that it might be a wiser course here if you advocated amending the Constitution to accomplish what you want, rather than to try to accomplish it by an act of Congress which a great many of us feel would be unconstitutional?

Mr. WILKINS. Senator, I am sorry that I can't agree on that. I feel that the Congress has legislated in a vast number of fields. Some of them offering, as Senator Monroney said, challengeable bases. But the Congress has always acted when it felt that there was a crisis, or when the Constitution was being violated, and when the Congress of all the people should act.

And we feel in this area that the Congress should not wait upon the slower process of a constitutional amendment which in effect amounts to passing the problem on to other legislators in the States, subject to a great many other pressures and problems, and unable therefore to focus on the national aspects of it as the Congress here in Washington is able to do.

Senator THURMOND. Do you object to following the procedure of amending the Constitution because it is slow and would take several years to accomplish?

Mr. WILKINS. Not at all.

Senator THURMOND. Or do you feel it is unnecessary to take that course?

Mr. WILKINS. Not at all. I don't object to the process of amending the Constitution. But the immediate question that occurs to me, and to all others who are situated as I am, is, Why should this process be subjected in this area when the Congress does not hesitate to legislate in what might be called related areas, or even in problems that do not have the urgency nor, as we see it, the constitutional basis for action presented by the present issue?

Senator THURMOND. Even though the Congress may have acted in some fields where the goal was felt desirable, if they did not act on the basis of the Constitution would you advocate that they act here on a subject that might not be on a constitutional basis simply because they have done that in the past?

Mr. WILKINS. Oh, Senator, I do not suggest that in the past the Congress has acted in any matter, consciously and deliberately, in ignoring the Constitution. And we do here suggest that this is a constitutional matter, that the Congress has a right to act here, that there is basis for it in the Constitution. And we are unable to agree that action by the National Legislature in this field would, in advance, constitute an unconstitutional act.

Senator THURMOND. You referred to Al Capone, and that it was necessary for him to be apprehended for violating income tax laws since they were not able to catch him for violating the law in other ways; they got him on a technicality. Are you suggesting maybe that this law should be passed although it is on a technicality?

Mr. WILKINS. I don't think that was the context in which the question was asked, Senator. I am trying to recall the exact language now.

Senator THURMOND. I got the impression that you felt that the goal was worthy and to accomplish that goal, even though they did it by a technicality——

Mr. WILKINS. No, no. I recall now, sir.

The question was, Do you not feel that the commerce clause base was too narrow to accomplish the objective you have in mind? Wouldn't it be preferable to place this on some other base than on the commerce clause? Would that not be preferable?

And I used the Al Capone illustration only to say that any legal base, narrow or wide or medium, will do when you wish to accomplish a constitutional objective. And therefore whether the commerce clause was a narrow base or a narrower base that the 14th amendment basis, we wanted to see it used in order to alleviate and correct, even if only partially, the evils that we conceive to be in existence.

I don't interpret that, I am sorry, as believing that this is a mere technicality that we wish to employ, because it does have a constitutional base.

Senator THURMOND. Would you want the law passed if it requires a technicality to do so?

Mr. WILKINS. I don't believe that any of this legislation now before the Congress is based upon a technicality. I would want to see the law passed for the reasons that it ought to be passed, and not on a technicality.

Senator THURMOND. You referred in your statement to quotas, that you did not feel that people should be placed in the position on a quota basis because of race, I believe. I presume you mean in government as well as in private business, do you not?

Mr. WILKINS. Yes. I don't believe in a racial quotas as such, predetermined and announced. I regard them as restrictive.

For example, for a job in a certain Government agency, there might be 10 Negroes qualified for the job, and if there are 10 vacancies, our position is that all 10 should be employed, and that they should not be disqualified because it would add 10 Negroes to this agency whereas the quota system would accommodate only 3 Negroes.

Similarly, if there are no Negroes qualified to function in a particular agency, we wouldn't say you should add three because three is the quota for that agency. We don't believe that they

should be hired on a racial basis, and we don't believe they should be disqualified because of race.

Senator THURMOND. So your organization is not one of the groups that is fostering the quota idea?

Mr. WILKINS. We have never, sir, and we do not now today foster it.

Senator THURMOND. I want to commend you for that position. Some, of course, as you know, have taken other positions.

Mr. WILKINS. Yes, sir.

Senator THURMOND. Would you favor on the civil service rolls going down, passing over white people who were next in line and going down the list and pulling out Negro people who were further down the list for positions?

Mr. WILKINS. Senator, I don't think people ought to be deliberately skipped over if they have earned a place on a list. But let me say this: As you know, as I recall, the system in civil service has been to have a certain number of eligibles at the top of the list from which appointments can be made, say three or five.

Let's say it is three; if there are two white men and a Negro, one, two, three, and two vacancies occur, and the two white men are selected, which is legal under the system, leaving the Negro there; then the list moves down, with the Negro still there, and say with two other white men now joining him as the top three. And two other vacancies occur, and the two white men are selected and the Negro is still there, this is not the kind of selection that we approve of under the civil service system.

But we certainly don't approve of going down and getting a Negro who is No. 18 and appointing him over a white man who is No. 7, or No. 6, or No. 5, as the case may be. We wouldn't want that done to a Negro in that position, and we don't want it done to a white man.

Senator THURMOND. In view of what you say, I presume then you would not approve of what happened out in Dallas, Tex., where they passed over 40 or 50 white people in order to go down and put on top several Negro supervisors.

Mr. WILKINS. Senator Thurmond, I would have to know a good deal more about the Dallas operation than I know now in order to pass off a quick—I am stating the general proposition of what we believe in. I must say this, sir: The system that has been in operation for so long has worked to the continued and continuing disadvantage of the Negro applicants and workers to a degree that many of them have been kept down arbitrarily on a racial basis when they deserved to move forward.

If it is true in the Dallas episode—and I am not familiar with the details—if it is true, that it was determined by someone in authority, either there or in the regional office or in the Post Office here, that there had been a number of Negroes continuously passed over for a number of years and allowed to remain in the lower echelon when they should have been promoted, and if it is now determined that as of today we will reach down and get these men and correct the inequity that has existed over 9 years, I couldn't disapprove of that under my general formula.

Senator THURMOND. So I understand from what you say that you would not favor passing over white people and going down and getting Negroes and putting them at the top just in order to place Negroes in Government?

Mr. WILKINS. That is the general position. And of course it would be modified by whatever specific instance or specific history there might be.

The instance I have just given of the supposition in Dallas is that these people did not belong, say, in Nos. 20, 21, and 23, or they long ago had earned the right to be supervisors, and belatedly they were now being given their just dues. In those circumstances my general statement would not apply.

Senator THURMOND. If that were done in the social security system as complainants have alleged, or in the Veterans' Administration, as complainants have alleged, or in the Post Office Department as complainants have alleged, then you would not approve of such action?

Mr. WILKINS. I would have to have the full facts, Senator, in each case.

Senator THURMOND. Mr. Wilkins, in your opinion do the owners of private business establishments, in the absence of a State statute or city ordinance to the contrary, now have the legal right to refuse service to whomever they wish, regardless of their motivation?

Mr. WILKINS. I don't think so. I don't think a proprietor of a public business has the right to say that he is running a sort of little establishment in his living room. He is not doing it. He is catering to the general public. He is inviting them to come in. He takes an advertisement in the local paper, he advertises over the local radio station. And if the public comes in, all kinds of people come in.

Senator, there have been black people in this country for 344 years, and everybody knows that they are likely to walk in. So when they do, you can't tell them, in our estimation, "I meant everybody except you."

Senator THURMOND. So you feel that any private business establishment which refuses to sell or serve to anyone is violating the law now?

Mr. WILKINS. Yes; I feel he is violating the law, and I also would like to submit that the designation of such people should be the proprietors of privately owned businesses, not private businesses. They are not private in the sense that we think of our homes as being private, or our private associations. These are public.

Senator THURMOND. Are they violating a national law, a State law, or a city ordinance?

Mr. WILKINS. It is our view, of course, that they are violating, if not a specific ordinance, they are violating the tradition, custom, morality, national policy—not only the national policy politically and morally, but a sound economic policy.

It is the public business that caters to only part of the public. The only differentiation he should make is in the quality of his goods and the class of the public that he attracts. If he wants to sell $50 shoes, then obviously people who want $7.50 shoes won't come in.

Senator THURMOND. Do you feel that they are violating a law for which punishment can be given?

Mr. WILKINS. I am not sure. If there is no law, Senator, no penalty is attached. But they certainly would suffer the penalty of public disapproval.

Senator THURMOND. Would you cite the law today that a person violates if his private business establishment refuses to serve some person?

Mr. WILKINS. I think he violates the moral law. The reason this provision is before this committee, the reason the public accommodations provision has been proposed, is because it is desired to incorporate what a great many people, the vast majority, recognize as a moral compulsion into a statute. In fact, that is where most of our statutes originate.

Senator THURMOND. Is he violating any statutory or constitutional law if he refuses today, in a private business, to serve someone?

Mr. WILKINS. I would think that he is violating the whole spirit and letter of the Constitution.

Senator THURMOND. Do you claim that in spite of the fact that a similar statute to the one now being considered by this committee was declared unconstitutional in 1883?

Mr. WILKINS. Senator, that is a long time ago. The country has grown a great deal since then.

As a matter of fact, some of the laws that were declared to be unconstitutional or constitutional in those days have been thrown out, as you know.

Notoriously, *Plessy* v. *Ferguson* (1896) has been completely reversed, as indeed have been a great many others, although the discussion has been that *Plessy* was a sort of unique reversal. It was not at all.

Senator THURMOND. We had the Bible in 1883. It has not changed, has it?

Mr. WILKINS. No; but the people who interpret it and who act upon it vary a great deal.

Senator THURMOND. We had the Constitution in 1883, and it hasn't changed on this point has it? And there has been no interpretation changing it, has there?

Mr. WILKINS. Now, Senator, the Constitution hasn't changed, but the courts change, and people change, and conditions change, and the world changes.

Senator THURMOND. Can you tell me any interpretation of the Constitution changing the decision of the Supreme Court in 1883 declaring a statute similar to this unconstitutional?

Mr. WILKINS. I don't know of any, and my history on the law is very short. But I would say this: that if it were seriously advanced that this 1883 decision remains in effect today, I would suggest that it would be challenged promptly, and perhaps overturned.

Senator THURMOND. Mr. Wilkins, in the absence of a State statute or city ordinance to the contrary, do the owners of private business establishments now have the legal right to determine who shall and who shall not enter and remain on their business premises?

Mr. WILKINS. I don't see that they have. That is, Senator, I am very careful to limit myself to my own field. That is, they cannot do it on the basis of race and color.

Senator THURMOND. If a person is refused permission to enter on privately owned premises and enters nevertheless, or refuses to leave the premises after being so directed by the owner, is not the entry or refusal to leave a trespass, and as such a breach of the law?

Mr. WILKINS. We don't believe so. We are challenging that concept in the courts in a half dozen instances. Cases are on their way now to the Supreme Court interpreting this concept of trespass. We contend that where it is used on the racial basis, and not used on any other basis, that it isn't actually trespass; it is enforcement of a racial restriction which we maintain is forbidden by the Constitution.

Senator THURMOND. So you do not think it is a trespass for one to enter upon the private property of another if he is asked not to, or to refuse to leave if he is asked to do so?

Mr. WILKINS. By "private property" you mean store or commercial establishment?

Senator THURMOND. Any private business, whether it is his home or store, barbershop, restaurant, or whatnot.

Mr. WILKINS. Senator, I don't see how we could include homes in that. They are not businesses. Every man has a right to defend his home and keep out whom he pleases from his home. But he doesn't have the right to set up a store on a public street and open the doors to the public and then to discriminate on the basis of race.

Of course he can keep anybody out of his home.

Senator THURMOND. Suppose a lady has a beauty shop in her home. She is the only operator. Would she have a right to exclude whom she wants to?

Mr. WILKINS. Would you say—is that a part of her home or is that a business? If it is a business then we maintain she can't exclude people.

Senator THURMOND. It is a home, but she has a beauty shop in her home. And suppose she orders——

Mr. Chairman, I ask that order be maintained.

Senator MONRONEY. The Chair would like to remind the audience that they are here as guests of the committee, and that the business of the committee can be greatly expedited by showing no approval or disapproval of anything said by the witnesses or in the questions.

Senator Thurmond.

Senator THURMOND. If she has a beauty shop in her home and has one room set aside for it, do you think she would have a right to exclude anyone she doesn't want to serve there?

Mr. WILKINS. This is a fine distinction, Senator. Probably she could get away with it. I wouldn't undertake to say that I would fight my way into her home in order to be served in her beauty shop. I mean by that——

Senator THURMOND. Mr. Chairman, I would ask that those who are expressing themselves in a way that is against the rules of this committee be excluded if they continue.

Senator MONRONEY. The Chair would remind——

Senator HART. Mr. Chairman, I laughed at that answer, and I felt myself wholly in order. I think that the Senator burdens the record with the comment that, on the reading, might suggest something that isn't in the atmosphere here today.

Senator THURMOND. It is very strange that when the witness answers there is a hearty laugh on the part of a great many of the people in the rear. The Senator from Michigan knows that. And the Senator from Michigan knows it is against rules of this committee to have any reaction on the part of those present.

Senator HART. We have been arguing about changing human nature, Senator. But I don't think we can do it in this area. I though it was an amusing remark, and I laughed, and I am up front. I am not offended by those in the rear who felt the same way.

Senator THURMOND. I haven't called the Senator's hand because he violated the committee rules. But I do think we ought to enforce it with the public generally.

Senator HART. I think we are talking about a nutty rule, if that is the suggestion.

Senator MONRONEY. The Chair, while impressed by what was said by the members of the committee, asks the audience to show no approval or disapproval. This is a very important subject. We are reaching for facts and information, and it would be better to have this come without any indication, through laughter or other means, of the witness' answers, which the Chairs finds perfectly proper and very temperate, to the questions which the Senator from South Carolina is entitled to make.

Let's keep this the way it has been. I think it has been very well conducted. We won't have to worry about points of order if the audience will just remember they are guests of the committee, and will expedite these hearings by remaining in silence as the questions are going forward.

Senator THURMOND. Mr. Chairman, I was told that the room would be filled this morning with people who were sympathetic to this bill. And I was just waiting to see if that were true. And from the reaction of the audience I see that it is true.

But it is their duty to keep quiet. They are guests here. I hope the chairman will enforce the rule strictly.

Senator SCOTT. Mr. Chairman——

Will the Senator yield?

I think it fair to point out that the country is filled with people who are sympathetic to this bill, too.

Senator THURMOND. I am afraid that is the Senator's opinion, and not the opinion of the people of the United States.

Mr. Wilkins, do you feel that a one-operator barbershop now would have to serve anyone who would go to his shop? Or do you feel that if this bill is passed he will have to do so?

Mr. WILKINS. I think he will have to obey the provisions of the bill, Senator, as passed.

Senator THURMOND. Do you think this would cover a barbershop that had only one operator?

Mr. WILKINS. I think if the bill as passed covered a one-operator barbershop, he would have to obey it.

Senator THURMOND. Does the bill cover a one-operator barbershop?

Mr. WILKINS. I think it covers all places of public accommodation.

Senator THURMOND. Do you think it would cover a small restaurant that seated only six people at stools?

Mr. WILKINS. I would say it would cover any restaurant if it covered two people at stools, if it were a restaurant.

Senator THURMOND. In other words, you feel this bill covers everybody who sells to the public?

Mr. WILKINS. Senator, we would hope that it covers everybody.

The previous question suggested that there might be some limitations on coverage under the present basing of the bill and under its language. What we on our side of the table shoot for is absolute and complete coverage. We don't believe that anybody ought to walk into any public establishment in this country offering services to the people and be refused because of his or her color, whether it is a 1-chair barbershop or a 50-chair barbershop.

Senator THURMOND. You understand, of course, since this bill springs from, or the basis of it arises from the interstate commerce clause, there would have to be a burden on interstate commerce.

Mr. WILKINS. Yes; I understand that this provision offers certain limitations. I am speaking only—your questions were directed toward specific situations, irrespective of the basis of the law. I am trying to stay within the limitations of the act.

Senator THURMOND. Mr. Wilkins, suppose a man operates a restaurant. He has a garden and a farm. He grows all of his produce; he buys nothing from out of the State. All of his customers are from the town. Do you think that this bill would cover him? Or would he have the right to exclude someone if he wanted to?

Mr. WILKINS. He would have the right to obey the provisions of the bill. And if the provisions of the bill did not cover him in all of his activities in the maintenance of his establishment, then he would obviously be outside of the coverage.

I only ask that whatever form this bill is passed—and we hope it will be passed in its maximum form—that all people subject to it will be held accountable.

Senator THURMOND. I understand that. I am asking if this bill would cover the type case I just mentioned.

Mr. WILKINS. Senator, it seems to me that would be up to the Senators to determine, and the lawyers and interpreters of the commerce clause.

Senator THURMOND. Suppose he opened himself to the public but he didn't buy anything in interstate commerce, no goods whatever. He produced it all on his farm and in his garden. And those who patronized him lived in the town where he operated the restaurant. There was no interstate trade.

Would this bill cover him?

Mr. WILKINS. Senator, I think this is one of those hypothetical questions to which I referred in my testimony. I would say that it is one of those that would have to be determined by you on the floor in defining the terms of the bill that you would act upon. It certainly would come out in the legislation as passed.

If this gentleman in truth grew all of his vegetables in his backyard or his nearby plot, and if he in truth catered only to the townspeople, and no outsider came from afar to partake of his fare, then he might not be covered.

Senator THURMOND. Then he could turn down anybody he wanted to?

Mr. WILKINS. Anybody who applied who was not a member of—who lived in that town; let's say.

Senator THURMOND. Mr. Chairman, the bell has rung. I raise the point.

I might say I have only gotten started with the testimony of the witness. I presume he will come back tomorrow and complete his testimony.

Senator MONRONEY. Would the Senator suspend for one moment?

We have other witnesses scheduled for tomorrow. It may be necessary to work out a return that would be convenient for the witness as well as for the committee.

Would you be available tomorrow?

Mr. WILKINS. Senator, I could.

Senator MONRONEY. Would it be more convenient to take you later?

Mr. WILKINS. I am going to be here on Thursday at 2 o'clock. I am scheduled at 2 o'clock for the House Judiciary Committee. I could come Thursday morning.

Senator THURMOND. Mr. Chairman, almost the full 2 hours, not quite all, was spent in hearing one side. I have some rather penetrating questions which I would like to propound which will bring out the other side of this case, I hope. And so I would request that the witness be returned and that I be given an opportunity to continue, if not tomorrow then some other date.

Senator MONRONEY. The Chair would suggest that, subject to the approval of the chairman of the committee, we schedule Mr. Wilkins for 9 a.m. on Thursday morning. In that way we will be able to accommodate Mr. Wilkins and perhaps the other witness as well. If necessary, we might even split the testimony so Mr. Wilkins can be excused and the other witnesses could participate in part of that time.

Senator THURMOND. I wish to thank the Chair.

Senator MONRONEY. Will that be agreeable?

Mr. WILKINS. Very good.

Senator MONRONEY. The committee will stand in recess until 9:15 tomorrow morning in this room.

(Whereupon, at 12:04 p.m., the committee was recessed, to reconvene at 9:15 a.m., July 23, 1963.)

O